

The snow from *res communis* to State property

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1. - Preface

It is a pleasure and in the meantime an honour for me to have the opportunity to intervene at this European Juridical Forum on Snow. I would like to address my first words for expressing my congratulations to your organisers, to the Chairman of the Scientific Committee Gianfranco Avella who so kindly invited me through several and pleasant correspondence by emails during these last months, and also to the Chairman of the Organizing Committee Beppe Bonseri. My enthusiastic compliments and thanks for the courteous welcome addressed to the participants.

Thanks to their enthusiastic initiative, jurists from several Countries may have the opportunity to enjoy a courteous communication and intellectual communion concerning most different branches of legal knowledge. The scientific Congress also constitutes an excellent pretext for the Meeting. We are being hosted by the *Magna Terra di Bormio and Honorate valli*. How can we not remember from here that terrible image created by Turner in his painting "Hannibal and his army cross the Alps", in which the great protagonist of the pictorial composition is not the Carthaginian general, but rather the spectacular snow storm that affects his troops during the attempt to penetrate the Italic peninsula. The magnificent city of Bormio, proud since ancient times, is today the *Alma Mater of our studies*.

I would like to point out that when tomorrow our Forum will come to an end, I will feel enriched and also privileged for having met here my colleagues during a few working days spent together, filled with intellectual activity and at the same time a community life. I end these words of introduction, hoping and wishing that our Third Forum will be summoned next year to consolidate this fertile juridical, sports, and human communication.

2. - Some reasons that may justify my presence

When, during a Doctorate Session, where I had been invited by the University of Parma, Prof. Piermaria Corso offered me the possibility of participating at today's Meeting, I thought that it would have been difficult to contribute something useful, or at least strange, to the participants of this international Event of experts in the incipient, even though powerful, Law on snow.

At that moment, I thought about some concepts elaborated in Roman law regarding the public domain and its possible use, on which it was perhaps possible to meditate in order to conceive a standard European law on snow.

My contribution to this Congress must be viewed according to this historical and pragmatic context.

3. - A linguistic note and a geographic-cultural curiosity

Before getting to the core of my intervention, I would like to specify a cultural curiosity, a sort of anecdote regarding snow, in so doing hoping to stir up your interest.

Start of the linguistic note. I express this with a strong belief that every jurist, worthy of such a name, must be extremely precise in the use of language, since only with the correct use of the latter it is possible to define any category or concept relative to Law.

The Italian word "*neve*", in Spanish "*nieve*", comes from Latin *nix-nivis*; this word means "frozen water falling from high in light bright white flakes". The Dictionary of the Royal Spanish Academy defines snow as follows: frozen water separating from the clouds in the form of crystals of extremely reduced dimensions which, by grouping while falling, reach the ground in the form of white flakes.

In a figurative sense, the expression "snow" indicates candour, namely the extreme white colour of an object. It is used metaphorically in the poetic language. With the term "snow", expressions are formulated such as: **perpetual snows**, those that in high mountains last from winter to winter; **sleet (water-snow)**, water that falls from clouds mixed with now, different from **snow water** which corresponds to water produced by thaw.

A curiosity regarding snow, object of our forum: in Colombia, there is a mountain called Tolima, which with its height of six thousand metres, is the third highest peak in the Country, located in the central cordillera of the Andes, known as the **land of perpetual snows**, and today has become the *National Park of the Snow Fields*. In its territory there are thermal waters, hundreds of lagoons and archaeological ruins. The name Tolima derives from a native word designating goddess Tulima, namely the goddess of the **snow country**, who supposedly was living on the snowy peaks and was protecting the ancient indios *pijaos*. The fact of converting Tulima as the goddess of the snow country appeared to me as a pleasant aesthetic image, of marvellous plasticity; for this reason I wanted to share this image with you on this occasion.

4. - A Romanist note regarding the elaboration of Law on snow

It is commonly accepted that, in order to perform a suitable analysis regarding the sense of any juridical institution, or to reach the correct interpretation of the contents of a rule, the scholar of Law must know and understand in advance the historical and social context in which such legislative provision has been promulgated and applied.

The social life of man and the constitution of society in which this occurs, will always represent a *prius* in relation to the juridical order that regulates them. Therefore, the Law accompanies life and the latter affects and changes it. The Law is therefore a historical product, which must never be separated from the social sphere in which it is applied. Should this occur, the risk would be run to convert the juridical system into an artificial and therefore useless utopia. If social life affects the adapting task of Law, it is at the same time essential to interpret it correctly.

Today Europe is struggling through a juridical dilemma in performing its task to conceive a super state order. Law is an instrument that brings populations together. The Old continent, which was able to host a great civilization, is currently outlining its political reality. It is not possible to build the European Union, by freeing it from its own past. In rediscovering its own identity, Europe must return to its roots; in order to do this, it must learn from its unified historical, linguistic and social experiences, so as to shape on solid foundations, based on these, its present and future reality. Roman Law, in general, is an essential element of the project which offers a common Law to the European Union.

Given this pragmatic introduction, as abstract formulation, I wish to express some tangible considerations, conscious of their relativity, in case they could be useful to elaborate that unified legislative sphere of the Law on snow, for which we are all awaiting.

5. - Snow in the Roman jurisprudential sources

Perhaps we should start our analysis by stating that the Latin term *nix-nivis*, with its derivatives, only appears twice in the entire *Corpus Iuris Civilis* or Justinian Code. Those are two jurisprudential texts contained in the Digest. The first belongs to "I Posteriori" of Labeone and is included in title I of book XVIII of the Digest, dedicated to purchase and sale; the case of a sale of wheat which had not been yet harvested is described. Due to a snowfall, the harvest is lost and the jurist is asking who is liable for it. The second case is even further from the concept of snow, intended as object of our congress, since it consists of a fragment of Pomponio, included in D. 34,2,21, regarding the definition of an inheritance: it must be determined whether, within an inheritance constituted by a set of silver glasses, other additional objects must be included intended to prepare beverages such as for example a bucket of ice. The term "ice" is expressed in this context with the Latin word *nivarium*.

Absence of any jurisprudential text relative to snow that covers mountains could certainly constitute enough ground to understand that Roman Law does not supply a great help to the topic with which we are dealing. It is obvious that the classic world in general and the Roman society in particular, were not familiar with any sporting activity related to snow. It is also true that, among the rich group of juridical realities regulated in Rome through administrative grants relative to assets of public domain, there aren't any that could refer to the exploitation for profit purposes of the slopes of a snowy mountain.

Nevertheless, snow is icy or frozen water fallen from clouds; it constitutes a tangible reality during its fall in soft flakes and later as a surface covering the ground, the juridical nature of which must be duly studied. To do this, we must refer to water as a physical element, of which snow is only one of its possible forms.

I do not know until what point the possible practical consequences of my brief historical reflection can lead. In any case, I present them at this community of law scholars on snow, in case they may be of interest in order to remember the birth and the development of such an important category in administrative law and such influence in the sphere dealt, such as the category of assets of public domain or state assets, which is an extraordinarily complex category in terms of its recurrence inside Roman essays, on which classicism and suitable exegesis of fragments that are possible to analyse, there is no agreement in the Romanist order.

My intention will be to offer a summary of what the category of *res communes omnium* consists, and then deal with *res publicae* and I will end with a brief note on possible administrative grants that could be offered to one or the other category.

6. – The problematic category of *res communes omnium*

I entitled my intervention: **Snow from *res communis* to a state asset**. I must underline that the term *res communis* to express a singular common object does not literally appear in any of the texts object of the collection of the Justinian Code. The recurring expression in Roman texts, used later by the Medieval and modern juridical science, is ***res communes omnium***, intended as plural.

The expression *res communis* can be found exclusively in some municipal laws, as *Lex Salpensana* and *Lex Malacitana*, both belonging to the Roman Hispania, included in the municipal Laws of the Flavian age. The expression *res communis* is used sometimes in the texts of these laws to refer to the assets of municipalities and differentiate them from the assets of the *Populus Romanus*; in this sense, it can perhaps be stated that the expression *res communis* precedes the expression *res universitatis*, which is recurring in the sources later. In *Instituta Iustiniani*, 2,1,6, it is stated that *res*

universitatis represent the objects belonging to the community, therefore of those who live in cities; in this category, the fragment of Institutes includes theatres, stadium and other similar buildings. All those assets on which the municipal government may exercise its rights fall therefore into this category.

Regarding the study of *res communes omnium*, it is necessary to analyse starting from a previous classification of objects: in this sense, we must remind that Roman law, as well known, has elaborated various classifications of things as object of rights. In the *Instituta*, Gaius starts book II dedicated to objects by stating:

Gaius, 2,1

Modo videamus de rebus; quae vel in nostro patrimonio sunt, ven extra nostrum patrimonium habentur

Let us treat now the objects falling within our property or outside it.

This Gaius bipartition will be picked up three centuries later, in a literal manner, by Justinian editors, in Inst. 2,1, pr., when the Emperor orders drafting of a new treaty expressly with educational purposes.

These two abstracts of Roman law start therefore by outlining this classification, their view of objects and rights exercised on them. Nevertheless, it must be stated that the majority of texts on classic jurisprudence offer basic classifications of objects, a different bipartition, which moreover had great influence on public Law; I refer to the dual distinction between *res intra commercium* and *res extra commercium*. It is obvious how this distinction seems more appropriate, since it reflects the dynamic sense of a possible transfer of objects and rights that may be exercised on them; therefore it refers to the susceptibility of objects as the purpose in the juridical-patrimonial relations.

Continuing with Gaius's dual classification, it is stated in Gaius 2,2 that some objects are *divini iuris* and some *humani iuris*. Referring to the latter, in agreement with the *ius civile*, objects are either public or private according to what indicated in Gaius 2,10. *Public objects, Gaius 2,11, are those that do not belong to anyone, since they belong to the community, while private objects are those that may belong to individuals.*

We know that *Instituta Gaii* were the main reference text when drafting of the Justinian Institutes. In this sense, the Emperor himself, in Constitution *Imperatoriam Maiestatem*, in which he promulgates the Institutes, issued in December 529 in Constantinople, expressly declares that they were drafted by keeping into consideration the content of various academic works of Institutes elaborated by various classic writers, despite expressly stating that the members of the compiling Commission mainly referred to the Institutes of *Gaii nostri*, as the Emperor was affectionately called.

For this reason, concerning the topic that we are dealing, it is surprising that the imperial Institutes considerably separated themselves from Gaius's model in the subsequent classifications that refer to the objects. So that, in Inst. 2,1 pr., after having copied Gaius's first bipartition between *res intra patrimonium* and *extra patrimonium*, instead of continuing with the divisions contained in Gaius between objects belonging to *divini iuris* and *humani iuris*, and to follow the division between *res publicae* and *privatae*, he chooses to realize a three-partition which does not correspond to the traditional model of classical jurisprudential texts. In this sense, he states:

Therefore, some are common to everyone as set forth by natural law, while others are public, some belong to universality, others to no one and the majority to single individuals.

Quaedam enim naturali iure communia sunt omnium, quaedam publica, quaedam universitatis, quaedam nullius pleraque singulorum.

This lack of agreement between the two Institutes is interesting, since, as we have indicated, the Justinian faithfully reflects in terms of content the correlative text included in Gaius's Institute. This is even more surprising if we notice that the Digest, promulgated in 529 A.C. together with the Institutes, literally includes Gaius's distinctions to which we referred, indicated in Gaius 2,10-11, and does so in a fragment included in Title VIII of Book I, having as page: "On the division and quality of objects". This text, *D.1,8,1 pr. (Gai. 2 inst.)*, states:

The first division of objects includes two classes: some belong to divine law and others to human law... Objects that fall within the human law are divided into public and private. Public objects are considered not to belong to anyone, since they belong to the community. Private objects are considered to belong to single individuals.

Therefore the text of the Institutes expresses a tree-partition as indicated by jurist Marciano, but slight recurrent in other jurisprudential texts.

The main novelty of this fragment is the creation of a category, the so-called *res communes omnium*, scarcely used by classical jurists. The scholars of this text referred it to a classic fragment. It was very unlikely that this was a new category elaborated during the Justinian age. The authors of Justinian Institutes drew inspiration from a passage included in the Marciano's Institutes, which was also object of transcription in the Digest, included in *D. 1,8,2pr. (Marciano 3, inst.)*

Some objects are common to everyone according to natural law while others belong to the community, others to no one and the majority to single individuals...

We note that *res publicae* are not included in Marciano's Institutes, but are integrated later in the Justinian Institutes. The rest of the fragment is reproduced word by word by the Justinian editors. We must not be astonished by the use of this source since, as already indicated, the editors of the Justinian Institutes, Teofilo and Doroteo, despite mainly referring to Gaio's, consulted and took passages from other works of similar content and academic nature, such as the Institutes of Callistrato, Marciano, Florentino, Paulo and Ulpiano. It is well known how this school work do not correspond, in all cases, to the authority to which they refer since, despite some of them are actually academic works from late classicism, others were composed during the post-classic age by anonymous professors of eastern law schools in Berito, Constantinople or Alexandria, thus conceiving a new altered version, drafted on the basis and upon consultation of similar works belonging to the aforesaid classic jurists.

7. – The classic category of the *res publicae*

A known jurisprudential text contained in the famous Title XVI of Book L, having as a scholar's page *De Verborum significationem*, undoubtedly established the concept of *res publicae*. In this sense, Ulpiano, in a passage taken from Book X relative to comments on the judge's edict included in D.50,16,15, states:

Publica sunt quae populi romani sunt.

Only those belonging to the Populus Romanus are public.

The Romanist science intends that the expression *Populus Romanus* coincides sometimes with the modern concept of State and some others, with the contemporary expression of central Administration. This Latin phrase was used by jurists to refer to Rome as a territorial entity under a unitary political power. It also refers to the same Roman central authorities as those local or peripheral Roman authorities, such as the bodies of what is called nowadays territorial Administration, as well as political powers established in provinces, municipalities and colonies.

Public objects fall in the main *res extra commercium* or *extra patrimonium* category; due to this, the majority of Romanist science usually identifies this *res publicae* category with what modern science of administrative law calls assets of public domain or state assets. Both of them, during Roman times and today, are identified by the fact that they perform functions of public utility, *utilitas publica*, therefore they must be directly administered by public authorities.

It is therefore obvious that *res publicae*, assets of public domain, since Roman times, had to be assigned to public utility in order to be considered as such. This appointment, which is the interpretative key of this category, may

not be necessary due to natural reasons of the same asset. For example water just like air does not require a solemn act of formal assignment, called *publication* in private law, since it is their own nature that renders them public. Together with *publicatio*, the expression *vetustas* was used in Roman law to refer to the assignment of an asset to public utility justified by the social awareness that since immemorial time, such an asset was of common and of general use.

We have already indicated that for Gaius, *res publicae* do not belong to anyone, since they are considered as belonging to the community (Gai. 2,11). In his *Instituta*, nevertheless, he does not offer a list of objects that must be deemed as public, neither has he referred to other subdivisions to which we can refer to infer the public character of an object. Instead, classic jurisprudential texts in which we can find listing of *res publicae* are many.

The first jurist of whom we know that indicates the *res publicae* category is Neratius Priscus, who, in a fragment taken from Book V of *Membranae* and included in D. 41,1,14 pr., refers to *res publicae* as *res in pecunia populi*, thus establishing that:

The beach and coast line are not of public domain in the sense in which the population's property is...

The text later qualifies improperly the coast line as a *res nullius* and therefore states that buildings constructed on the beaches become the property of the constructor, who becomes owner through appropriation or to express ourselves in a more precise form, through embezzlement or *ocupatio*. It is obvious that in the first century B.C. the concept of *res publicae* had not yet been defined precisely.

Only at the end of the first third of the second century A.C. it is possible to find a more precise context concerning the *res publicae* category: it is a text written by Pomponio, extracted from Book IX of "Commenti a Sabino" and included in D. 18,1,6pr.

But Celso's son says that you cannot buy..., knowingly, an object that is not on the market, as for example public objects that do not fall within the public property, but are of public domain, as for example the field Mars.

It is obvious as the *res publicae* are a category of *res extra commercium*; the jurist also makes a distinction between *res publicae in pecunia populi* and *res publicae in publico usu*.

The *Res publicae in pecunia populi*, together with the *res in patrimonio fisci* will be those with the purpose to sustain the costs generated by the same administration of the Roman political organization. In many cases, these sets of goods were supplying, through their exploitation, economic resources to the same public authorities of the community; for example, *ager publicus* was object of tenancy in many cases and in various

historical ages, for example in the Republic through the activity of censors. In virtue and as a consequence of these uses, the *Populus Romanus* was able to obtain high profits that conveyed inside the public Treasury.

Differently from objects falling within the *Populus'* property, *res publicae in publico usu* are those currently called state assets, since belonging to the *Populus Romanus*, therefore of public title, but in addition, they are intended to be used by everyone, therefore without restrictions by the community. In addition, due their particular destination and use, they are inalienable.

This differentiation is accepted by Papiniano in a passage taken by Book X of *Quaestiones*, included in D. 18,1,72,1. The text makes a distinction between *res in usu publico* and *res in patrimonio fisci*; the latter category originates from the fact that the Fiscal office is conceived starting from the first century A.C. as a separate entity compared to *Populus Romanus* since administered by the Prince. In any case, Papiniano also refers to *res in usu publico* as a category of *res extra commercium* coinciding with the current concept of asset of public domain or state asset.

A list of objects that classic jurists consider as *res publicae in publico usu* is difficult to draft; the reason of this inaccuracy with regards to these, is due to the fact that the jurisprudential texts that describe the various types of *res publicae* are not exhaustive, but they offer a variable list of things that depends on the answer inferred by the fragment and on the problematic matter relative to the jurist's activity.

Since the majority of the content of jurists' works is essentially pragmatic and of complex nature, in the sense that they try to find the fairest solution to each case, it is difficult to find defining or classifying texts in the Digest. For this reason, if we analyse the fragments in which it is mentioned the *res publicae* category, we will be dealing with various lists of objects, some which are the same and some which are complementary. *So, ad exemplum*, Marciano in D. 1,8,4,1 (3 inst.) states that:

the majority of rivers and ports are public.

Venuleio, in Book I of his *Stipulationes*, included in D. 45,1, 137, 6, states that no agreement can be reached on:

res publicae quae publicis usibus in perpetuum relictæ sunt

a forum...or a similar object that is permanently dedicated to public use

The same answer is literally reproduced in a passage of Paulo taken from Book 72 of "Commenti all'Editto", indicated in D. 45,1,83,5, stating that:

I cannot discern effectively...an object permanently intended to public use, as a forum...

Finally, in a passage of Ulpiano included in D. 43,8,2 (Ulp. 68 ed.), the jurist and encyclopaedist from late classicism defines public objects as those which are at the service of individuals, intended not as single subjects, but in quality of assets of public use. Several and various *res publicae* are mentioned in the text, relative to public roads and walkways, coming to the conclusion that a public road is one in which the soil is public, traced inside specific limits by whoever had the right to declare it public, and that passage on it is allowed.

8.-Content of the *res communes omnium*.

The first aspect that we must underline is that this category is not only mentioned in Institutes 2,1 pr., as previously mentioned, but that it is also completed in the following passage through an explicit list, and we believe that it is also exhaustive of those tangible objects that must be included in this abstract category. Inst. 2,1,1 states:

Et quidem naturali iure communia sunt omnium haec: aer, aqua profluens, et mare et per hoc litora maris.

And by natural law are, actually, common to all the following objects: air, running water and sea and for the same reason, coastlines.

The above mentioned list is taken from the above mentioned Marciano's passage, contained in D.1,8,2,1

Therefore air, running water, sea and coastlines are common to everyone by natural law.

This passage is included in its main work, *Libri Institutionum XVI*, a treaty that partially complies with the characteristics of an academic work but at the same time, it meditates on some matters, with deeper comments on current law. Its clear style, its accuracy and its perfect method render this treaty suitable to be used considerably by Justinian when drafting his Institutes.

The majority of Romanist doctrine that performed the relative exegesis of this text, has considered that its content is not the result of a jurisprudential elaboration that can be found in other texts, neither is it the consequence of an evolution of jurists' thoughts. The predominant science considers that the creation of the *res communes omnium* category and its implementation into four explicit tangible realities are the result of a singular creation of the same jurist, strongly influenced by meta-juridical concepts and categories.

In this sense, it must be remembered that Elio Marciano is a jurist of the third century A.C. of the Severian age, from which content it is possible to infer an important literal and philosophical culture. He is a civil jurist and academic writer. Precise quotations of Greek and Latin authors can be found in many of his works, of great philosophical-cultural influence and impact. *Ad exemplum*, in Marciano's answers we can find references to Homer, Demosthenes, Cicerone and Virgil. For this reason, it was considered that together with a jurisprudential education, Marciano also had vast humanistic education; his readings, and moreover his juridical-philosophical conception brought him to consider that specific physical realities should be listed as belonging to all men in general, without claiming any title on them.

From this mainly philosophical concept, it is obvious how, when listing objects that must be included in the *res communes omnium* category, the most indispensable elements to human life are included in it, such as air and water. Marciano also mentioned the natural law, in compliance with that stoic conception to which we referred as reason for which these objects are subject to a free and common use by all men, which exclude the possibility to claim any particular title on them.

9.-Afterward

In conclusion, notwithstanding the *res communes omnium* category is not frequent within classic jurisprudence, we must state that this was implemented and was successful in the post-classic era and that, starting from this age, it was included in Justinian texts. For this reason, even if classic jurists deemed that *res publicae* correspond to our current definition of state assets, it can also be stated that, starting from Justinian law, *res communes omnium* can be identified with the modern concept of assets of public domain. In this case, snow would be a *res publicae* in the classic age that in Justinian law was classified as *res communis*, therefore belonging to *res communes omnium*. In any case, this different denomination did not influence in any age, its invariable juridical system, since the snow, as frozen water, cannot be under any circumstance, object of exclusive private title which would prevent the right of use by everyone.

In the Spanish historical law, starting from "Leggi di Partida" the juridical system of water is modified and capitalization is allowed, thus eliminating its condition of asset of public domain. Nevertheless, the same "Leggi di Partida" of King Alfonso X the Wise, that allowed the capitalisation of river waters, established that rain water and certainly snow water were excluded from capitalisation and that, in any case, retained its condition of object belonging to *res communes omnium*

Upon Heraclitus' inexorable eternal return, a genuine Roman meaning was recovered in Spain from a Law of 1866: surface, underground, source, river or sea waters are qualified as *res publicae* or *res communes omniu*,

therefore a state asset, which we all have the right to exploit. Nowadays, we enjoy snow in Bormio and we duly give that unitary right to our Forum.

I conclude by reciting the first strophes of a beautiful poem by Gabriela Mistral, a Chilean poet, entitled: **While snow falls**.

*Snow fell, divine creature,
to know the valley.
Snow fell, bride of the star.
Let's watch it fall!*