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JACEK WIEWIOROWSKI

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WPROWADZENIE

Truizmem byłoby twierdzenie, że Gdańsk jest związany z morzem od początku istnienia. Uniwersytet Gdański, obchodzący w przyszłym roku półwiecze działalności, realizuje stąd dewizę *in mari via tua* („w morzu droga Twoja"), służąc rozwojowi regionu pomorskiego, którego bogactwem jest morze. Aktualnie na Wydziale Prawa i Administracji UG funkcjonuje jedyna w Polsce Katedra Prawa Morskiego, która aktywizuje działalność polskiego środowiska prawników zajmujących się współczesnym prawem morskim. Dzieje prawa morskiego są z kolei ważnym obszarem zainteresowań historyków prawa związanych z gdańskim wydziałem prawa, w tym specjalizujących się w prawie rzymskim. Gdańskie tradycje kształcenia z zakresu prawa, a także prawa rzymskiego są jednak wcześniejsze niż UG i związane były z Gdańskim Gimnazjum Akademickim, działającym w latach 1580–1811. Dydaktyka obejmowała w nim „czyste" prawo rzymskie, ale też jego praktyczne wykorzystanie oraz romanistyczne opracowanie niektórych instytucji rodzimych praw zwyczajowych, co łączyło się często z prawnymi aspektami działalności człowieka na morzu. Współczesna tradycja nauczania i badań nad prawem rzymskim w Gdańsku sięga dopiero lat siedemdziesiątych XX wieku, ale do rangi symbolu urasta to, że pierwszy doktorat w zakresie prawa rzymskiego obroniony na WPiA UG poświęcony był właśnie prawu morskiemu (Jacek Dmowski, *Pożyczka morska w prawie rzymskim*, 26 maja 1978 r.).

Publikacje dotyczące prawa morskiego, w tym jego dziejów, znajdowały się często na łamach „Gdańskich Studiów Prawniczych". Niniejszy numer jest w przeważającej mierze mu poświęcony. Zawiera on studia historyczne, ogniskujące się wokół rzymskiej obecności na morzu i instytucji rzymskiego prawa morskiego, a także związanej z nimi romanistycznej tradycji prawnej oraz dziejów prawa morskiego. Obok nich zamieszczono również kilka prac podejmujących wątki współczesne w zakresie dogmatyki oraz teorii prawa, dotyczące prawa związanego z żeglugą morską i w części inspirowane prawem rzymskim. Prezentowane artykuły są w dużej mierze pokłosiem międzynarodowych seminariów „Roman maritime law", zorganizowanych w latach 2017 i 2019 z inicjatywy Zakładu Prawa Rzymskiego WPiA UG i stąd wielojęzyczny charakter publikacji. Udział zagranicznych autorów i specyfika tematyki jest przyczyną zastosowania w numerze *Harvard Referencing System* i modyfikacji systemu skrótów oraz wprowadzenia indeksu źródeł.

Ostatnie z seminariów „Roman maritime law" poprzedzało obrady VIII Ogólnopolskiej Konferencji Prawa Morskiego pt. „Przewóz ładunku drogą morską"

(WPiA UG, 11 kwietnia 2019 r.), mając na względzie realizację postulatu wiązania doświadczenia historycznego z wyzwaniami współczesności. Pozostaje mieć nadzieję, że poza wartością poznawczą na polu nauk historycznych i dogmatyczno-prawnych, prezentowane prace w części odpowiadają na to palące, zwłaszcza dziś, zapotrzebowanie. Być może ich lektura pozwoli również czytelnikowi nadać własny sens wynikający z przesłania *in mari via tua*, łączącego ściśle Uniwersytet Gdański z morzem. W kontekście wartości poznania historycznego dla współczesności można dodać, że dewiza ta bezpośrednio nawiązuje właśnie do antyku: zaczerpnięto ją z Księgi Psalmów (Ps 77[76].20), w wersji przekazanej przez starożytną Wulgatę, łaciński przekład Biblii z przełomu IV i V wieku n.e.

Jacek Wiewiorowski

WYKAZ SKRÓTÓW

ABBREVIATIONS

General abbreviations according to *Oxford Classical Dictionary*: https://oxfordre.com/classics/page/abbreviation-list/#m.

Journals are cited according to the abbreviations used by *Oxford Classical Dictionary* or *L'Année Philologique*: http://www.archeo.ens.fr/IMG/pdf/annee_philologique_abrev_revues.pdf.

Abbreviations of classical authors according to *Oxford Classical Dictionary*: https://oxfordre.com/classics/page/abbreviation-list/#m with the exception of selected Roman Law Sources i.e.:

B. – *Basilicorum libri LX* (eds. H.J. Scheltema, D. Holwerda, N. van der Wal, Groningen 1945–1988)

C. – *Codex Iustinianus* (ed. *Corpus iuris civilis*, vol. 2, ed. P. Krueger, Berolini 1954)

C. Th. – *Codex Theodosianus* (ed.: *Theodosiani libri XVI cum Constitutionibus Sirmondianis et leges novellae ad Theodosianum pertinentes*, eds. T. Mommsen, P.M. Meyer, vol. 1–2, Berolini 1954)

D. – *Digesta Iustiniani* (ed. *Corpus iuris civilis*, vol. 1, eds. T. Mommsen, P. Krueger, Berolini 1954)

G. – *Gai Institutionum commentarii quattuor* (eds. Ph.E. Huschke, E. Seckel, B. Kuebler, Lipsiae 1926)

I. – *Institutiones Iustiniani* (ed. *Corpus iuris civilis*, vol. 1, eds. T. Mommsen, P. Krueger, Berolini 1954)

N.N. – *Nomos rhodion nautikos* (ed. W. Ashburner, *The Rhodian Sea-law*, Oxford 1909 = Aalen 1976 = New York 2001).

Editions of inscriptions are cited according to the abbreviations used by *L'Année épigraphique*, editions of papyri according to the conventions of the *Duke Databank of Documentary Papyrology*: http://www.papyri.info/browse/ddbdp/.

RZYMSKIE PRAWO MORSKIE
I DZIEJE RZYMSKIE

ROMAN MARITIME LAW
AND ROMAN HISTORY

GDAŃSKIE STUDIA PRAWNICZE 2019, NR 3

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PERICULUM MARIS COME IL VALORE CONTRATTUALE NEL DIRITTO ROMANO

Anacarsi, antico filosofo di Scizia, alla domanda se erano più i viventi o i morti rispose: "Quelli che sono sul mare, in qual numero li mettete voi?"[1]

Nel I secolo a.C. Cicero scriveva al suo amico Attico: *Magnum negotium est navigare*[2] e in questa frase laconica di Arpinate si rispecchia perfettamente il rapporto tra i Romani e il mare e i rischiosi viaggi marittimi. Il commercio marittimo e la navigazione erano di fondamentale importanza per l'economia e per la vita politica dell'impero romano. Grazie alla navigazione, non solo fu possibile acquisire e amministrare nuovi territori, riuscendo a controllarli, ma essendo la più veloce e la più efficace via di trasporto, fu assicurato lo scambio di beni nell'ambito di tutto il mondo antico. In questo contesto, per gli abitanti di Roma, il trasporto marittimo aveva una rilevanza cruciale dato che assicurava gli approvvigionamenti di grano e di altri mezzi necessari per la loro sopravvivenza. Infine, la navigazione e il trasporto marittimo facilitarono i contatti tra le diverse civiltà, rendendo possibile lo scambio delle idee e delle informazioni, così come dell'esperienza e del sapere acquisito nel corso dei millenni dalle diverse culture del mondo antico[3].

La navigazione era di fatto il *magnum negotium* anche a causa dei numerosi pericoli che si dovevano affrontare in mare aperto. Il *periculum maris* nasceva *in*

[1] Cfr. Diog. Laert., *Vitae Philosophorum* I.8.
[2] Cic. *Att*. 5.17.6.
[3] Sull'importanza del commercio marittimo, cfr. Casson (1976), 220–236; Casson (1978), 110–118; De Martino (1979), 126–131; Rickman (1980); Höckmann (1988), in particolare 118–121, 254–271; De Salvo (1992), 69–94; Greene (1990), 17–30; De Churruca (2001); Benincasa (2011), 35–47 con la letteratura ivi citata.

primis dall'imprevedibilità del tempo, dalla costruzione delle navi, dai primitivi strumenti di navigazione utilizzati ed infine dalla presenza dei pirati – "il male endemico del Mediterraneo"[4].

Come si evince dal commentario di Paolo *ad Sabinum*, per i giuristi romani il rischio legato al viaggio marittimo era percepito come *periculum propinque mortis*[5] e la paura che suscitava il mare negli antichi era paragonabile alla paura della morte. Il mare personificava l'imprevedibilità del destino: in ogni istante tutto poteva essere perduto compresa la vita, ma per quelli fortunati dava la possibilità di grandi guadagni e di scalata sociale[6].

Nonostante i numerosi sforzi delle autorità statali, interessate a favorire lo sviluppo del commercio marittimo, per garantire ai mercanti e ai naviganti la sicurezza in mare, intraprendere un viaggio con la nave significava sempre affidare la propria vita agli dei, perché nessuno era in grado di prevedere il modo in cui si sarebbe concluso. Al fine di ridurre il rischio marittimo, i Romani, da un lato cercavano di liberare le rotte commerciali più usate dai pirati, dall'altro utilizzavano leggi specifiche per tutelare i viaggiatori ed i loro beni, ma per le persone che volevano investire il loro patrimonio nel commercio marittimo, i viaggi *trans mare* rappresentavano sempre un pericolo enorme ed impossibile da eliminare[7].

La pratica legale non sviluppò soluzioni autonome che permettessero di cautelarsi contro il *periculum maris*[8]. In questa situazione l'unico modo di limitare il rischio legato alla navigazione, era quello di condividerlo tra più persone nell'ambito di un'impresa comune. A tal fine venivano usate due costruzioni giuridiche: il contratto di prestito marittimo[9] e il contratto di società. Nell'ambito di queste due costruzioni, veniva riconosciuto al rischio connesso con i viaggi marittimi

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[4] Sui rischi legati ai viaggi marittimi nell'antichità, sulla pirateria e sulla paura che il mare suscitava negli antichi, vedi Rougé (1977), in particolare 15–22, 108–110; Casson (1976), 197–203; Höckmann (1988), in particolare 138–146; Ormerod (1997); de Souza (1999); Schulz (2005), 176–181, 207–210; de Souza (2008); Tarwacka (2009); Benincasa (2011), 48–59; Álvarez-Ossorio Rivas, Ferrer Albelda (2013); de Souza (2014); Mastrorosa (2018).

[5] D. 39.6.3. *Paulus libro septimo ad Sabinum: Mortis causa donare licet non tantum infirmae valetudinis causa, sed periculi etiam propinquae mortis vel ab hoste vel a praedonibus vel ab hominis potentis crudelitate aut odio aut navigationis ineundae*: D. 39.6.4. *Gaius libro primo rerum cottidianarum sive aureorum*: *aut per insidiosa loca iturus.* D. 39.6.5. *Ulpianus libro primo institutionum*: *aut aetate fessus*; D. 39.6.6. *Paulus libro septimo ad Sabinum*: *haec enim omnia instans periculum demonstrant*.

[6] Paradigmatico in tal senso il personaggio di Trimalchio (Petron. *Sat*. 76).

[7] Sulle azioni dirette ad eliminare i pirati dalle rotte commerciali intraprese dallo stato romano e le regolazioni riguardanti la tutela della proprietà dei naviganti e della vita dei naufraghi, vedi Benincasa (2011), 52–54, 82–91.

[8] Le costruzioni giuridiche indicate nella letteratura come antecedenti al moderno contratto di assicurazione marittima, servivano a realizzare altri scopi rispetto a quest'ultimo. Sui pretesi antecedenti del contratto di assicurazione marittima, cfr. Goldschmidt (1913), 275; Huvelin (1929), 95–114; Valeri (1936); Kupiszewski (1972); Castresana Herrero (1982), 89–90; Ankum (1994); Zamora Manzano (1997); Benincasa (2011), 98, 11–114, 159–170.

[9] Sul contratto di prestito marittimo cfr. recentemente Chevreau (2008); Stelzenberger (2008), 108–123; Benincasa (2011), 115–179; Pontoriero (2011); Blicharz (2017), 1–4.

un certo valore economico: in caso di prestito marittimo, il prestante riscuoteva un'elevata quota di interessi, nel caso di società il valore economico del rischio era rappresentato dalla parte assegnata del profitto derivante dall'impresa comune.

Il contratto del prestito marittimo, nato con la pratica del commercio nel mondo greco, consentiva di trasferire il rischio della perdita dei mezzi investiti alla persona che finanziava l'impresa marittima: se la condizione *si salva navis pervenerit* non veniva a realizzarsi, il prestante non poteva richiedere il pagamento del credito. In questo modo tutte e due le parti del contratto perdevano ciò che era stato investito: il creditore i suoi fondi e il debitore la nave con l'equipaggio ed in alcuni casi perfino la vita. Nel caso invece di felice ritorno della nave (al porto di destino), il creditore recuperava il proprio credito e prendeva interessi elevati, mentre il debitore godeva della parte rimanente del profitto complessivo[10]. In questo modo il contratto di prestito marittimo costituiva una forma di joint venture che permetteva di condividere il rischio legato alle imprese nell'ambito del commercio marittimo[11].

Una funzione simile poteva essere svolta dal contratto consensuale di *societas*[12]. Parlando dell'importanza e delle funzioni che questo contratto poteva svolgere nell'ambito del commercio e del trasporto marittimo, bisogna indicare le sue due principali funzioni. Da un lato poteva essere adoperato per lo svolgimento delle tradizionali funzioni di accumulazione del capitale necessario per organizzare l'impresa marittima e la ripartizione del rischio legato al commercio marittimo tra più persone. In questo caso ogni socio si obbligava a contribuire nella società con una certa somma di capitale e il capitale accumulato serviva a realizzare lo scopo comune. I profitti che ne derivavano venivano condivisi tra i soci in relazione alla rispettiva quota e ogni socio assumeva il rischio connesso alla perdita di una parte del capitale investito. Dall'altro lato però il contratto di società poteva costituire

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[10] D. 22.2.1 (*Modestinus libro decimo pandectarum*); D. 22.2.6 (*Paulus libro vicesimo quinto quaestionum*); D. 22.2.7 (*Paulus libro tertio ad edictum*); C. 4.33.2(1); C. 4.33.5(4); Paulus, *Sent*. 2.14.3.

[11] Tranne *periculum creditoris*, un ulteriore argomento a favore nel trattare il contratto di prestito marittimo come una forma de'investimento comune nell'ambito del commercio marittimo può essere ricavato dal fatto che, differentemente dal semplice mutuante, il creditore era personalmente coinvolto nella realizzazione dell'impresa: stabiliva le date entro cui doveva realizzarsi la navigazione e la rotta da seguire ed era rappresentato durante il viaggio da un proprio agente, intitolato a richiedere immediatamente il saldo del prestito e forse perfino impegnato in prima persona a realizzare l'impresa comune tramite la *opera* prestata per il debitore – cfr. ad es. D. 22.2.3 (*Modestinus libro quarto regularum*); D. 22.2.4.1 (*Papinianus libro tertio responsorum*); D. 45.1.122.1 (*Scaevola libro vicensimo octavo digestorum*). Più dettagliatamente sul contratto di prestito marittimo come forma dello svolgimento dell'impresa commerciale in comune, cfr. Benincasa (2011), 170–175.

[12] Il commercio marittimo a Roma si svolgeva spesso nell'ambito di un'impresa comune, in particolare nella forma di società. Tale pratica viene attestata già dal III sec. a. C trovando conferma nei testi letterari (Livy, *Per*. 23.48.10–49.4; Plut. *Cat. Mai.* 21.6), nei testi provenienti dal Digesto (D. 14.1.1.25 (*Ulpianus libro vicensimo octavo ad edictum*); D. 14.1.2 (*Gaius libro nono ad edictum provinciale*); D. 14.1.4 pr. (*Ulpianus libro vicensimo octavo ad edictum*); D. 17.2.29.1 (*Ulpianus libro trigensimo ad Sabinum*)) ed anche nel vasto materiale epigrafico. Vedi: Rougé (1980), 291–303; De Salvo (1992), 237–259; Rathbone (2003); Minaud (2006).

una forma alternativa al prestito marittimo permettendo di finanziare le imprese marittime e di investire il capitale nel commercio marittimo nel caso in cui uno solo dei soci contribuisse nella *societas* con il capitale, mentre l'altro prestava per la società solo la sua opera, organizzando e realizzando l'impresa comune e assumendosi tutti i rischi direttamente connessi alla navigazione. Tale società che operava nell'ambito del commercio marittimo costituiva un'impresa particolarmente rischiosa. Per i numerosi rischi connessi alla navigazione nell'antichità, il risultato dell'attività societaria era molto più insicuro in confronto alle società ordinarie. Per questo motivo il rischio legato alla navigazione, e più precisamente la volontà di assumersi tale rischio, veniva trattata dai giuristi romani come aspetto particolarmente prezioso dell'opera prestata da un socio, e nel caso in cui solo uno dei soci avesse viaggiato *trans mare* a fini societari, il suo apporto veniva ritenuto fondamentale, giustificandone una posizione privilegiata nell'ambito della società.

D. 17.2.29.1. *Ulpianus libro trigensimo ad Sabinum: Ita coiri societatem posse, ut nullam partem damni alter sentiat, lucrum vero commune sit, Cassius putat: quod ita demum valebit, ut et Sabinus scribit, si tanti sit opera, quanti damnum est: plerumque enim tanta est industria socii, ut plus societati conferat quam pecunia, item si solus naviget, si solus peregrinetur, pericula subeat solus.*

Ulpiano, riferendo le opinioni di Cassio e Sabino, riteneva che fosse possibile concludere una società in cui uno dei soci veniva escluso dalle perdite ma partecipava ai profitti generati dall'attività comune. Tale patto secondo Ulpiano poteva ritenersi valido se il valore dell'opera di tale socio fosse stato considerato equivalente alla perdita subita dalla società. Come esempio in tal senso, Ulpiano cita il caso di un socio che si era assunto da solo i rischi legati alla navigazione e ai viaggi pericolosi nei paesi lontani (*si solus navigat, si solus peregrinetur, pericula subeat solus*)[13]. In tale società i rischi del viaggio marittimo erano così grandi, da conferire all'apporto del socio che affrontava il viaggio un valore superiore a quello del capitale investito nell'impresa comune dagli altri soci

Il testo citato corrisponde al *principium* del frammento del D. 17.2.29 proveniente dallo stesso trentesimo libro del commentario *ad Sabinum*, in cui il giurista severiano ragiona sulla validità del patto in cui i soci avevano stabilito che le loro rispettive quote societari sarebbero state disuguali.

D. 17.2.29 pr. *Ulpianus libro trigensimo ad Sabinum: Si non fuerint partes societatis adiectae, aequas eas esse constat. si vero placuerit, ut quis duas partes vel tres habeat, alius unam, an valeat? placet valere, si modo aliquid plus contulit societati vel pecuniae vel operae vel cuiuscumque alterius rei causa.*

Ulpiano, dopo aver stabilito che l'elemento naturale del contratto di società corrispondeva alla presunzione che i soci partecipassero nei profitti e nelle perdi-

[13] Nonostante i dubbi sollevati nella letteratura romanistica rispetto al carattere originale del testo, nella letteratura recente non si mette in discussione la sua provenienza classica. Cfr. Santucci (1997), 83 e la letteratura citata dall'autore.

te in parti uguali, pone la questione della validità di un accordo fatto tra i soci, in cui si fosse stabilito che le rispettive quote non sarebbero state uguali. Il giurista severiano è pronto ad accettare tale patto se giustificato dalla non corrispondenza economica dei conferimenti societari. La regola di uguaglianza di quote viene quindi adoperata se gli stessi soci non hanno stabilito diversamente nel contratto di società e può essere derogata da loro nel caso di non equivalenza dei conferimenti societari[14]. Nella parte finale del testo Ulpiano indica i possibili tipi di conferimento nella società. Accanto al conferimento pecuniario (*pecunia*)[15], elenca il lavoro prestato da un socio (*opera*) finendo col constatare che qualsiasi valore utile per realizzare l'obiettivo comune può essere conferito da un socio come un apporto (*vel cuiuscumque alterius rei causa*)[16]. Sembra che Ulpiano intenzionalmente abbia rinunciato all'elenco tassativo dei possibili tipi di conferimenti societari essendo cosciente della varietà dei modi in cui i soci potevano giungere a realizzare lo scopo della società e della non-omogeneità degli elementi che condizionavano la sua realizzazione.

Un problema simile veniva trattato da Proculo nel quinto libro delle sue *epistulae*[17], in cui il giurista rifletteva sulla decisione dell'arbitro in materia delle rispettive quote assegnate ai soci, nel caso in cui tale arbitro avesse stabilito che uno dei soci partecipava nella società con una quota di 1/1000 (un millesimo) e l'altro di 999/1000 (novecentonovantanove millesimi). Secondo Proculo tale disuguaglian-

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[14] Sull'assegnazione delle quote societarie e il rapporto tra il valore dei contribuiti e le rispettive parti negli utili e nelle perdite, cfr. Guarneri-Citati (1934); Arangio-Ruiz (1950), 93–115; Watson (1981); Riccobono (1988); Borges dos Santos Gomes de Araujo (2002).

[15] D. 50.16.178 pr. *Ulpianus libro quadregensimo nono ad Sabinum*: '*pecuniae*' *verbum complecitur, vero omnem omnino pecuniam, hoc est omnia non solum numeratam pecuniam corpora*: *nam corpora quoque pecuniae appellatione nemo est qui ambiget*. Cfr. anche D. 50.16.122 (*Pomponius libro octavo ad Quintum Mucium*).

[16] Scettico rispetto all'autenticità di questa parte del commentario di Ulpiano rimane Arangio Ruiz (1950), 107. Di diverso parere Santucci (1997), 185–192 che difende il carattere originale del testo.

[17] Questo testo segue la catena dei testi provenienti dalla stessa opera di Proculo, nei quali si analizza la materia dell'arbitraggio, ed in particolare l' *arbitrium boni viri* adoperato per definire le quote negli utili e nelle perdite a carico di singoli soci – D. 17.2.76 (*Proculus libro quinto epistularum*): (…) *Societatem mecum coisti ea condicione, ut Nerva amicus communis partes societatis constitueret*: *Nerva constituit, ut tu ex triente socius esses, ego ex besse*: *quaeris, utrum ratum id iure societatis sit, an nihilo minus ex aequis partibus socii simus. existimo autem melius te quaesiturum fuisse, utrum ex his partibus socii essemus quas is constituisset, an ex his quas virum bonum constituere oportuisset. arbitrorum enim genera sunt duo, unum eiusmodi, ut sive aequum sit sive iniquum, parere debeamus (quod observatur, cum ex compromisso ad arbitrum itum est), alterum eiusmodi, ut ad boni viri arbitrium redigi debeat, etsi nominatim persona sit comprehensa, cuius arbitratu fiat…*; D. 17.2.78 (*Proculus libro quinto epistularum*): (…) *in proposita autem quaestione arbitrium viri boni existimo sequendum esse, eo magis quod iudicium pro socio bonae fidei est*.; D. 17.2.80 (*Proculus libro quinto epistularum*): (…) *Quid enim si Nerva constituisset, ut alter ex millesima parte, alter ex duo millesimis partibus socius esset? illud potest conveniens esse viri boni arbitrio, ut non utique ex aequis partibus socii simus, veluti si alter plus operae industriae gratiae pecuniae in societatem collaturus erat*. Cfr. Gallo (1970). Come ritiene Santucci (1997), 63–75, mettendo in dubbio la tradizionale interpretazione dei testi sopra citati, il problema analizzato da Proculo riguardava non solo la possibilità di affidare la ripartizione delle quote negli utili e nelle perdite ad una terza persona nominata arbitro, ma era legato anche ad una questione più rilevante per la società, cioè la possibilità di stabilire quote disuguali.

za poteva essere giustificata dalla non corrispondenza dei conferimenti portati alla società da questi soci. Come possibili tipi di conferimento, Proculo indica: l'*opera*, l'*industria*, la *gratia* ed anche il conferimento pecuniario (*pecunia*).

> D. 17.2.80. *Proculus libro quinto epistularum: Quid enim si Nerva constituisset, ut alter ex millesima parte, alter ex duo millesimis partibus socius esset? illud potest conveniens esse viri boni arbitrio, ut non utique ex aequis partibus socii simus, veluti si alter plus operae industriae gratiae pecuniae in societatem collaturus erat.*

Un altro testo che conferma la corrispondenza del valore dei conferimenti societari e delle quote assegnate ai soci nella società, è un frammento del commentario di Pomponio *ad Sabinum*. Questo giurista analizza la questione del patto che affidava la definizione di quote societarie ad uno dei soci, riferendosi all'*arbitrium boni viri*[18] come criterio da adottare dal socio nominato arbitro. Analogamente ai testi sopra citati, la base per stabilire le rispettive quote nella società costituiva il valore dei conferimenti portati dai singoli soci, sia nella forma pecuniaria sia come lavoro o *industria*.

> D. 17.2.6. *Pomponius libro nono ad Sabinum: Si societatem mecum coieris ea condicione, ut partes societatis constitueres, ad boni viri arbitrium ea res redigenda est: et conveniens est viri boni arbitrio, ut non utique ex aequis partibus socii simus, veluti si alter plus operae industriae pecuniae in societatem collaturus sit.*

Nei testi citati vengono indicati i diversi tipi di conferimenti societari, il cui valore è ritenuto dai giuristi cruciale per definire le rispettive quote societarie[19]. Accanto al conferimento pecuniario (storicamente di primaria importanza)[20], era possibile conferire nella società anche il lavoro necessario per realizzare l'obbiettivo comune. Particolare rilevanza avevano i conferimenti definiti dai giuristi come la *gratia* e l'*industria*. Il termine *gratia* aveva un ampio spettro di significati e veniva usato nelle fonti per descrivere la particolare caratteristica di un socio rispetto alla

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[18] L'adozione di questo criterio dipendeva dal carattere del contratto di società basato sulla *bona fides*. Questa delineava i limiti della libertà dei soci nel regolare i loro rapporti nell'ambito di una società e nello stesso modo definiva i limiti della discrezionalità di un terzo, nominato da soci un arbitro per definire le loro rispettive quote sociali. La buona fede in riferimento alla definizione delle quote societarie comportava la necessità di correlarle con il valore del contributo di ogni socio, senza riguardo al carattere di quest'ultimo. Cfr. Santucci (1997), 61–75 con la letteratura ivi citata.

[19] Per definire il contributo non pecuniario del socio, a parte dell'*industria* e *gratia* vengono usati anche i termini *peritia* e *ars* – D. 17.2.52.2 (*Ulpianus libro trigensimo primo ad edictum*); D. 17.2.52.7 (*Ulpianus libro trigensimo primo ad edictum*). Cfr. Santucci (1997), 172–183.

[20] D. 17.2.5 pr.-1 *Ulpianus libro trigesimo primo ad edictum. pr.: Societates contrahuntur sive universorum bonorum sive negotiationis alicuius sive vectigalis sive etiam rei unius. 1. Societates autem coiri potest et valet etiam inter eos, qui non sunt aequis facultatibus, cum plerumque pauperior opera suppleat, quantum ei per comparationem patrimonii deest. donationis causa societas recte non contrahitur*. Questo frammento, pur proveniente dal commentario all'editto, a causa delle locuzioni come *patrimonium*, *aequae facultates*, *pauperior*, viene riferito alla società di tipo *omnium bonorum*, anche se la regola espressa da Ulpiano ha un carattere più generale. Nell'ottica del giurista severiano, il contributo del socio consistente nell'opera, aveva un carattere complementare rispetto al contributo pecuniario e svolgeva una funzione compensativa in riferimento ad un capitale insufficiente per poter essere ammesso nella società.

sua posizione sociale, ai suoi contatti sociali, alle sue conoscenze ed alla stima di cui godeva come una persona conosciuta e degna di gratitudine da parte di altre persone, comprese quelle influenti. Questo tipo di conferimento, come ha notato giustamente Santucci, assumeva una particolare rilevanza nel contesto sociale ed economico romano dove ogni relazione, partendo dai livelli più bassi per arrivare ai ceti alti, si basava su relazioni personali e rapporti di clientela[21]. Il conferimento definito con il termine *industria* indicava invece caratteristiche particolari del lavoro prestato da un socio come la diligenza, la creatività, l'operosità, l'intraprendenza ed anche la volontà di assumersi particolari rischi connessi all'attività svolta in comune[22]. La volontà di affrontare i rischi connessi ai viaggi costituisce in quest'ottica un tipo particolare d'*industria*, il cui valore si esprime nella volontà di rischiare la propria vita per realizzare lo scopo comune. Tale conferimento viene considerato da Ulpiano di particolare valore rispetto ai fini societari, e ciò trova conferma nell'affermazione secondo cui un socio che lo conferisca *plus societati conferat quam pecunia*. L'attribuzione di un tale valore dipendeva *in primis* dal fatto che il socio metteva a rischio la propria vita, cosa non traducibile in termini economici, se messa a confronto coi conferimenti pecuniari degli altri soci. Dall'altro lato, tale conferimento risultava cruciale per realizzare lo scopo della società, in quanto l'elemento che determinava il successo dell'impresa commerciale non era tanto il capitale investito, quanto la capacità di ricavarne profitto. La volontà di affrontare il rischio legato ai viaggi trasmarini era quindi riconosciuta come un valore che poteva essere conferito nella società, almeno equivalente ai valori economici investiti dagli altri soci nell'impresa comune.

Ulpiano si serve dell'esempio del socio conferente nella società la volontà di assumersi i rischi connessi con i viaggi marittimi (*item si solus naviget, si solus peregrinetur, pericula subeat solus*) per illustrare la situazione in cui viene giustificato il patto sulla base del quale uno dei soci veniva escluso dalle perdite pur avendo partecipato nei profitti derivanti dall'attività svolta in comune. Tale questione costituiva uno dei punti cruciali della polemica riguardante la possibilità di pattuire le quote disuguali nelle perdite e nei profitti, rinomata nella tradizione letteraria romana come la *magna quaestio*[23]. Questa discussione è spesso percepita nella

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21 Sul contributo del socio definito come *gratia*, cfr. Santucci (1997), 151–172; Santucci (2003), 395.

22 Sul significato del termine *industria*, cfr. Santucci (1997), 111–151.

23 G. 3.149: *Magna autem quaestio fuit, an ita coiri possit societas, ut quis maiorem partem lucretur, minorem damni praestet. Quod Quintus Mucius contra naturam societatis esse censuit. sed Servius Sulpicius, cuius etiam praevaluit sententia, adeo ita coiri posse societatem existimavit, ut dixerit illo quoque modo coiri posse, ut quis nihil omnino damni praestet, sed lucri partem capiat, si modo opera eius tam pretiosa videatur, ut aequum sit eum cum hac pactione in societatem admitti. Nam et ita posse coiri societatem constat, ut unus pecuniam conferat, alter non conferat et tamen lucrum inter eos commune sit, saepe enim opera alicuius pro pecunia valet*; I. 3.25.2: *De illa sane conventione quaesitum est, si Titius et Seius inter se pacti sunt, ut ad Titium lucri duae partes pertineant damni tertia, ad Seium duae partes damni, lucri tertia, an rata debet haberi conventio? Quintus Mucius contra naturam societatis talem pactionem esse existimavit et ob id non esse ratam habendam. Servius Sulpicius, cuius sententia praevaluit, contra sentit, quia saepe quorundam ita pretiosa est opera in societate, ut eos iustum sit meliore condicione in societatem admitti: nam et ita coiri posse societatem non dubitatur, ut alter pecuniam conferat, alter*

dottrina romanistica come una eco delle discussioni giurisprudenziali derivanti dal confronto di due visioni diverse della società: la visione tradizionale, statica, che identificava questo contratto con la comunità patrimoniale e la più moderna concezione "dinamica" dove la società diveniva lo strumento per realizzare profitti legati all'attività commerciale svolta in comune. La polemica, nata tra due eminenti giuristi del periodo repubblicano, concerneva la seguente questione: se sia ammissibile pattuire tra soci che uno partecipi con una quota maggiore nei profitti e con la quota minore nelle perdite risultanti dall'attività comune. Quinto Muccio che rappresentava l'approccio più tradizionale rispetto al suo antagonista più giovane e liberale – Servio Sulpicio, riteneva tale patto contrario alla natura stessa del contratto di *societas*. Il suo avversario invece, non solo riteneva tale patto valido, ma perfino era disposto ad accettare l'idea di un patto sulla base del quale uno dei soci veniva totalmente escluso dalle perdite ricavando una parte dei profitti realizzati dalla società[24]. Molti autori che affrontano la problematica di *magna quaestio* la percepiscono come l'effetto dello scontro di due concezioni di contratto di società. La posizione presa nella polemica da Quinto Muccio viene interpretata come prova dell'attaccamento di questo giurista alla visione patrimoniale di un contratto di società basata sullo schema della *societas omnium bonorum*, in cui il conferimento d'opera veniva visto come valore complementare rispetto al conferimento pecuniario e non veniva preso in considerazione nei calcoli finali tra soci, mentre la soluzione proposta da Servio tendeva ad assegnare ad un conferimento d'opera un valore equivalente al conferimento pecuniario, ma il modo in cui questo veniva a realizzarsi resta un punto ancora discusso in dottrina[25].

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non conferat et tamen lucrum inter eos commune sit, quia saepe opera alicuius pro pecunia valet. et adeo contra Quinti Mucii sententiam obtinuit, ut illud quoque constiterit, posse convenire, ut quis lucri partem ferat, damno non teneatur, quod et ipsum Servius convenienter sibi existimavit: quod tamen ita intellegi oportet, ut, si in aliqua re lucrum, in aliqua damnum allatum sit, compensatione facta solum quod superest intellegatur lucri esse.; D. 17.2.30: *Paulus libro sexto ad Sabinum: Mucius libro quarto decimo scribit non posse societatem coiri, ut aliam damni, aliam lucri partem socius ferat: Servius in notatis Mucii ait nec posse societatem ita contrahi, neque enim lucrum intellegitur nisi omni damno deducto neque damnum nisi omni lucro deducto: sed potest coiri societas ita, ut eius lucri, quod reliquum in societate sit omni damno deducto, pars alia feratur, et eius damni, quod similiter relinquatur, pars alia capiatur.*

[24] Fuori discussione rimaneva invece l'inammissibilità di escludere uno dei soci dalla partecipazione negli utili. Nel testo del D. 17.2.29.2. Ulpiano informa che tale patto non poteva essere aggiunto al contratto di società, in quanto portava alla conclusione di iniquissimus genus societatis, che, come riteneva Aristone, Cassio chiamava la società con il leone D. 17.2.29.2. *Ulpianus libro trigensimo ad Sabinum: Aristo refert Cassium respondisse societatem talem coiri non posse, ut alter lucrum tantum, alter damnum sentiret, et hanc societatem leoninam solitum apellare: et nos consentimus talem societatem nullam esse, ut alter lucrum sentiret, alter vero nullum lucrum, sed damnum sentiret: iniquissimum enim genus societatis est, ea qua quis damnum, non etiam lucrum spectet*. L'inammissibilità di concludere una società, in cui uno dei soci fosse escluso dagli utili, partecipando solo nelle perdite fu legata al divieto di concludere le società *donationis causa*. Cfr. D. 17.2.5.1 (*Ulpianus libro trigesimo primo ad edictum*). Sulla *societas leonina* cfr. Guarino (1972b); Blanch Nougés (2008a); Blanch Nougés (2008b).

[25] Sulla *magna quaestio*, vedi innanzitutto: Del Chiaro (1928), 133–135; Guarneri-Citati (1934); Wiaecker (1936), 251–268; Watson (1963), 88; Watson (1965), 137; Bona (1968), 443–461, in particolare 448; Horak (1969), 158–165; Guarino (1972a); Bona (1973), 24–34; Schiavone (1976), 137–144; Stein (1978),

Ritengo che alla radice della *magna quaestio* poteva risiedere la posizione di un socio d'opera nella situazione in cui la società non ha generato profitto previsto e contemporaneamente il capitale investito è stato perduto. Se la perdita del capitale fosse avvenuta nel corso della realizzazione dello scopo comune, in quanto danno comune, doveva gravare su tutti i soci, in proporzione alle rispettive quote societarie[26]. In questa situazione, un socio che partecipasse all'impresa comune solo con i propri servizi, poteva trovarsi nella situazione di svantaggio dovendo ripagare al socio di capitale una parte del capitale perso senza poter recuperare dalla società nessun equivalente pecuniario per l'opera prestata. L'intenzione di Servio Sulpicio era quindi probabilmente quella di evitare la situazione in cui un socio d'opera in caso di perdita del capitale investito, fosse costretto a pagare all'altro socio la parte del capitale perso. Dato che il valore dei servizi prestati da un socio non poteva essere preso in considerazione nel momento dei calcoli finali tra soci (così come poteva succedere nel caso del conferimento del capitale), Servio propose la modifica del contratto di società tramite un patto che consentisse al socio d'opera di essere escluso, totalmente o in parte, dalla perdita del capitale investito dagli altri soci. Questo portò al riconoscimento dell'equivalenza economica della prestazione d'opera rispetto al conferimento di capitale.

È significativo che questa polemica sia nata in un momento di trasformazione del contratto di società per dar vita ad uno strumento che consentisse di condurre l'attività commerciale in comune. Tale processo comportò una rivalutazione del conferimento d'opera a scapito del tradizionale conferimento pecuniario e l'abbandono della visione del contratto di società identificato con la comunità dei beni.

Nella riflessione giurisprudenziale posteriore riguardante la problematica della *magna quaestio*, quando, come si può supporre, l'opinione di Servio era già comunemente approvata, come esempio di tale società, in cui uno dei soci, pur partecipando ai profitti, veniva escluso dalle perdite, Ulpiano si serve di un esempio di *societas* in cui uno dei soci, conducendo gli affari della società, effettuava viaggi, anche trasmarini in paesi lontani (*si solus naviget, si solus peregrinetur*) assumendosi tutti i rischi legati a questi viaggi (*pericula subeat solus*), mentre l'altro socio conferiva nella società solo con il capitale. L'assunzione del rischio connesso con i viaggi diventa in quest'ottica un tipo particolare di conferimento alla società, il cui valore supera l'importanza del conferimento di capitale (*plerumque enim tanta est industria soci ut plus societati conferat quam pecunia*).

179; Schiavone (1981), 69–70; Schiavone (1987), 63–68; Watson (1981); Riccobono (1988); Talamanca (1990); Talamanca (1991); Santucci (1997), 49–53; Fuenteseca (1998); Borges dos Santos Gomes de Araujo (2002); Harke (2005), 51–54; Meissel (2004), 220; Blanch-Nougés (2008a), 1–14; Benincasa (2011), 209–228; Santucci (2014a); Benincasa (2019).

[26] Cfr. D. 17.2.52.4 (*Ulpianus libro trigensimo primo ad edictum*); D. 17.2.58.1 (*Ulpianus libro trigensimo primo ad edictum*); D. 17.2.60 (*Pomponius libro duodecimo ad Sabinum*).

Basandosi sui testi a disposizione, non si può stabilire quale ruolo avesse quest'esempio nella discussione dottrinale concernente la validità di un *pactum* che escludesse un socio d'opera dalle perdite nei calcoli finali. Bisogna però notare che nei testi conservati nel Digesto, l'unico esempio di società in cui tale patto è ritenuto valido è proprio il caso del socio che *solus navigat, solus peregrinetur*. Si può quindi presumere che questo caso, a cui si riferivano sia Cassio che Ulpiano, ai loro tempi costituisse l'esempio tipico di società in cui il conferimento d'opera prestato da uno dei soci veniva ritenuto d'importanza vitale ai fini dell'attività svolta in comune, fino a giustificarne l'esclusione dalla partecipazione nelle perdite del capitale[27]. Non si può quindi escludere che quest'esempio, come particolarmente suggestivo, fosse utilizzato anche da Servio e dai suoi sostenitori al fine di giustificare l'idea da loro proposta di escludere un socio d'opera dalle perdite societarie. Dato che la realizzazione dello scopo della società era connessa con il rischio di perdere la vita durante i viaggi, un socio che si assumeva tale rischio voleva essere tutelato contro gli eventuali costi derivanti dalla perdita del capitale investito dagli altri soci. Tale preoccupazione era giustificata dal fatto che nelle società operanti nel settore del commercio marittimo il rischio di fallimento dell'impresa comune per motivi di forza maggiore era enormemente più elevato rispetto alle altre società, in cui uno dei soci conferiva la propria opera[28].

La società in cui uno dei soci conferiva esclusivamente con la *pecunia*, mentre l'altro investiva tale capitale viaggiando *via* mare, poteva svolgere una funzione analoga a quella del contratto del prestito marittimo. La caratteristica di quest'ultimo contratto consisteva nell'assunzione da parte del creditore del rischio di perdere i soldi prestati, nel caso in cui la nave su cui il mutuatario trasportava la merce acquistata con il denaro prestato, non arrivasse felicemente al porto di destinazione. Per bilanciare tale rischio, il creditore poteva stipulare interessi elevati dovuti nel caso del felice ritorno della nave. Un socio, il cui conferimento nella società consistesse esclusivamente in capitale, aveva quindi una posizione analoga al creditore nel prestito marittimo. Il suo contributo erano i soli mezzi economici e non la realizzazione dello scopo sociale, effettuando viaggi marittimi e rischiando quindi la propria vita. Nel caso in cui gli affari societari fossero an-

[27] Va sottolineato, che i giuristi posteriori che si riferivano alla *magna quaestio* e dibattevano sull'ammissibilità del patto che escludesse, in parte o pienamente, uno dei soci dalla partecipazione nelle perdite del capitale, al fine di giustificare la validità di un tale patto sottolineavano l'importanza particolare del lavoro prestato da questo socio per la realizzazione dello scopo societario. Cf. G. 3.149: (…) *si modo opera eius tam pretiosa videatur, ut aequum sit eum cum hac pactione in societatem admitti*…; I. 3.25.2: (…) *quia saepe quorundam ita pretiosa est opera in societate, ut eos iustum sit meliore condicione in societatem admitti* (…).

[28] Nei testi dei giuristi contenuti nel Digesto che trattavano del caso della perdita di capitale investito nella società (D. 17.2.52.4 (*Ulpianus libro trigensimo primo ad edictum*); D. 17.2.58.1 (*Ulpianus libro trigensimo primo ad edictum*); D. 17.2.60 (*Pomponius libro tertio decimo ad Sabinum*)) di solito viene esaminato il caso in cui uno dei soci partito per un viaggio per acquistare della merce per causa di forza maggiore aveva perso i soldi ed altre cose neccessarie per la realizzazione dello scopo societario prima di effettuare l'acquisto. Cfr. Benincasa (2019).

dati bene, questo partecipava ai profitti proporzionalmente alla sua quota nella società, e ciò gli consentiva non solo di recuperare i soldi investiti, ma anche di ricavare profitto dall'attività svolta in comune, cosi come il creditore nel contratto del prestito marittimo, che nel caso si fosse realizzata la condizione *si salva navis pervenerit*, poteva richiedere la somma del mutuo insieme ad interessi elevati. Invece, nella situazione in cui l'impresa comune non fosse andata a buon fine, il socio di capitale non poteva recuperare dall'altro socio una parte del capitale perso e quindi, analogamente al creditore nel contratto di prestito marittimo, si assumeva il rischio di perdere i mezzi investiti se la nave non fosse arrivata al porto di destinazione. Allo stesso modo, la posizione giuridica del socio d'opera che si assumeva il rischio di navigazione viaggiando per realizzare lo scopo sociale era paragonabile a quella del debitore nel contratto del prestito marittimo. Nel caso in cui, i viaggi commerciali avessero generato profitti, questi era costretto a dividerli con un socio che finanziava tutta l'impresa rispetto alle quote nella società, mentre in caso di fallimento dell'impresa, nulla doveva rispetto alla perdita del capitale investito, così come il debitore nel caso del prestito marittimo non doveva ripagare il prestito se il viaggio con la nave non era andato a buon fine.

Possiamo quindi dire che la società di cui parlavano Cassio e Sabino costituiva un'alternativa per il contratto del prestito marittimo, essendo una forma adatta per le persone che volevano investire i propri mezzi nell'impresa commerciale marittima, ma non volevano partecipare personalmente nella realizzazione di tale impresa (sia perché non volevano rischiare la vita, sia per i motivi organizzativi ma anche sociali, in quanto la società romana tradizionalmente attaccata ai profitti generati dall'attività agricola disprezzava, almeno nominalmente, l'idea di profitti generati dalla rischiosa attività commerciale)[29]. Questi potevano quindi concludere le società con le persone, che pur non disponendo del capitole necessario, erano disposte ad organizzare il viaggio assumendosi personalmente i rischi connessi alla navigazione e dirigendo tutta l'impresa. Analogamente al debitore nel contratto di prestito marittimo, un socio che conferiva nella società svolgendo attività rischiosa a fini societari, non era obbligato a ripagare al socio di capitale una parte dei mezzi persi, così il creditore nel contratto di prestito marittimo si assumeva tutto il rischio della perdita della somma prestata se il viaggio marittimo non fosse andato a buon fine.

[29] Partendo dalla metà del secondo secolo a.C, il commercio, ed in particolare il commercio marittimo, diventa una fonte attraente di guadagni, molto più elevati rispetto ai tradizionali profitti derivanti dall'agricoltura e dall'allevamento. Dato che la tradizionale ideologia romana del *pius quaestus* fu ostile a guadagni ricavati dall'attività commerciale ed ai senatori e ai loro figli era perfino vietato di impegnarsi in persona nel commercio marittimo (*lex Claudia*), i *nobiles* romani cercavano forme giuridiche che permettessero d'investire il patrimonio nel rischioso commercio marittimo nascondendo al contempo il vero investitore, grazie a ciò non dovevano rinunciare alla possibilità di arricchirsi e non rischiavano la propria reputazione. Cfr. innanzitutto D'Arms (1980); D'Arms (1981). Vedi anche Pavis d'Escurac (1977); Guarino (1982); Clemente (1983); Schleich (1983); Schleich (1984); Narducci (1985); Rauh (1986); De Salvo (1992), 59–68; El Beheiri (2001).

Il contratto di società divenne quindi, nel momento del passaggio dalla concezione della società identificata con la comunità patrimoniale alla figura della *societas quaestuaria* diretta a ricavare profitto dalle attività commerciali, una delle forme giuridiche con cui si poteva realizzare il finanziamento delle imprese nell'ambito del commercio marittimo, in alternativa al prestito marittimo. La volontà di assumersi il rischio connesso con i viaggi trasmarini veniva ritenuta un valore conferibile nella società che determinava la partecipazione di un socio ai profitti dall'attività comune. Nello stesso tempo il carattere particolare di tale conferimento veniva utilizzato come argomento nella discussione concernente la questione dell'esclusione di un socio d'opera dalle perdite. I giuristi ritenevano che la volontà di assumersi i rischi legati alla navigazione avesse in termini economici un valore paragonabile al capitale conferito dagli altri soci. Di conseguenza, se la società non avesse generato profitti e il capitale investito fosse stato perso, il socio che si assumeva questi rischi veniva escluso dalla partecipazione nella perdita del capitale. *Tanti sit opera quanti damnum est scribit Sabinus* e questa frase esprimeva pienamente la regola dell'equivalenza del lavoro conferito da un socio d'opera rispetto al capitale investito dall'altro. L'elemento decisivo per assegnare tale valore all'opera prestata da un socio-viaggiatore era l'assunzione del rischio consesso con i viaggi marittimi[30]. Analogamente nel caso di prestito marittimo, gli interessi spettanti al creditore superavano il limite legale, proprio al fine di ricompensare al creditore il rischio assunto.

[30] Riconoscere come un valore conferibile nella società, la volontà di assumersi il rischio legato ai viaggi marittimi, costituisce una prova che gli *iurisprudentes* romani accettavano l'idea secondo cui a fini societari era importante non solo mettere a disposizione una qualche parte del patrimonio di un socio ma anche, ed in particolari casi innanzitutto, il lavoro prestato da un socio che poteva conferire alla società competenze, talenti particolari (*ars*, *perizia*), conoscenze o posizione sociale (*gratia*) oppure semplicemente perché era disposto a rischiare la propria vita pur di realizzare gli affari comuni. Riconoscere questo genere di valore come cruciale per una questione così importante come la partecipazione nelle perdite e negli utili della società, equivaleva all'accettazione nell'ambito giuridico degli elementi provenienti dall'ambito delle *negotiationes* romane e dalla pratica del commercio. Grazie a ciò, la società divenne un contratto utile per le persone che volevano condurre insieme una qualche attività lucrativa divenendo uno strumento adatto per realizzare diverse imprese nell'ambito della vita economica. Le possibilità che questo contratto offriva agli imprenditori romani, grazie al riconoscimento da parte dei giuristi di una concezione così ampia e così elastica del conferimento, costituisce un'ulteriore argomento a favore della tesi secondo cui il ruolo di questo contratto nella realtà economica dell'antica Roma non era così marginale come individuato dai sostenitori della tesi sull'importanza delle costruzioni che si basano sulla figura del *servus comunis*. Sull'inadeguatezza ai bisogni del commercio del contratto di società e sul ruolo dominante dell' *exercitio negotiationum per servos communes* come forma organizzativa adatta per svolgere l'attività economica in comune, cfr. innanzitutto Serrao (1971); Serrao (1990); Di Porto (1994), in particolare 7–28, 371–392; Di Porto (1997); Cerami, Di Porto, Petrucci (2004), 61–63, 166–172, 247–254. Più moderato sembra il parere di Cerami (2007), in particolare 92–132, secondo cui l'*exercitio negotiationum per servos communes* e il *plurium exercitio per societatem* non devono essere trattate come le soluzioni giuridiche alternative ma come costruzioni complementari, utili a realizzare gli scopi economici Cfr. anche dello stesso autore: Cerami (2014), 130 e Santucci (2014b).

Le costruzioni adoperate dai Romani per limitare il rischio legato alla navigazione tramite la condivisione di questo rischio nell'ambito di un'impresa comune, permettono di trarre un'osservazione di tipo generale riguardo la loro percezione del rischio. In questo contesto, al rischio, o più precisamente alla volontà di assumerselo, viene assegnato un certo valore economico riconosciuto al mercato come equivalente al capitale. Tale valore costituiva una sorta di *periculi pretium*[31], da considerare nelle relazioni contrattuali. Riconoscere questo elemento come un valore contrattuale significava che i giuristi romani accettavano nell'ambito giuridico gli elementi della sfera delle *negotiationes* e della conduzione degli affari economici. Questo può considerarsi una prova dell'adattamento del loro sistema giuridico ai bisogni del mercato e alle esigenze del commercio.

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[31] Il termine *periculi pretium* appare in un testo proveniente dall'opera di Servidio Scaevola (D. 22.2.5 pr. *Scaevola libro sexto responsorum*) in riferimento ai contratti, in cui una delle parti si assumeva il rischio di non poter chiedere la prestazione alla controparte, se una condizione dipendente in parte del caso non si fosse verificata. Come esempio questo giurista parla del prestito dato ad un pescatore *ut si cepisset redderet* oppure ad un lottatore sotto la condizione *si vicisset*. In questi casi, dato che il ripagamento del mutuo avveniva solo realizzata la condizione, al mutuante spettava qualcosa in più che la somma del prestito, al finedi bilanciare il rischio assunto. Sul testo vedi Benincasa (2011), 162–170.

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PERICULUM MARIS COME IL VALORE CONTRATTUALE NEL DIRITTO ROMANO

For persons who wanted to invest their resources in international commerce, the necessity of a sea voyage significantly increased the risk connected to this venture. Thus the contracts, which took into account the risk related to navigation, constituted under Roman law a special category of contracts, as they modified standard contracts such as a loan or

a partnership contract. In the contract of maritime loan the fact that the creditor assumed the risk of losing money in case the condition *si salva navis pervenerit* was not fulfilled and in exchange could claim high interest to compensate him for such risk transforms this contract into an instrument used for the joint gain of profits. The classical scheme, in which all partners were obliged to share both profits and losses was modified by a partnership contract, in which a partner whose contribution involved exclusively undertaking risky sea voyages was exempt from bearing losses. This *pactum* made it possible to treat pecuniary contributions and in-kind contributions as equivalent in value. This prevented a situation in which the partner whose sole contribution involved services, in spite of due performance of his obligations, would be liable to repay a part of the loss to the partner who brought capital, if the activity of the partnership resulted in the loss. A typical example, referred to by jurists, of a situation in which services performed by a partner justified discharging him from participating in the loss, was the case in which one of the *socii* financed the purchase of goods to be subsequently sold with profit in another port, while the other one carried out this venture risking his life during the sea voyage. Therefore, undoubtedly, services entailing a dangerous sea voyage constituted a good example of a partnership, in which the value of a contribution of *opera* was even greater than the value of the capital invested, and this justified releasing one of the partners from participation in the loss. Therefore, the risk related to navigation, and more specifically the willingness to assume it, starts to be considered as having a certain economic and market value. This value constitutes a special *periculi pretium*, that is to be taken into consideration in a contract relationship. The acknowledgement by Roman jurists that the willingness to assume the risk connected with certain types of business constituted an economic value, means that the importance of such factors as the partner's efficiency, resourcefulness, or willingness to embark on a risky activity (in most cases crucial for a success of an enterprise) – was fully appreciated.

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SOME REMARKS ON SEA TRANSPORT AND ITS LEGAL REGULATIONS IN ROMAN LAW[1]

Just a cursory look at the map of the Roman Empire shows clearly the importance of transport, for both military and commercial purposes (*cf.* Rougé, 1966; de Martino, 1980; Cerami, di Porto, 2004). It is well known that the Romans had a road network of 80,000 kilometres, spread over Europe, Africa and Asia (*cf.* Chevallier, 1976). At the beginning of the Republic, Rome was as large as Cyprus, near 10,000 sq. km. But at the height of the Empire it covered the unbelievable territory of 4.5 million sq. km, becoming as large as the entire European Union today. That was well over four times more than the Kingdom of Poland and Lithuania at its territorial peak in 1634. The state had a multi-ethnic composition and people were in a continuous movement. Its parts were therefore well connected by means of roads such as *Via Salaria* or *Via Latina*. It provided a good infrastructure for local commercial trips, but when it came to long-distance trade transport, only shipping could be fast, efficient and safe enough to meet the needs of the merchants, their bankers and finally customers (*cf.* Thiel, 1946). The safety of travelling along the inland roads varied with time, but the *latrones* were often more dangerous than the *piraterii*. Anybody could be robbed, which even happened to armed soldiers. In 98, young Publius Aelius, a tribune of the XXII Legion and later emperor Hadrian, travelled from Mainz to Cologne and was lucky enough to survive the attack of highwaymen. He lost everything as his *milites* were unable to defend him (*cf.* Grünewald, 2004, 21). In 152, Valerius Etruscus, the governor of Numidia

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received a complaint from Varius Clemens, the procurator of Mauretania, who had been robbed and wounded on the way and hardly escaped with his escort (*cf.* Bryant, 1895).

It is clear that if it had not been for the highly developed shipping, Rome would never have achieved such a dominant commercial position. This was a whole industry which could easily have astonished future generations in the medieval and early modern times. The most important cargo was grain, with the centre in Alexandria, the largest harbour in the ancient world.[2] Grown in the highly fertile Nile Valley, it was harvested and shipped to Europe, most often to Misenum and Ostia near Rome. This was a massive transportation challenge: 450,000 tonne of grain a year. The modern giant bulk-carrier of the Panamax class (the largest ship to cross the Suez or the Panama Channel), able to carry near 80,000 tonne, would have to make 6 voyages to do it. How large was the ancient grain market? The highest volume in the Vistula grain trade in 1618 hardly reached 250,000 tonne; this is noteworthy considering that the Vistula grain route which ended in Gdańsk was regarded as the world's leading one in the seventeenth century (*cf.* Mielczarski, 1982, 61–79).

To enable the trade, the Roman fleet had to keep a variety of vessels (*cf.* Torr, 1894). From the smallest carrying from 70 tonne, the medium-sized from 100 to 200, and the huge *muriophorio* with the maximum load of 550 tonne. Those carriers would have been able to take the weight of five Boeing 787 Dreamliners. But the largest was *Isis*, 55 meters long, with the maximum capacity of 1,200 tonne of grain, enough to feed an entire town for a year. This was not the last word of antiquity, as Ptolemy IV Philopator had a ship able to take 6,500 tonne, and Noah's Ark is calculated to have carried 11,0 thousand tonne (*cf.* Hölbl, 2003, 133). That was very much if we compare it with Columbus's flagship *Santa Maria* with its carrying capacity of 200 tonne.

We can only imagine how many ships crossed the *Mare Nostrum* and the *Pontus Euxinus*, carrying all sorts of goods and providing very good income for the Roman state (*cf.* Casson, 1971, 336). Although there were some shipping lines for passengers only, travellers usually had to find cargo ships to take them.[3] Both ship agents and captains had free places on board and could offer them to those who received their departure passports, having paid a fee to Roman harbour masters. Apart from commercial and regular passenger trips, the elite of the state were frequently travelling for leisure, usually on board of luxurious imperial ships. Greece and nearby islands were the major destination: Cicero, Julius Cae-

[2] Many students would arrive in Alexandria to study. It had a large university, discovered by the Polish archaeologists in Komm-el-Dikka. It was able to accommodate up to five thousand students in the mainauditorium and the twenty-two lecture halls at the same time. See Derda, Markiewicz, Wipszycka (2007).

[3] Ulpianus wrote about passenger-only ships sailing from Cassiope (Corfu) and Dyrrachium (Durrës in Albania) to Brundisium (Italian Brindisi): D. 14.1.12. All Digest citations are based on Palmirski (2014), the first Polish complete edition and translation of the Digest of Justinian.

sar, Lucretius, Pompeius, Cato the Younger, Tiberius, Antonius and many others travelled to Rhodos to learn at the school of rhetoric. We should bear in mind that sailing and travelling was not easy at the time. The hope to start the voyage within a reasonable time could not always be fulfilled. The weather was the primary consideration condition, but a captain could not depart if ill-omened birds appeared or somebody had a bad dream. No timetable was therefore followed and much patience was necessary.

The sea freight required an entire body of legal regulations, given how important this branch was for the Roman economy (cf. Meyer-Termeer, 1978; Palmirski, 2008; Benincasa, 2011; Kordasiewicz, 2011). The list of applicable regulations spans almost the entire private law: the organization and status of the cargo company, the relations of co-owners, bankers and loans, including the special maritime loan called *foenus nauticum*, the security of debts, hiring and employment of the crew (slaves were very rarely admitted to work on ships), hiring a captain (*magister navis*), the relations between the ship owner (*exercitor*), the captain and third persons (see Falenciak, 1956; Wiliński, 1960; Wiliński, 1964; Krzynówek, 2000; Żeber, 2003; Wolny, 2007; Służewska, 2007; Benincasa, 2010a; Benincasa, 2010b). Those regulations varied depending on whether the captain was a slave, whether the "ship owner" was the real owner or had just hired the ship from somebody else, and, last but not least, if the ship owner was a *pater familias*, his son, or finally an emancipated woman *sine manu*. All those possibilities are seen in the Roman legal practice.[4] This, however, was not the most important part of regulations, as they pertained rather to internal relations. Shipping goods over the sea could be legally established in two general ways. The first one could be the simple *locatio-conductio rei*, according to which a piece of the deck or a loading place was hired to the merchant who stored his goods there and could only pray for them to reach the destination safely (on this issue see Thomas, 1960, 489). If he or his people would not travel along, anything could happen to the cargo as the captain was only liable for letting them use the place and nothing else. There was no liability in case it was stolen, broken, disappeared etc. – the responsibility extended as far as a place on board of the ship which sailed somewhere. Captains were rather unwilling to assume any more liability. However, if merchants managed to impose *locatio-conductio operis*, according to which reaching the harbour of destination was necessary to enable payment, their situation became slightly better.[5] The

[4] Roman law regulated maritime issues in detail. The "Captain" was to take care of the entire ship (D. 14.1.1), they were appointed masters of the ship, they could hire the ship for the carriage of goods or passengers (D. 14.1.3). The ship-owner had all benefits, no matter if he or she were "owners" or just a lease-holders (D. 14.1.15) Either a woman or a slave could be a ship-owner. Captains were appointed by them, or by the already appointed captain (D. 14.1.5). The liability of ship-owners for the captains' obligations was laid down as well (D.14.1.7–12); there was also a detailed definition of what a ship was (D. 14.1.6), a raft also qualified as a ship.

[5] With respect to passengers as opposed to merchants, there was a practice of using *locatio-conductio rerum vehendarum*, probably with the liability limited only to his personal, non-commercial luggage. See Zimmermann (1990), 518.

captain was paid after delivering goods, or had to return the money if the voyage failed.[6] This was far better than *conductio rei*, but merchants were still at risk of losing the money as captains were liable for damages or theft only when a proof of his *culpa* could be provided by the plaintiff.[7] It literally meant that if the captain had not been caught red-handed by the merchant, or his collusion with thieves or pirates was not proven, it was impossible to make him pay. There is an account of rather poor reputation of sailors (as well as inn-keepers and stable-keepers). Ulpianus tried to explain the situation by quoting Pomponius, in whose opinion the praetor wanted to warn them against dishonesty, because cheating was a common practice.[8] This was a serious barrier for possible investors or creditors if we bear in mind that a similar legal situation applied to inn or stable owners, who kept merchants' goods, horses, mules and carriages. As a result, there was a serious gap in the law which hampered efficient development of the sea and land commercial transport. There was a great necessity to create an instrument to help those who lost their cargo but the carriers refused liability. A modern case refers to "common carriers" who have a strict type of liability as long they are common, which means they offer service to everyone for money (see Zimmermann, 1990, 523). The praetor's edict *De nautae* was a real revolution on the market, shifting the contractual liability from *culpa* to *custodia*, with an invaluable modern effect which may be truly called consumer protection, even if most of those contracts were business to business (on the edict and relevant literature see Földi, 1993). We have a direct reference from Ulpianus: D. 4.9.1 pr. *Ulpianus libro quarto decimo ad edictum:* (…) *Ait praetor: nautae caupones stabularii quod cuiusque salvum fore receperint nisi restituent, in eos iudicium dabo*. It was a milestone in the history of maritime and transport law. Now the merchant had not only *actio locati*, but also much more powerful *actio de recepto*, according to which initial liability comprised *custodia* as well as *vis maior*. Even if this was moderated in Labeo's times (*exceptio* was granted in the case of pirate attack or sea disaster), it still meant an entirely new shape of the contract, now very attractive for merchants, bankers and investors, who could feel secure from abuse on the part of entrepreneurs. Now, the *custodia*-based liability made major services such as sea transport, inland commercial haulage, shipping of goods, storing, or logistics much safer. It was enough to prove the contract was established, in fact a simple statement of the quantity and quality of goods was sufficient. In general, property had to be received by carriers or stablers, with some exceptions when their liability was extended even to the goods awaiting to be loaded. Consequently, not only reaching the destination, but also the safety of the merchants' goods was a contractual duty of a *nauta*, just as inn or stable keep-

[6] D. 19.2.15.6, where Ulpianus refers to Caracalla's *rescriptum*.

[7] "But even in case of locatio conductio operis, the nauta (here in the role of conductor) did not automatically incur this type of liability." *Cf.* Zimmermann (1990), 519.

[8] D. 4.9.1.1: (…) *et nisi hoc esse statutum, materia daretur cum furibus adversus eos recipiunt coeundi, cum ne nunc quidem abstineant huiusmodi fraudibus*. *Cf.* Zimmermann (1990), 516.

ers were responsible for the travellers' property. This understanding of liability in contracts was unlikely to make captains and ship-owners happy as it forced them to increase their care of the cargo, but it resulted in encouraging more investors to put their money in the business.[9] The same applied to bankers, who would henceforth be more willing to lend money, even if the maritime loan (*foenus nauticum*) (see Biscardi, 1937, 350; Biscardi, 1947; Biscardi, 1978, 280 f.; Castresana Herrero, 1982, 76 f.; Purpura, 1987, 187 f.) did not allow them to claim it back if the enterprise failed (see Niczyporuk, 2013, 113–118; on loan prices and the problem of usury see Pikulska-Robaszkiewicz, 1999). Now a part of their risk was shifted to the *nauta*. As a result, loan prices for merchants were expected to decrease, but the sailors' rates could be an unpleasant surprise. Somebody had to pay for the reduced risk, and to a fair extent the maritime loan worked as an insurance policy. However, for the merchants who had not taken out such a loan, the liability of *nauta* had the same insurance effect, excluding exceptions described by Labeo. It could not cover the risk of a storm wrecking the ship, but it worked well against the safety problems on board, such as theft or damage. In modern days, this is a field for the insurance industry, but there was no classical insurance policy in the Antiquity, in itself a fascinating subject of disputes among Roman law scholars on sources such as the famous epigram composed by Martial regarding home insurance fraud committed by a Tongilian.[10] Roman legal practice had of course the Rhodian law *de iactu* which – long before praetor's *de nautae* edict – provided a simple and equitable spread of the risk among everybody on board of the ship, if cargo had to be jettisoned in order to save the ship (*cf.* e.g. Osuchowski, 1950; Osuchowski, 1951; Płodzień, 1961; Reszczyński, 1981; Sondel, 1982). Republican lawyers adopted this rule into Roman law "not by the way of legal surgery, but in a most natural or homeopathic manner" (Zimmermann, 1990, 408). This is still in the modern use as a York-Antwerp rule, in which all parties involved in a sea venture must proportionately share any losses that result from sacrifices made to the cargo to save the remainder. Still, it applies to a rather limited number of cases and is usually covered by the insurance while strict contractual liability of entrepreneurs has a very wide modern use. In fact, it would be impossible not to have it. Regardless of whether the edict *de nautae* provided a direct custodial liability or whether parties had to conclude an additional *receptum nautarum* contract in a formal manner, it changed the way of doing business. Carriers, innkeepers, stable-

[9] When the optional *receptum* was transferred into the unconditional guarantee to receive goods back is under dispute, but it might have happened in the post-classical period. See Brecht (1962), 114, and Kordasiewicz (2011), 8.

[10] Roman law did not provide for any insurance contract, but it was known to legal practice. Martial wrote: *Empta domus fuerat tibi, Tongiliane, ducentis: abstulit hanc nimium casus in urbe frequens. Conlatum est deciens. Rogo, non potes ipse uideri incendisse tuam, Tongiliane, domum?* (Mart. 3.52). See Thomas (2009). In fact, using *foenus nauticum* reduced the risk of the travel and the increased interest rate (usually 33%) was indeed an insurance premium while the banker was in the position of the insurance company.

keepers in fact became insurers of their own services, albeit not unlimited. One might be inclined to state that it gave new life to the notion of a "professional", and represented a step in the history of capitalism. As this mode of liability was widely accepted in the *ius commune* and in the modern law, it would be justified to say that it shaped modern trade and commercial law. The subsequent step of comparable significance in the history of private law consisted in my opinion in the introduction of modern product liability rules and consumer protection rights.

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Łukasz Marzec

SOME REMARKS ON SEA TRANSPORT AND ITS LEGAL REGULATIONS IN ROMAN LAW

The article examines the commercial and legal environment of sea transportation in Ancient Rome. The Author shows the size of Roman wheat trade. Carriage by sea required efficient legal tools. *Locatio-conductio* was the most common in use, but praetorian edict *nautae, caupones stabularii ut recepta restituant* changed the customers' situation. Roman law enabled equitable legal environment for sea trade, providing the base for modern international trade regulations.

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NAVICULARII, *NAUCLEROI*, AND THE ROMAN STATE

Introduction

The relatively restricted dossier of contemporary information relating to the development of associations of shippers (*corpora navicularium*) in the early Roman imperial period has recently received a significant addition. During their excavations in the summer of 2011 on the eastern slopes of Humeitepe hill at Balat in Turkey (the site of ancient Miletus), the team of the Ruhr-Universität Bochum unearthed a rectangular marble block elegantly inscribed with eighteen lines of Greek text addressed by the emperor Hadrian to the Milesians, granting permission for the establishment of a hitherto unattested 'house of *naucleroi*' (ναυκλήρων οἶκος).[1] This paper explores the possible implications of this text for our understanding of the nature of such associations of *navicularii/naucleroi* in the light of the scholarly debate on their function, especially in relation to Roman authorities.

This debate has been shaped inevitably by the pattern of the surviving sources concerning *navicularii/naucleroi* in the Roman world.[2] For the period from the late republic to the mid-second century AD the sources are meagre and largely literary in character; it is only from the Antonine age onwards that technical legal literature, surviving through the sixth-century *Digest* of Justinian, can be joined with sporadic epigraphic testimony to form a clearer picture. Even then, the focus remains predominantly on the western Mediterranean and the shipping of goods to Rome. Moreover, the bulk of the Roman legal evidence, juristic and legisla-

[1] Balat (Milet), Archaeological Museum, inv. HU 11.28.3; Ehrhardt and Günther (2013), 200 = *AE* 2013, 1578 = *SEG* 63, 974.

[2] Broekaert (2015), 216–250, nos 383–443, provides an alphabetical catalogue of *navicularii* and *naucleri* attested in Greek and Latin epigraphic sources. This partially, but not entirely, supersedes the catalogue of De Salvo (1991), 611–645, listing *navicularii*, *nautae* and other boatmen, and of their *corpora*, organized regionally.

tive (*Digest*, *Codex Theodosianus*, *Codex Iustinianus*), derives from the third to sixth centuries AD, when members of the associations of shippers became increasingly closely tied by obligation to the service of the needs of the Roman imperial state. So the evidence of the new text from Miletus helps to fill both a chronological and a geographical gap in our knowledge and it can, moreover, shed light on the mechanisms of and original purposes for establishing such associations.

The inscription from Miletus

Although the text is brief and breaks off before the end because of damage to the bottom of the stone, the main substance is preserved complete, as it is probably only the remains of the dating clause (day and month) and location of issue that have been lost:

Αὐτοκράτωρ Καῖσαρ θεοῦ
Τραιανοῦ Παρθικοῦ υἱὸς
θεοῦ Νέρουα υἱωνὸς Τραιαν[ὸς]
Ἁδριανὸς Σεβαστός, ἀρχιερ[εὺς]
μέγιστος, δημαρχικῆς ἐξουσία[ς]
τὸ ιε′, ὕπατος τὸ γ′, πατὴρ
πατρίδος Μιλησίων τοῖς ἄρχουσιν
καὶ τῆι βουλῆι καὶ τῶι δήμωι
χαίρειν·
Ναυκλήρων οἶκον ἔχειν
δίδωμι ὑμῖν καὶ τὸν νόμον
καθ᾽ ὃν ἠξίωσαν συντετάχθαι
βεβαιῶ. Ἐπρέσβευεν
Κοσσούτιος Φρόντων
καὶ Αἰλιανὸς Πολίτης.
Εὐτυχεῖτε.
Ἐπὶ ὑπάτων Σεργίου Λεαίνα
Π[ον]τιανοῦ καὶ Μ. Ἀντω[νίου
Ῥουφίνου ---].

"The emperor Caesar Traianus Hadrianus Augustus, son of the divine Trajan *Parthicus* and grandson of the divine Nerva, *pontifex maximus*, with tribunician power for the 15th time, consul for the 3rd time, *Pater Patriae* (says) greetings to the magistrates, council, and to the people of the Milesians.
«I concede to you the possibility to form an association of shippers and I confirm the regulations according to which they have asked to be organised. Cossutius Fronto and Aelianus Polites carried out the embassy. Farewell!»
Under the consuls Sergius Laenas Pontianus and Marcus Anto[nius Rufinus ---]. (= AD 131)."

The text, which is carefully laid out, is carved on to an architectural block (125 cm high × 63 cm wide × 27 cm deep) that formed part of a gateway. That the

inscription begins over a third the way down the front surface of the block (at 53 cm from the top) reflects the fact that it was carved onto part of a pre-existing edifice and positioned to facilitate its visibility. The inscribed text is not, of course, the authoritative copy of reference of the imperial grant but rather its public commemoration. The significance of the location is explained by the fact that this gateway would originally have opened onto the quayside of the east harbour of ancient Miletus, facing the estuary of the river Maeander and sheltered from the open sea of the Aegean by the promontory that survives as the now landlocked Humeitepe. The findspot of the inscription is thus plausibly close to the location of the meeting place of the beneficiaries of the grant, the *naucleroi* of Miletus, who no doubt paid for its carving.

Petition and response

The fact that the emperor's reply is conveyed in the form of a letter, rather than simply a subscription to a petition, reflects the fact that it responds to an approach from a public body not a private group or individual (Millar, 1977, 228–240 – imperial hearings, 240–252 – petitions and subscriptions). The dating of the imperial letter by the ordinary consuls of AD 131 (M. Sergius Octavianus Laenas Pontianus and M. Antonius Rufus), if it here faithfully reports the usage of the imperial chancery, is proper to the period from 1 January to 31 March, and certainly accords with the mention of the Hadrian's fifteenth tribunician power, which ran from August 130 to August 131 (on the chronology of Lassère, 2011, 1008, rather than Kienast [*et al.*], 2017, 124). The Milesian delegation will have met Hadrian somewhere in the East, during his travel from Alexandria, where he stayed in the spring of AD 131, to Athens, where he spent the winter of 131/132 and where the Milesians accorded him the honour of a statue.[3] The addressing of Hadrian's letter to all three organs of civic government (magistrates, council, and popular assembly) shows that the ambassadors, whose names are duly recorded, approached the emperor to present a formal request on behalf of the city of Miletus. This accords with what else is known about these two ambassadors. Despite the fact that the names of both suggest their possession of Roman citizenship, whether intentionally or not, the two delegates also appear to represent two significant strands in the composition of the social élite of Roman Miletus: the descendants of Italian immigrants on the one hand and those of Greek heritage on the other. As the original editors of the inscription point out, the first ambassador, Cossutius Fronto, is very plausibly identical with Gaius Cossutius Fronto, one of the *archontes* (magistrates) who had overseen the erection of a public statue to Hadrian in Miletus in AD 123–124,[4] and was likely a scion of a family of Cam-

[3] *IG* II² 3300. A further, unpublished, inscription (signaled in Kienast [*et al.*], 2017, 123) shows Hadrian to have arrived in Athens by September AD 131.

[4] *Milet* I.7, 230 = *SEG* 4, 425.

panian origin that had been active in the Greek East since the second century BC (Rawson, 1975, 38–40). The second ambassador, Aelianus Polites, may be the same as the Polites that minted coins for Miletus between AD 139 and 147,[5] and may also be identified as the father or grandfather of Aelianus Asclepiades Polites, who headed a Milesian delegation to the emperors Marcus Aurelius and Commodus in Rome in AD 177.[6]

The careful wording of Hadrian's reply makes it clear that his action in favour of Miletus has two parts. First he grants permission to 'you' (the magistrates, council, and people of Miletus) to have an association of *naucleroi*. Secondly he approves the regulation (νόμος) according to which 'they' have asked to be organized. The 'they' here is clearly distinct from the civic authorities and may plausibly be identified with the prospective members of the association of *naucleroi*; though 'they' might also be the ambassadors, Fronto and Polites, who presented the case before the emperor. In fact, although effectively acting as the patrons of the *naucleroi* (van Nijf, 2003), and despite the high social standing of the ambassadors, the two possibilities (that 'they' are both the ambassadors and *naucleroi*) might not be entirely mutually exclusive (see further below). In any event, the process alluded to, attests to a reasonable degree of local autonomy in drafting the regulations.

The draft regulations no doubt defined criteria for membership, internal governance, and the identity of the religious cult that would likely have been a focus of any meetings. Epigraphic evidence from Latium and Rome shows that familiarity with the rules was a prerequisite for membership of the religious association of *cultores* of Diana and Antinous at Lanuvium and that the chief officers (*curatores*) of the *collegium* of *negotiatores eborarii aut citriarii* were responsible for checking the good character of new entrants.[7] New members might be expected to pay entrance fees, as the award to the Ostian magistrate, Cn. Sentius Felix, of membership *gratis* of the *navicularii maris Hadriatici* demonstrates.[8] The rules of the same association of worshippers of Diana and Antinous attest to a mechanism for the referral of complaints by individuals to the general assembly of members and papyrological evidence from Egypt shows that associations could enforce internal discipline by levying fines for misbehaviour.[9] A papyrus from fifth-century Oxyrhynchus demonstrates how complaints against fellow associations members could be escalated to the relevant civic authorities.[10] The example of the Milesian *naucleroi* suggests that associations were generally incorporated within the legal authority of a specific civic community, in whose archives the regulations

5 *RPC Online* IV, 9086.
6 *Milet* VI.3, 1075 = *AE* 1977, 801.
7 *CIL* XIV 2112, VI 33885; Broekaert (2011), 227.
8 *CIL* XIV 409 = *ILS* 6146; Broekaert (2013), 237–238, nº 406.
9 *CIL* XIV 2112, *P.Mich.* inv. 720; Broekaert (2011), 234.
10 *P.Oxy.* XVI 1943; Broekaert (2011), 234.

of the association of will have been registered. This may have implications for our understanding of the patterns of geographic/ethnic naming that have been observed for associations of *navicularii* in the Roman world (see further below).

Whether or not the initiative for the proposal came spontaneously from the Milesians or was encouraged by the Roman provincial authorities (or even the emperor himself, as he passed through the region), the emperor's ready acceptance of the draft regulations of the association strongly suggests that they closely conformed to an accepted model. After all, permission to form a professional association could not be taken for granted.

Associations in the Roman world

The process of acquiring permission from the emperor to form the association of *naucleroi* at Miletus certainly accords with what we know about the regulation of voluntary associations in the provinces by the Roman authorities in this period (Cotter, 1996). The general attitude is already made clear famously in c. AD 111 by Hadrian's predecessor, Trajan. In reply to the enquiry of Pliny the Younger, governor of Pontus and Bithynia, about the possibility of establishing a *collegium fabrorum* of a hundred and fifty men at Nicomedia in order to fight fires, the emperor refuses on the grounds that the cities of Bithynia have had a history of being troubled by factions and because meetings of any sort have a tendency to become *hetaeriae* (political clubs).[11] This general prohibition is confirmed by the jurist Gaius, writing in the mid-second century, in his commentary on the provincial edict (preserved at *Justinian Digest*: D. 3.4.1, pr.-1). Here he not only emphasises the multiple legal bases for the prohibition but also the narrow range of exceptions to the ban on associations (mostly at Rome), amongst whom he explicitly lists *navicularii*, who, he notes, also exist in the provinces:

> D. 3.4.1. *Gaius libro tertio ad edictum provinciale: pr. Neque societas neque collegium neque huiusmodi corpus passim omnibus habere conceditur: nam et legibus et senatus consultis et principalibus constitutionibus ea res coercetur. Paucis admodum in causis concessa sunt huiusmodi corpora: ut ecce vectigalium publicorum sociis permissum est corpus habere vel aurifodinarum vel argentifodinarum et salinarum. Item collegia Romae certa sunt, quorum corpus senatus consultis atque constitutionibus principalibus confirmatum est, veluti pistorum et quorundam aliorum, et navicullariorum, qui et in provinciis sunt. 1. Quibus autem permissum est corpus habere collegii societatis sive cuiusque alterius eorum nomine, proprium est ad exemplum rei publicae habere res communes, arcam communem et actorem sive syndicum, per quem tamquam in re publica, quod communiter agi fierique oporteat, agatur fiat*. – "Gaius, *On the Provincial Edict*, Book 3, pr. Neither a *societas*, nor a *collegium*, nor *corpus* of such type is generally permitted for everyone to have: for the matter is governed by statutes, *senatus consulta* and imperial constitutions. Such *corpora* are permitted in only a few cases: the *socii* of the *vectigalia publica* (indirect taxes) are for instance permitted to avail themselves of a *corpus*, or (the *socii*) of gold or silver mines, and (*socii*) of salt pans. There are also

[11] Plin. *Ep.* X 33–34.

> certain *collegia* in Rome, in each of which the *corpus* has been ratified by *senatus consulta* and imperial constitutions, such as (that) of the *pistores* (miller-bakers) and some others, and of the *navicularii*, who are also in the provinces. 1. Those permitted to form a corporate body (*corpus*) consisting of a *collegium* or *societas*, be it in the name of one or other of these, have the right on the pattern of a civic community to have common property, a common treasury, and an attorney or advocate through whom, as in a civic community, what should be transacted and done in common is transacted and done."

Although οἶκος ('house') is not a direct semantic parallel to the *collegium*, *societas*, or *corpus* of Gaius' Latin terminology, it seems reasonably secure to assume that the ναυκλήρων οἶκος being permitted at Miletus is such a corporate institution rather than simply a reference to the establishment of a physical meeting house (*statio* or *schola*). Comparison with parallel examples of οἶκος τῶν ναυκλήρων in the epigraphic record of the Aegean and Black Sea coasts demonstrates that, by the end of the first century AD, the term οἶκος had come to replace κοινόν (which had been the usage of the Hellenistic period) to designate the human association and not just its physical meeting place (De Salvo, 1992, 452–453; Bounegru, Bounegru, 2007, 191–193). Nor should there be any doubt that Greek ναύκληρος and Latin *navicularius* were equivalent as occupational titles by the Roman imperial period (De Salvo, 1992, 228–237; Broekaert, 2013, 220–222; *cf.* Rougé, 1966, 229–231). And, while *navicularii* might act personally as ship masters, who sailed with their cargo, or as ship owners, who were simply investors enjoying a profit, in essence the *navicularius* seems to be someone who uses a ship to offer certain services and retain the profits, whether or not he (or she) owns the vessel; that is, in modern English terms, a 'shipper' (Broekaert, 2013, 220).[12] Thus, although *navicularii* have been considered of modest social standing in their local communities (Pleket, 1984, 10; Tran, 2006), it is no surprise, then, to find *navicularii* occupying a relatively eminent position in civic life. Thus in the amphitheatre of Nemausus (Nîmes), members of the *navicularii* of neighbouring Arelate (Arles) enjoyed reserved seating on the first-level walkway,[13] while at Nicomedia in Bithynia a ναύκληρος is attested simultaneously as a member of the town council (βουλευτής),[14] and at Tomis on the Black Sea another is attested as simultaneously occupying the position of local magistrate (βασιλεύς).[15] Nor did the role exclude respectable female participation, as the example of Aelia Isidora and Aelia Olympias, ματρῶναι στολᾶται and ναύκληροι of the Red Sea, demonstrates.[16] This raises the possibility that, in the case of Miletus, Cossutius Fronto and Aelianus Polites were not simply civic ambassadors or patrons of the prospective *naucleroi* but were actually themselves prospective members of the proposed association.

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[12] *Cf.* Palma (1975), 11, for whom the *navicularius* is always on board ship, and Herz (1988), 124, for whom he is purely an investor enjoying profit.

[13] *CIL* XII 3318; van Nijf (1997), 234.

[14] *TAM* IV.1, 304 = *SEG* 27, 828; De Salvo (1992), 622.

[15] *ISM* II 186; De Salvo (1992), 626.

[16] *SEG* VIII 703 = *AE* 1930, 53; De Salvo (1992), 231, 458–459.

Given that it is plausible that the Milesian ναυκλήρων οἶκος is semantically equivalent to a Latin *corpus navicularium*, this also raises the possibility that its juridical status might be assimilated to that enjoyed by the *corpora navicularium* known from the western provinces of the Empire. As we know from a passage of the third-century jurist Callistratus's work on hearings (preserved at *Justinian Digest*: D. 50.6.6, 3–6), active members of associations of *navicularii* that helped the supply (*annona*) of the City of Rome enjoyed the special privilege of immunity from local obligations (*munera*):

> D. 50.6.6. *Callistratus libro primo de cognitionibus:* (…) *3. Negotiatores, qui annonam urbis adiuvant, item navicularii, qui annonae urbis serviunt, immunitatem a muneribus publicis consequuntur, quamdiu in eiusmodi actu sunt. Nam remuneranda pericula eorum, quin etiam exhortanda praemiis merito placuit, ut qui peregre muneribus et quidem publicis cum periculo et labore fungantur, a domesticis vexationibus et sumptibus liberentur: cum non sit alienum dicere etiam hos rei publicae causa, dum annonae urbis serviunt, abesse. 4. Immunitati, quae navicullariis praestatur, certa forma data est: quam immunitatem ipsi dumtaxat habent, non etiam liberis aut libertis eorum praestatur: idque principalibus constitutionibus declaratur. 5. Divus Hadrianus rescripsit immunitatem navium maritimarum dumtaxat habere, qui annonae urbis serviunt. 6. Licet in corpore navicullariorum quis sit, navem tamen vel naves non habeat nec omnia ei congruant, quae principalibus constitutionibus cauta sunt, non poterit privilegio navicullariis indulto uti. Idque et divi fratres rescripserunt in haec verba: Ἦσαν καὶ ἄλλοι τινὲς ἐπὶ προφάσει τῶν ναυκλήρων καὶ τ<ῶ>ν σῖτον καὶ ἔλαιον ἐμπορευμένων εἰς τὴν ἀγορὰν τοῦ δήμου τοῦ Ῥωμαϊκοῦ ὄντων ἀτελῶν ἀξιοῦντες τὰς λειτουργίας διαδιδράσκειν, μήτε ἐπιπλέοντες μήτε τὸ πλέον μέρος τῆς οὐσίας ἐν ταῖς ναυκληρίαις καὶ ταῖς ἐμπορίαις ἔχοντες. ἀφαιρεθήτω τῶν τοιούτων ἡ ἀτέλεια.* – "Callistratus, *On Hearings*, Book 1. 3. Merchants (*negotiatores*), who help the *annona* of the city (of Rome), likewise shippers (*navicularii*), who serve the *annona* of the city (of Rome), are entitled to an exemption for as long as they are occupied with it. Because it has rightly been established that their risks should be remunerated, and even encouraged by recompenses, so that those who perform risky and laborious *munera* and even *munera publica* outside their town, should be freed from domestic burdens and expense for there is nothing odd in saying that they too serve the *annona* of the city (of Rome) are absent in the public interest. 4. A particular clause is added to the *immunitas* given to the *navicularii*: 'which *immunitas* only they themselves have; it is not granted at the same time to their children or freedmen.' And this is made clear by imperial constitutions. 5. The divine Hadrian replied that only those who serve the *annona* of the city (of Rome) have immunity on account of seagoing ships. 6. Although someone may be in a *corpus* of *navicularii*, if he has no ships and does not conform to all that is laid down by imperial constitutions, he cannot utilize the concession given to *navicularii*. And this the divine brothers also wrote in a rescript in these words: "There were also some other people who, while neither making voyages nor having the greater part of their resources in shipping or mercantile affairs, claimed to be exempt from *munera* on the pretext of being immune as *naucleroi* who convey both grain and oil to the market of the Roman people. Immunity is to be removed from such people."

Motivations for the establishment of the *corpus navicularium* at Miletos

Reading the situation back from the legislation preserved in the Theodosian and Justinian Codes, under which the *corpora navicularium* were certainly obliged to supply Rome and Constantinople as an obligation (*munus*),[17] past studies have emphasised the strategic interest of the earlier Roman authorities in fostering the corporations of shippers as key participants in the delivery of the *annona* to the city of Rome, and hence, tended to assume that imperial authorities were instrumental in encouraging the formation of these corporations (Sirks, 1991, 24–107; De Salvo, 1992, 15–22). A more recent trend has come to appreciate the commercial benefit that the formation of professional associations conferred on their members as well as on their customers. Studies by Koen Verboven, Wim Broekaert, Nicolas Tran, and Taco Terpstra have all proposed that professional associations protected their members interests and acted as lobbying groups but also, importantly, have explored how for *negotiatores* and *navicularii* the associations would have functioned thus as alternative or complementary networks to those of their own family members, slaves and freedmen (Broekaert, 2011; Tran, 2011; Verboven, 2011; Terpstra, 2013, 95–125). Membership enabled them to combat the impediments to efficient commerce inherent in the pre-industrial world. These associations facilitated the exchange of information on the reputation and financial resources of prospective economic partners, the drawing up of contracts with trustworthy agents, the seeking out financial investors, and the minimization of the risk of fraud and predatory conduct. It has additionally been proposed, in relation to the *collegium* of the *nautae Ararici* (river boatmen of the Saône) and that of the *negotiatores vinarii Luguduni in canabis consistentes* (the wine traders of Lyon) benefitted economically and commercially from having patrons in common, through whom disputes might be resolved without the need of costly and time-consuming court proceedings.[18] The most famous example of successful lobbying by associations of shippers is commemorated in the letter, preserved on a bronze disc found in Beirut, of a certain Iulianus (probably the *praefectus annonae* c. AD 198–203) to the *navicularii marini Arelatenses quinque corporum*, after a successful case prompted by their collective action in the form of a decree (*decretum*) of the association (now lost).[19] Their threat to withdraw their co-operation in shipping the *annona* was successful in producing the reprimand issued to a lower procurator, laying down how his staff should behave in future:

> *[Cl(audius) I]ulianus navicul*ariis / *[mar]inis Arelatensibus quinque / [co]rporum salutem. / [Qu]id lecto decreto vestro scripserim / [[---]S[---]] proc(uratori) Augg(ustorum) e(gregio) v(iro) subi / [e]ci iussi. Opto felicissimi bene valeatis.*

[17] C. Th. 13.5–6; C. 11.2–4. Cracco Ruggini (1976); De Salvo (1992), 483–598.

[18] *CIL* XIII 2020, VI 29722; Hasegawa (2015).

[19] *CIL* III 14165, 8, *cf.* III p. 2328, 78 = *ILS* 6987 = *AE* 1998, 876 = 2006, 1580, col. I; see most recently Virlouvet (2004) and Corbier (2006).

E(xemplum) e(pistulae):
Exemplum decreti naviculariorum ma / rinorum Arelatensium quinque cor/ porum, item eorum quae aput me acta / sunt, subieci. Et cum eadem querella la/tius procedat, ceteris etiam implo-ranti / bus auxilium aequitatis, cum quadam de/nuntiatione cessaturi propediem obsequi / si permaneat iniuria peto, ut tam indemni/tati rationis quam securitati hominum / qui annonae de-serviunt consulatur, / inprimi charactere regulas ferreas et / adplicari prosecutores ex officio tuo iu/beas qui in urbe pondus quo susce/perint tradant. – "[Claudius I]ulianus to the *navicularii marini* of Arles belonging to the five *corpora* greeting! What I wrote, after reading your decree, to (name deleted), *vir egregius*, procurator of the emperors, I have commanded to be appended. I wish, fortunate people, that you may prosper!
Copy of the letter:
I have appended below a copy of the decree of the *navicularii marini* of Arles belonging to the five *corpora* and likewise (a copy) of the documents from the court case conducted before me. And should the same dispute continue further, and the others (*sc.* the *navicularii*) appeal to justice with what amounts to a formal warning that they will soon cease to comply with their obligations, and if the injustice continues, I request that provision be made for both a guarantee against financial loss in the books and for exoneration of the people providing services for the *annona*, and that you order the marking of an indelible scale on the (inner sides of the) ship, and that escorts from your staff be provided, who will hand over (details of) the cargo weight that they loaded."

On a more modest scale perhaps, Nicolas Tran has argued that successful lobbying by the *nautae Rhodanici* (boatmen of the river Rhône) for some unidentified benefit lies behind their celebration of Hadrian early in his reign as *indulgentissimus princeps* on a statue base from Tournon-sur-Ardèche in Gallia Narbonensis.[20] Tran argues that the benefit might plausibly relate to an advantage in the management of commercial navigation and taxation.

So there is a strong argument that commercial and strategic advantage was sufficient motive for provincial shippers to wish to form themselves into associations. Obviously, if Hadrian considered the *naucleroi* of Miletus to be a *corpus navicularium* serving the *annona* of Rome, then a very tangible benefit (immunity from local civic obligations) would follow. However, if not, then a further specific motivation for the shippers of Miletus petitioning Hadrian may be found. We might imagine that they hoped that an approved *corpus navicularium* could act as platform for lobbying the emperor to exercise his *indulgentia*, as he had done towards the *nautae* of the Rhône, perhaps by granting them an exemption from the Romans' 2.5% tax on goods passing through Asian ports (the *quadragesima portuum Asiae*), for which there was a collection station established at Miletus (Cottier [*et al.*], 2008; Herrmann, 2016).

On the other hand, we must consider what motivations might have persuaded Hadrian, against the background of the general prohibition, to permit the for-

[20] *CIL* XII 1797: Imp. Caes. divi / Traiani Parthici / fil. divi Nervae / nepoti Traiano / Hadriano Aug. / pontif. max. trib. / potest. III cos. III / n. Rhodanici / indulgentissimo / principi. (AD 118/119). Tran (2011).

mation of this particular *corpus*. In the same way that the collegial practices of the associations helped to enforce honest commercial behaviour and guarantee the reliability of their members to the benefit of other traders so this was also to the advantage of Roman authorities in the event that they wished to make contracts with members of such corporations for state purposes. It is fairly easy to identify the purposes for which Roman authorities wished to contract shippers in the western Mediterranean and from Alexandria (the *annona* of the city) and to some extent also those attested in the Black Sea (supply of the army on the Danube). The reason for recognising a *corpus navicularioriorum* at Miletus is less immediately obvious in terms of the supply of the needs of the population of Rome or the provincial armies. However, there is good evidence that Miletus acted as an entrepôt for the shipment of marble from the imperially owned quarries in inland Asia Minor, specifically those of Phrygia, which provided the *marmor Phrygium*, known today as *pavonazetto* (Russell, 2013, 47–50); though it should not be forgotten that Phrygia was also famous for the textiles produced at Hierapolis and Laodicea (Thonemann, 2011, 185–190). Quarries at Docimium and in the Upper Tembris Valley are known to have been under imperial control (Fant, 1989; Hirt, 2010; Russell, 2013, 38–94, esp. 43–50), and the area was managed by procurators (Vitale (2015), though private contractors were also involved (Pensabene, 2015, 575–593). Given that the river Maeander was not navigable further upstream than the area of Laodicea and Hierapolis, the marble from the quarries to the north east must have come overland via Apamea, lake Sanoas, and Colossae, to Laodicea (Fant, 1989, 6–41; Pensabene, 2013, 360–387; Russell, 2013, 138–139). The significance of the river for transport of the marble down to the Aegean and on to Rome, may be reflected in the pattern of activity of a certain imperial freedman, Chresimus, attested as *procurator a marmoribus* or *a lapicidarum* in Asia between the reigns of Domitian and Trajan. Aside from Ephesus, the centre of the imperial administration of the entire province of Asia, he is otherwise recorded on three inscriptions from different locations in the Maeander valley, including his possible final resting place at Miletus.[21] Given the importance of the supply of marble to Hadrian's building projects in the city of Rome and elsewhere, this emperor may have considered the establishment of a *corpus navicularioriorum* at Ephesus of real benefit. Certainly changes in the styles of the control inscriptions carved at the Phrygian quarries suggest a reorganization under Hadrian in the later 130s (Fant, 1989, n^{os} 40, 127; Hirt, 2010, 328–331).

[21] *IK* 13, 856, Ephesos (imperial dedication to uncertain emperor); *AE* 1988, 1028 = *SEG* 38, 1073 = *IK* 35, 929 = *RRMAM* 3.5, 111a, Mylasa (AD 92/97): vias restituit / [per] Chresimum lib. pro[cur. / a] marmoribus, / [διὰ] Χρησίμου ἀπελευθέ / [ρου κα]ὶ ἐπιτρόπου τῶν λατομίων; *CIL* III 7146 = *IK* 36, 148, Tralles (under Nerva): [Chr]esimus [Aug. l. proc. lapi / cidin]arum; *Milet* VI.2, 524 = *SEG* 38, 1215 (possibly his tombstone): Χρήσιμος Σεβαστοῦ / ἀπελεύθερος ἐπὶ / τῶν λατομίων. Hirt (2010), 115–117.

The significance of place of incorporation

Before the discovery of the new text, the only corporations of *naucleroi* known from the province of Asia were located at Smyrna (or Ephesos?), and Iasos.[22] The majority of corporations of shippers are named after a specific community, as for example on the mosaic floors of the various *stationes* around the so-called «Piazzale delle Corporazione» at Ostia.[23] On the pattern of the titles of these other corporations (De Salvo, 1991, 614–621), it is reasonable to imagine that the Milesian shippers might have been known as οἱ Μιλήσιοι ναύκληροι or οἱ ἐν Μειλήτῳ ναύκληροι. Such geographical designations have generally been understood as reflecting the origin of the shippers, even though it is clear from a several examples that these corporations were open to members who did not share the geographical origin.[24] The new evidence from Miletus reminds us of an alternative significance of the geographical titles: as indicators of the city in which the corporation is registered. In most instances, of course, there will have been a large overlap between the origin of the majority of the members and the city in which the association was incorporated. This is eminently plausible for the *navicularii Karthaginienses*, the *Sabrathenses*, the *Narbonenses*, etc. who maintained *stationes* at Ostia. But what of the *corpus navicularium maris Hadriatici*, attested by half a dozen inscriptions, mostly from Ostia? Lietta de Salvo assumed that their headquarters were located at Aquileia, the chief port of the Adriatic (De Salvo, 1992, 436). However, in this case might the unspecific description reflect the nature of a group of shippers whose common interest was in doing business to various destinations in the Adriatic but whose central location was Ostia not Aquileia? The discovery at Ostia of an altar dedicated by one of the senior officers of the association to the *genius corporis navicularium [maris] Had[r]iatici* may confirm this hypothesis, given that it may have embellished the *schola* of the corporation.[25] The place of incorporation of an association of shippers need not have had much real impact on daily business but will have been significant in relation to its common property, which might include slaves. For the status of freed slaves would varying according to the nature of the community in which the owning association was incorporated. The status of slaves freed by an association incorporated in a peregrine community, such as Miletus, would be dictated by the local rules of that community, while slaves freed by associations incorporated in Roman com-

[22] *CIG* 5888 = *IG* XIV 1052 = *IGR* I 147 = *IGUR* 26, Rome (AD 154); *BCH* 1894, 21 nº 11, Iasos (undated). De Salvo (1991), 452.

[23] *CIL* XIV 4549; De Salvo (1991), 391–395, 612–613; Terpstra (2013), 117–126.

[24] *CIL* XIII, 1942 = *ILS* 7029: Q. Capitonius Probatus Senior, domo Roma, sevir Augustalis Luguduni et Puteolis, navicularius marinus (at Lyon?); Broekaert (2013), 228, nº 392. *CIL* XII 982 = *ILS* 6986: M. Frontonius Euporus, sevir Augustalis coloniae Iuliae Aug. Aquis Sextis, navicularius maritimus Arel(atis), curator eiusdem corporis (probably from Nîmes); Broekaert (2013), 231–232, nº 396.

[25] *AE* 1987, 192: Genio / corporis / navicularium / [maris] Had[r]iatici / [---]s T. f. Ser. / [---]sus / [quinq.] perpetuus / [---]i poni iussit.

munities, such as the *Quinque corpora* registered in the *Colonia Iulia Paterna Arelate Sextanorum* (founded by Caesar in 46 BC for veterans of his Sixth Legion) or the *navicularii maris Hadriatici* at Ostia, would become Roman citizens. The residents of Ostia, Hadriaticus Hermias and Hadriaticus Felix, are plausibly identified as such former slaves of the *navicularii maris Hadriatici*.[26]

Conclusions

Despite its brevity, Hadrian's letter to the Milesians, concerning the establishment of a corpus of *naucleroi* there, sheds new light on the relationship between central imperial authority and local regulation, through the technicalities of the process of obtaining permission for a professional association in a provincial context. In this case the chances of success in obtaining permission may have been increased by the mutual benefit identifiable for both local shippers and Roman authorities by establishing a *corpus naviculariorum* at Miletus in the early second century AD.

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[26] *CIL* XIV 4562 = *AE* 1919, 65; *CIL* XIV 4569 = *AE* 1928, 123.

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Benet Salway

NAVICULARII, NAUCLEROI, AND THE ROMAN STATE

In a recently discovered letter the Roman emperor Hadrian grants to the civic authorities of the port of Miletus permission to establish a corporation of shippers. Confronting this new text with the relevant legal and other epigraphic evidence, this paper explores the implications of this text for our understanding of the process for and, the motivations behind, setting up such a corporation.

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INTERDYKTALNA OCHRONA SWOBODY ŻEGLUGI MORSKIEJ I ZASOBÓW MORZA W PRAWIE RZYMSKIM

Wprowadzenie

W oparciu o źródła prawnicze można stwierdzić, że zainteresowanie ochroną wód morskich pojawiło się między ostatnimi dziesięcioleciami Republiki a połową I w. po Chr. Spotykamy wtedy pierwsze jurysprudencyjne próby definiowania brzegów morza (*litora maris*) oraz interwencje pretorskie służące rozciągnięciu ochrony prawnej w celu zapewnienia możliwości korzystania z morza, żeglugi oraz rybołówstwa.

Niewątpliwie przyczynę aktywności pretora stanowiły intensywny wzrost żeglugi morskiej, licząc od II w. przed Chr., związany z ekspansją terytorialną i ekonomiczną państwa rzymskiego oraz zwiększona strukturalnie i produkcyjnie aktywność, związana z pozyskiwaniem ryb i innych zwierząt morskich (Fiorentini, 2003, 278). Wybrzeża morskie były atrakcyjne nie tylko ze względu na walory krajobrazu, Rzymianie budowali tam wille dla swej przyjemności (por. Fiorentini, 1986; Lafont, 2001), ale wybrzeża stanowiły także miejsce aktywności ekonomicznej.

Zwiększona aktywność w zakresie rybołówstwa kolidować mogła z żeglugą prowadzoną przybrzeżnie i z tradycyjnymi sposobami połowu z brzegu czy łodzi. Istniała więc potrzeba zapobiegania sytuacjom konfliktowym, choćby nawet pośrednimi środkami. Jednakże żadna z form ochrony morza i brzegu morskiego nie została wprowadzona specjalnie dla ochrony korzystania z wód morskich; wszystkie oparte były na modelu interdyktów zapowiedzianych w edykcie w stosunku do innych dóbr publicznych. Przeciwko osobie, która poprowadziła groblę (*molo*) w morze, przysługiwał *utile* interdykt służący ochronie miejsc

publicznych (D. 43.8.2.8); dogodne korzystanie z portu, przybijanie do brzegu, niezakłócony szlak żeglugi chronione były w oparciu o model przewidziany w edykcie dla ochrony swobody żeglugi rzecznej (wypowiedź Labeona cytowana przez Ulpiana w Komentarzu do edyktu pretorskiego – D. 43.12.1.17); ochrona wykonywania przysługującego jednostce szczególnego prawa (*prioprium ius*) względem morza polegała wedle relacji Paulusa na zastosowaniu interdyktu *uti possidetis* (D. 47.10.14); swoboda połowu oraz zastawiania sieci podlegała ochronie – nie bez kontrowersji – za pomocą *actio iniuriarum* (D. 43.8.3.9 i D. 47.10.13.7).

W niniejszym artykule przedstawiam zagadnienia związane z problematyką statusu prawnego morza i jego brzegów w starożytnym Rzymie, przebiegu postępowania interdyktowego oraz poszczególnych interdyktów jako narzędzi prawnych opracowanych przez rzymską jurysprudencję i pretora w celu ochrony swobody żeglugi morskiej i korzystania z brzegów morskich oraz zasobów morza.

Morze i pojęcie *res communes omnium*

Istniało w świecie rzymskim przekonanie, że morze i jego brzegi, tak jak woda pitna oraz powietrze, ze względu na *ius naturale*, należą do kategorii *res communes omnium*, tj. rzeczy wspólnych wszystkim ludziom, oddanych i przeznaczonych z natury do swobodnego użytku jednostek.

Punktem wyjścia do rozważań o *res communes omnium* jest tekst prawnika Eljusza Marciana (II–III w. po Chr.) pochodzący z jego Instytucji, a umieszczony przez kompilatorów justyniańskich w D. 1.8.2.4, a potem w Instytucjach Justyniana na początku księgi drugiej w tytule pierwszym *De rerum divisione* („O podziale rzeczy"). Warto zauważyć, że fragment tekstu Marciana umieszczony w Digestach nie zawiera w wyliczeniu rzeczy publicznych (*res publicae*).

D. 1.8.2. *Marcianus libro tertio institutionum pr.: Quaedam naturali iure communia sunt omnium, quaedam universitatis, quaedam nullius, pleraque singulorum, quae variis ex causis cuique adquiruntur. 1. Et quidem naturali iure omnium communia illa sunt: aer, aqua profluens, et mare, et per hoc litora maris.* – „Niektóre rzeczy według prawa naturalnego są współwłasnością wszystkich, niektóre własnością zbiorowości, inne natomiast nie należą do nikogo, większość jednak należy do poszczególnych osób, które nabywają je różnymi sposobami. 1. Te zaś, które według prawa naturalnego wspólne są wszystkim [ludziom]: powietrze, woda pitna, morze a przez to brzegi morza".

I. 2.1 pr.: *Quaedam enim naturali iure communia sunt omnium, quaedam publica, quaedam universitatis, quaedam nullius, pleraque singulorum, quae variis ex causis cuique adquiruntur, sicut ex subiectis apparebit*. 1. *Et quidem naturali iure communia sunt omnium haec: aer et aqua profluens et mare et per hoc litora maris. Nemo igitur ad litus maris accedere prohibetur, dum tamen villis et monumentis et aedificiis abstineat, quia non sunt iuris gentium, sicut et mare.* – „Niektóre rzeczy według prawa naturalnego są wspólne wszystkim, niektóre publiczne, niektóre własnością zbiorowości, inne natomiast nie należą do nikogo, większość

jednak należy do poszczególnych osób, które nabywają je różnymi sposobami, jak to się z tego, co podajemy w dalszym toku wykładu, okaże. 1. Te zaś [rzeczy] według prawa naturalnego wspólne są wszystkim [ludziom]: powietrze i woda pitna, i morze, i przez to brzegi morza. Nikomu nie zabrania się dostępu do brzegu morza, jeśli tylko powstrzyma się od wchodzenia do posiadłości wiejskich, grobowców i budynków, ponieważ nie podlegają one prawu narodów, tak jak morze".

Romaniści przedstawiali różne opinie co do kategorii *res communes omnium*. Dawniejszą literaturę zebrał w tej mierze Vicenzo Arangio-Ruiz (2012, 171); nowszą podaje Maria Casola (2017, 2–3). Najpierw kategorię *res communes omnium* przypisywano interwencji prawników justyniańskich, którzy mieliby dokonać interpolacji w tekście Marciana, później uznano fragment za oryginalny, pogląd Marciana uważano jednak za odosobniony (Talamanca, 1990, 382–383). Odnotowania wymaga zdanie Giuseppe Grosso, wedle którego Marcian nie był twórcą kategorii *res communes omnium*. Pojęcie to funkcjonowało już w jego czasach w celu przedstawienia dóbr zdolnych zaspokoić potrzeby wspólnoty i przeznaczonych do wspólnego użytku (Grosso, 1974, 25). Francesco Sini podkreślał funkcjonalność kategorii *res communes* przeznaczonej do ochrony interesów wspólnych oraz przysługujących jednostce we wspólnocie (Sini, 2008)[1]. W terminologii prawniczej *res communes* oznaczałyby rzeczy, które nie należą do osób prywatnych ani wspólnot politycznych, lecz są przeznaczone do korzystania przez wszystkich ludzi. Z tego punktu widzenia *res communes omnium* zajmowały pozycję odmienną od *res publicae*. Ich usunięcie bowiem z powszechnego użytku nie byłoby możliwe, co z kolei mogło zdarzyć się w przypadku rzeczy należącej do kategorii *res publicae*. Podnoszone zarzuty dotyczące teoretycznej wadliwości jurysprudencyjnej koncepcji, uznającej możliwość istnienia praw wielu osób o tej samej treści na jednej rzeczy, zostały oddalone przez przedstawicieli współczesnej romanistyki, dostrzegającej w tym rozwiązaniu szczęśliwą intuicję rzymskich jurystów. Dostrzegli oni i opracowali koncepcję praw do rzeczy, które nie mogą ze swej natury przynależeć wyłącznie do jednostki czy wspólnoty jednostek i przez to charakteryzują się swoistym reżimem prawnym, będąc dobrem całej ludzkości (Casola, 2017, 4). W ten sposób stworzyli podstawy dla prawnej koncepcji niektórych współczesnych praw człowieka, np. prawa do czystego środowiska.

Morze i jego brzegi ujmowane były często łącznie, odmiennie niż rzeki i ich brzegi. Widać to w szczególności w myśli Marciana. Podleganie morza i jego

[1] Autor zaznacza również, że Eljusz Marcianus pozostawał pod wpływem literatury i pism filozoficznych, w tym Plauta, Cycerona i Wergiljusza, por.: Plaut. *Rud.* 975 (4.3.5): *Mare quidem commune certost omnibus.*; Cic. *Pro Roscio* 26.72: *Etenim quid tam est commune quam spiritus vivis, terra mortuis, mare fluctuantibus, litus eiectis? Verg. Aen.* 7.228–230: *Diluvio ex illo tot vasta per aequora vecti / dis sedem exiguam patriis litusque rogamus / innocuum et cunctis undamque auramque patentem; Sen. De ben*. 4.28: *Deus quoque quaedam munera in universum humano generi dedit, a quibus excluditur nemo; nec enim poterat fieri ut ventus bonis viris secundus esset, contrarius malis: commune autem bonum erat, patere commercium maris, et regnum humani generis relaxari*. Bliższa analiza rzymskich źródeł literackich odnoszących się do morza jako bonum commune zob. Ortu (2017).

brzegów dyscyplinie *ius gentium*, stanowi u niego podstawę ich jednolitego traktowania.

D. 1.8.4. *Marcianus libro tertio institutionum. pr.*: *Nemo igitur ad litus maris accedere prohibetur piscandi causa, dum tamen ullius et aedificiis et monumentis abstineatur, quia non sunt iuris gentium sicut et mare: idque et divus pius piscatoribus formianis et capenatis rescripsit. 1. Sed flumina paene omnia et portus publica sunt.* – „pr. Nikomu nie zabrania się dostępu do brzegu morskiego, jeśli chciałby łowić ryby. Istnieje jednak zakaz wchodzenia do domów i grobowców, ponieważ nie podlegają one prawu narodów, tak jak morze. I to boski Pius odpisał w reskrypcie rybakom Formii i Kapeny. 1. Lecz prawie wszystkie rzeki i porty są własnością publiczną".

Niektórzy juryści uważali jednak, że brzegi morskie przynależały do kategorii *res publicae*, a więc rzeczy przeznaczonych do użytku publicznego, jak drogi publiczne, porty, rzeki żeglowne.

D. 50.16.96. *Celsus libro vicensimo quito digestorum. pr.: Litus est, quousque maximus fluctus a mari pervenit: idque Marcum Tullium aiunt, cum arbiter esset, primum constituisse.* – „Brzeg rozciąga się tak daleko, jak daleko dociera największa fala od strony morza. I mówi Marcus Tuliusz [Cyceron], że podobno Gallus Aquilius jako pierwszy to ustalił, kiedy miał pełnić funkcje sędziego".

D. 50.16.112. *Iavolenus libro undecimo ex Cassio: Litus publicum est eatenus, qua maxime fluctus exaestuat. Idemque iuris est in lacu, nisi is totus privatus est.* – „Brzeg morski stanowiący własność publiczną rozciąga się tak daleko, jak daleko sięga fala. Ta sama norma prawna dotyczy jeziora, chyba że całkowicie jest ono własnością prywatną".

D. 43.8.3. *Celsus libro trigensimo nono digestorum. pr.: Litora, in quae populus Romanus imperium habet, populi Romani esse arbitror. 1. Maris communem usum omnibus hominibus, ut aeris, iactasque in id pilas eius esse qui iecerit: sed id concedendum non esse, si deterior litoris marisve usus eo modo futurus sit.* – „pr. Uważam, że brzegi morskie, co do których lud rzymski sprawuje imperium, należą do ludu rzymskiego. 1. Morze podobnie jak powietrze jest do wspólnego użytku wszystkich ludzi, a ustawione w nim pale stanowią własność tego, kto je ustawił. Nie należy jednak pozwalać na takie działanie, jeśli miałoby to utrudnić korzystanie z brzegu czy morza".

D. 18.1.51. *Paulus libro vincesimo primo ad edictum.: Litora, quae fundo vendito coniuncta sunt, in modum non computantur, quia nullius sunt, sed iure gentium omnibus vacant: nec viae publicae aut loca religiosa vel sacra.* – „Brzegi morza, które graniczą ze sprzedawanym gruntem, nie są wliczane do jego powierzchni, ponieważ nie należą do niego, lecz na mocy *ius gentium* dostępne są dla wszystkich, jak i drogi publiczne, miejsca otoczone czcią religijną czy uświęcone".

D. 39.2.24. *Ulpianus libro octogensimo primo ad edictum. pr.: Fluminum publicorum communis est usus, sicuti viarum publicarum et litorum. In his igitur publice licet cuilibet aedificare et destruere, dum tamen hoc sine incommodo cuiusquam fiat.* – „pr. Rzeki są przedmiotem wspólnego użytku, tak jak drogi publiczne i brzegi morza. Na tych zatem terenach każdemu wolno budować i burzyć, dopóki nie dzieje się to ze szkodą dla innych".

Sprzeczność poglądów między jurystami być może jednak jest pozorna. Interesującą interpretację wypowiedzi Celsusa zawartej w D. 43.8.3 pr. proponuje Paolo Maddalena (2012, 36). Autor sądzi, że w stosunku do brzegów morza ludowi rzymskiemu przysługiwało *imperium*, na mocy którego uprawniony był do regulowania zasad wspólnego korzystania z brzegu.

Żyjący przed Marcianem jurysta Neracjusz (I–II w. po Chr.) wyjaśniał, że określenie *litora publica* (brzegi publiczne) nie oznacza rzeczy, które znajdują się w majątku publicznym (*in patrimonio populi*). Pozycję prawną brzegów morskich porównał do statusu prawnego ryb i dzikiej zwierzyny, przed zawładnięciem niestanowiących niczyjej własności. Ich szczególny status prawny wynika z tego, że należą one do rzeczy pierwotnie ukształtowanych przez naturę (*primum a natura prodita sunt*).

D. 41.1.14. *Neratius libro quinto membranarum. pr.: Quod in litore quis aedificaverit, eius erit: nam litora publica non ita sunt, ut ea, quae in patrimonio sunt populi, sed ut ea, quae primum a natura prodita sunt et in nullius adhuc dominium pervenerunt: nec dissimilis condicio eorum est atque piscium et ferarum, quae simul atque adprehensae sunt, sine dubio eius, in cuius potestatem pervenerunt, dominii fiunt.* – „pr. To, co ktoś zbuduje na brzegu morza, należeć będzie do niego. Brzeg morza uznaje się bowiem za grunt publiczny nie w takim sensie jak rzeczy, które stanowią majątek publiczny, ale tak jak to, co pierwotnie ukształtowała sama natura i co nie stało się jeszcze czyjąś własnością. Ich status podobny jest do sytuacji ryb i dzikiej zwierzyny, które, gdy tylko zostaną złapane, bez wątpienia stają się własnością tego, pod którego władzę weszły".

Pierwotny charakter brzegów morskich rozstrzyga także o tym, że po zniszczeniu posadowionego na nich budynku wracają do swego pierwotnego stanu i znów pozostają dobrem niebędącym niczyją własnością.

D. 41.1.14.1. *Neratius libro quinto membranarum: Illud videndum est, sublato aedificio, quod in litore positum erat, cuius condicionis is locus sit, hoc est utrum maneat eius cuius fuit aedificium, an rursus in pristinam causam reccidit perindeque publicus sit, ac si numquam in eo aedificatum fuisset. quod propius est, ut existimari debeat, si modo recipit pristinam litoris speciem.* – „Zobaczmy, jeśli budynek, który został wzniesiony na brzegu, zostanie zniszczony, jaka będzie sytuacja prawna miejsca, na którym został wzniesiony: czy zostanie ono własnością tego, który wzniósł budynek, czy też powróci do poprzedniej sytuacji i stanie się publicznym, tak jakby nigdy nie wzniesiono na nim budynku. Właściwszy jest drugi pogląd, zakładając, że utrzyma swoje dawne położenie jako część brzegu".

Pozyskiwanie zasobów morza mogło stanowić pewną uciążliwość dla właścicieli gruntów nadmorskich. W D. 8.4.13 pr. umieszczony został fragment *Opiniones* Ulpiana, w którym relacjonuje on przypadek kontraktu sprzedaży gruntu, z klauzulą, w której sprzedawca zastrzegł sobie na rzecz zatrzymanego sąsiedniego gruntu, by nie można było wzdłuż jego brzegów prowadzić połowów tuńczyka.

D. 8.4.13. *Ulpianus libro sexto opinionum. pr.: Venditor fundi Geroniani fundo Botriano, quem retinebat, legem dederat, ne contra eum piscatio thynnaria exerceatur. Quamvis mari, quod natura omnibus patet, servitus imponi privata lege non potest, quia tamen bona fides contrac-*

tus legem servari venditionis exposcit, personae possidentium aut in ius eorum succedentium per stipulationis vel venditionis legem obligantur. – „Sprzedawca gruntu geroniańskiego zastrzegł w umowie sprzedaży na rzecz gruntu botriańskiego, który zatrzymał dla siebie, by nie prowadzono wzdłuż jego brzegów połowów tuńczyka. Choć w prywatnej umowie nie można nałożyć służebności na morze, które ze swej natury jest dla wszystkich otwarte, to jednak skoro dobra wiara wymaga, by przestrzegać dodatkowych postanowień umowy sprzedaży, posiadacze lub ci, którzy jako następcy wejdą w ich prawa, ponoszą odpowiedzialność na podstawie klauzuli stypulacji bądź kontraktu sprzedaży".

Mimo że nakładanie w umowie służebności na morze było niedopuszczalne – przecież stanowiło ono z natury dobro dla wszystkich otwarte – dobra wiara wymagała jednak, by nabywca aktualny i kolejni przestrzegali dodatkowych klauzul umowy[2]. Nie znamy przyczyn, dla których sprzedawca domagał się obciążenia gruntu. Być może chodziło o zapewnienie walorów estetycznych krajobrazu, spokoju, który mógłby być zakłócany aktywnością rybacką. Mogło iść także o wyeliminowanie konkurencji gospodarczej. Warto jeszcze wspomnieć o krytycznej uwadze podniesionej w literaturze romanistycznej, że w istocie służebność nie byłaby nałożona na morze, lecz na grunt geroniański (Biondi, 1954, 193)[3].

Na podstawie powyższych materiałów źródłowych i naszych obserwacji spróbujmy określić status prawny morza i jego brzegów. Morze i brzegi morza stanowiły dobro wspólne i jako takie przeznaczone były i otwarte dla użytku każdego. Treść tego użytku mogła być rozmaita, zaś prawo jednostki do korzystania ograniczone było o tyle, że nie mogło negować prawa o tej samej treści przysługującego innej jednostce. W oparciu o te spostrzeżenia juryści i pretorzy opracowali środki prawne służące ochronie swobody żeglugi i wykorzystania zasobów morza. Wśród tych środków niepoślednią funkcję pełniły interdykty.

Interdykty i postępowanie interdyktowe

Interdykt był to nakaz określonego postępowania albo zaniechania działania, zobowiązujący stronę (strony) do jego przestrzegania, gdyby znalazła się w położeniu określonym przez interdykt[4].

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[2] W literaturze polskiej fragment w kontekście wymogów dobrej wiary omówiony został w: Dajczak (1998), 101–102.

[3] Wątpliwości budzi wskazanie na umowę jako źródło powstania służebności; wskazanie na stypulację sugerować może, że chodziło o służebność ustanawianą na gruncie prowincjonalnym, który to sposób stał się powszechny w prawie justyniańskim; por. G. 2.31.

[4] G. 4.139: (…) *et in summa aut iubet aliquid fieri aut fieri prohibet. Formulae autem et verborum conceptiones, quibus in ea re utitur, interdicta decrtave cocantur*. – „(…) I w ogólności albo rozkazuje coś uczynić, albo zakazuje czynić. Formuły zaś i ułożenia słów, które są tu w użyciu, nazywają się interdyktami i dekretami". Według Biscardi (2002), 18 wyrażenie *formulae et verborum conceptiones* nie stanowi u Gaiusa *hendiadys*, tj. figury stylistycznej, polegającej na przedstawieniu jednego pojęcia przez dwa wyrazy połączone; *verborum conceptiones* użyte są w znaczeniu odpowiednich słów do konkretnej sytuacji faktycznej, w przeciwstawieniu do *certa verba* powództw legisakcyjnych, czyli uprzednio określonych, sztywnych formuł słownych.

Postępowanie interdyktowe oparte było na autorytecie i imperium najwyższych rzymskich urzędników[5]. W nauce prawa rzymskiego panuje zgoda co do tego, że powodem wprowadzenia tego postępowania była konieczność podjęcia działań w sposób szybki, energiczny i z odpowiednią powagą, w celu ochrony dóbr publicznych. Uważa się zresztą, że najstarsze interdykty miały właśnie na celu dobra publiczne (Di Lella, 2004, 193)[6].

Interdykty prohibitoryjne to te zakazujące określonego zachowania adresatowi. Jusrysprudencja zauważyła, że można je podzielić na jednostronne (*simplicia*) i dwustronne (*duplicia*), biorąc pod uwagę role procesowe stron[7]. Przy jednostronnych powodem był ten, który domagał się, by pewne zdarzenie nie nastąpiło, pozwanym ten, kto usiłował coś czynić. Natomiast przy dwustronnych położenie każdego z uczestników sporu było jednakowe i każdy z nich przyjmował rolę tak pozwanego, jak i powoda, zaś słowa pretora adresowane były do obydwu. Jednostronnymi były np. te, w których pretor zakazywał pozwanemu określonego zachowania w miejscu uświęconym albo w publicznej rzece lub u jej brzegu, zaś dwustronnymi – interdykty posesoryjne *uti possidetis* i *utrubi*.

Ochronie miejsc publicznych (*loca publica: areae, agri, insulae, viae publicae, itinera publica*[8]) służyły interdykty prohibitoryjne, posiadające często tę cechę, że mógł je wnieść ktokolwiek (*quivis ex populo*)[9]. Jednak, mimo że przedmiotem ochrony było dobro publiczne, nakaz magistratury wydany był na wniosek osoby prywatnej, która znajdowała się w sytuacji sporu z drugą osobą prywatną[10]. Trafnie zauważa Luigi Di Lella (2004, 194), że w postępowaniu interdyktowym stronami są zawsze osoby prywatne, także kiedy interes podlegający ochronie ma charakter publiczny.

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[5] Por. G. 4.139: *Certis igitur ex causis praetor aut proconsul principaliter auctoritatem suam finiendis controversiis interponit*. – "W określonych wypadkach pretor lub prokonsul używa głównie swej powagi dla położenia kresu sporom". Gaius wydaje się, moim zdaniem, podkreślać, że moc powagi urzędu pretora sprawia, że interdykty spełniają swoją funkcję. Por. także D. 43.8.7. *Iulianus libro quadragensimo octavo digestorum*: *Sicut is, qui nullo prohibente in loco publico aedificaverat, cogendus non est demolire, ne ruinis urbs deformetur, ita qui adversus edictum praetoris aedificaverit, tollere aedificium debet: alioqui inane et lusorium praetoris imperium erit.* – "Tak jak ten, kto zbudował coś w miejscu publicznym bez sprzeciwu ze strony innych nie powinien być zmuszany do zburzenia tego, aby nie oszpecać miasta ruinami, tak ten, kto zbudował wbrew edyktowi pretora, powinien rozebrać budowlę. W przeciwnym razie władza pretora będzie pozorna i śmieszna". Julian zatem kładzie nacisk na mający swe źródło w *imperium* pretora obligacyjny charakter interdyktu. Por. Biscardi (2002), 24.

[6] Na temat pochodzenia ochrony interdyktalnej zob. Gandolfi (1955), 120 i nn.; Capogrosso Colognesi (1971). Ogólnie na temat charakteru ochrony interdyktalnej i postepowania interdyktalnego zob. Biscardi (2002), 9–98.

[7] Por. G. 4.158–160.

[8] Por. wypowiedź Labeona cytowaną przez Ulpiana w D. 43.8.2.3.

[9] We fragmencie Ulpiana przekazanym w D. 43.8.2.34 znajdujemy sformułowanie *interdictum populare*. Por. Sitek (1999), 34–39; Kamińska (2017), 2–3.

[10] Por. D. 47.10.14. *Paulus libro testio decimo ad Plautium:* (…) *ad privatas enim causas accomodata interdicta sunt, non ad publicas*. – „Interdykty przeznaczone są do spraw prywatnych, nie publicznych".

Interdyktów służących ochronie miejsc publicznych było wiele. W edykcie pretorskim, zrekonstruowanym przez Otto Lenela (1927, 458 i nn.) występują: *interdictum ne quid in loco publico vel itinere fiat*; *interdictum quod in itinere publico factum erit, ut restituatur*; *interdictum ut via publica itinereve publico ire agere liceat*; *interdictum de loco publico fruendo; interdictum de via publica et itinere publico recifiendo.*

Przedmiotem ochrony jest tu pożytek (*utilitas*) osoby prywatnej jako takiej, jak i użytkownika miejsca publicznego. Wprawdzie *interdictum ne quid in loco publico vel itinere fiat* uwzględnia zarówno interes prywatny, jak i publiczny[11], jednak jego udzielenie stanowi realizację ochrony prawa jednostki do korzystania z miejsca publicznego. Ochrona nie jest realizowana wprost przez inicjatywę organów państwowych, lecz inicjatywa ta jest pozostawiona samym obywatelom jako użytkownikom miejsc publicznych. Procedura interdyktowa zaczyna się wnioskiem o udzielenie interdyktu i kończy się nakazem skierowanym do innej osoby prywatnej. W ten sposób tłumaczy się tzw. popularny charakter wielu interdyktów (Di Lella, 2004, 195). Przychylam się do tezy, że takie ukształtowanie sposobu reakcji prawnej jest wyrazem określonej koncepcji porządku prawnego, zawierającego zespół instrumentów prawnych bezpośrednio skierowanych na zapobieganie i rozwiązywanie konfliktów między osobami prywatnymi (Di Lella, 2004, 195).

Przeciwko temu, kto prowadzi groble w morze

Ulpian we fragmencie swojego Komentarza do edyktu *ne quid in loco publico itinere fiat* zaznacza, że w stosunku do osoby, która wznosiłaby groblę[12] w morze, przysługuje interdykt analogiczny(*utile*), tj. oparty na modelu *ne quid in loco publico*.

> D. 43.8.2.8. *Ulpianus libro sexagensimo octavo ad edictum: Adversus eum, qui molem in mare proi[e]cit, interdictum utile [competit] ei, cui forte haec res nocitura sit: si autem nemo damnum sentit, tuendus est is, qui in litore aedificat vel molem in mare iacit.* – „Przeciwko osobie, która poprowadziła groblę w morze, przysługuje analogiczny interdykt temu, komu ta rzecz może zaszkodzić. Jeśli zaś nikt nie doznaje szkody, należy wziąć w obronę tego, kto buduje na brzegu lub prowadzi groble w morze".

Legitymowana do postulowania edyktu była wyłącznie osoba prywatna, która obawiała się pogorszenia swojej sytuacji możności „korzystania z morza". Z drugiej części fragmentu wynika, że interdykt przysługiwał nie tylko przeciw-

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[11] D. 43.8.2.2. *Ulpianus libro saxagensimo octavo ad edictum:* (…) *Et tam publicis utilitatibus quam privatorum per hoc prospicitur.* Szczegółowo na temat interesu publicznego i interesów jednostek w kontekście interdyktu *ne quid in loco* por. Kamińska (2017).

[12] Labeo zalicza do nakładów koniecznych poniesionych na dobra posagowe groblę (*moles*) skonstruowaną w celu ochrony budynku wzniesionego na brzegu morskim lub rzeki, por. D. 25.1.1.3. *Ulpianus libro trigesimo sexto ad Sabinum*: *Inter necessarias impensas esse Labeo ait moles in mare vel flumen proiectas.* (…). Por. Fiorentini (2003), 331, przyp. 114.

ko temu, kto budował groblę, ale także przeciwko temu, kto wznosił jakąkolwiek budowlę na brzegu.

Wiemy, że morze, a w szczególności brzegi morza nie były uznawane za *loca publica* w ścisłym znaczeniu. Stąd pretor wydawał interdykt w oparciu o model *ne quid in loco publico*. Taka praktyka jest wyrazem tendencji do asymilacji morza i brzegów morskich do innych miejsc publicznych (por. na ten temat Fiorentini, 2003, 340–342). Podobieństwo wynika z faktu, że morze i jego brzegi ze swojej natury dostępne są dla wszystkich.

Postulować wydanie interdyktu można było w sytuacji, gdy obiekt miał zostać wybudowany lub był w trakcie budowy. Środek ten miał więc wyłącznie charakter prohibitoryjny[13]. W krytycznym opracowaniu tekstu Digestów T. Mommsena i P. Krügera zasugerowano błąd w pisowni – w oryginalnym tekście Ulpiana zamiast czasu przeszłego – *proiecit*, czasownik ten, oznaczający tu poprowadzenie budowli w morze, użyty był w czasie teraźniejszym, w znaczeniu „wysuwa", „wznosi"[14]. Wyrażono także pogląd, że czasownik *competit* w znaczeniu „przysługuje", określający legitymację czynną do postulowania wydania interdyktu jest formalną interpolacją, w oryginalnym tekście zamiast czasownika *competere* użyto czasownika *dare* („dawać") (Luzatto, 2004, 165, przyp. 2).

Przesłanką wydania interdyktu był stan potencjalnej szkody (*damnum*), której doznać miałby wnioskodawca wskutek wzniesienia grobli lub innej budowy na brzegu morskim. W edykcie użyto sformułowania *ei, cui forte haec res nocitura est.* Forma czasu przyszłego wyrazu *nocitura* potwierdza, że szkoda dopiero miałaby nastąpić wskutek budowy obiektu. Słowo *forte* („przypadkiem, możliwie, może") wydaje się wskazywać, że już sama możliwość wystąpienia szkody mogła się okazać wystarczająca.

W jaki sposób rozumiano pojęcie *damnum* na gruncie tekstu edyktu *ne quid in loco*? Ulpian wyjaśnia, że szkoda polegała na utracie korzyści, którą ktoś czerpał z miejsca publicznego.

> D. 43.8.2.8.11. *Ulpianus libro sexagensimo octavo ad edictum: Damnum autem pati videtur, qui commodum amittit, quod ex publico consequebatur, qualequale sit. 12. Proinde si cui prospectus, si cui aditus sit deterior aut angustior, interdicto opus est*. – „Uważa się zaś, że doznaje szkody ten, kto traci korzyść, którą czerpał z miejsca publicznego, jakakolwiek by ona była. 12. Dlatego, kiedy komuś pogarszany albo ograniczany jest widok albo dostęp, konieczne jest zastosowanie interdyktu".

Prawdopodobnie ze względu na to, że interdykt *ne quid in loco* stosowano do sytuacji poprowadzenia grobli w morze lub wzniesienia obiektu na brzegu morskim jedynie odpowiednio, Ulpian nie precyzuje, czy szkoda polegać musi na pogorszeniu warunków żeglugi morskiej. Uznać należy, że jakiekolwiek ogra-

[13] Por. *ad prohibendum eum reficere* – Aristo w D. 43.8.2.7.

[14] Zob. D. 48.2.8, przyp. 8.

niczenie korzyści, którą ktoś czerpie w związku z aktywnością prowadzoną na morzu czy brzegach morskich, może uzasadniać wydanie interdyktu.

Ochronie podlega tu dobro, którym jest swoboda korzystania z morza, ale w takich granicach, by nie wyrządzać szkody drugiej osobie, innymi słowy: w ten sposób, by nie ograniczać możliwości korzystania z morza i brzegów morskich drugiej osobie. Idea ta widoczna jest w końcowym fragmencie tekstu: *si autem nemo damnum sentit, tuendus est is, qui in litore aedificat vel molem in mare iacit.* Jeśli wskutek budowli nie grozi szkoda, wznoszenie obiektu na brzegu czy przy brzegu morskim nie tylko jest dozwolone, ale podlega ochronie[15].

W sprawie utrudnień żeglugi morskiej – projekt Labeona?

Ulpian we fragmencie Komentarza do edyktu omawia zapowiedź pretora udzielenia interdyktu w przypadkach utrudnień żeglugi rzecznej (*de fluminibus, ne quid on flumine publico ripave eius fiat, quo peius navigetur*). W tekście jurysty znajduje się odwołanie do opinii Labeona, przywołującego słowa zapowiedzi edyktu stanowiącego reakcję na możliwe utrudnienia żeglugi morskiej.

> D. 43.12.1.17. *Ulpianus libro sexagensivo octavo ad edictum: Si in mari aliquid fiat, Labeo [ait] competere tale interdictum: 'ne quid in mari inve litore' 'quo portus, statio iterve navigio deterius fiat'.* – „Jeżeli dokonywano by czegoś na morzu, Labeo twierdzi, że przysługuje taki interdykt: 'aby ani na morzu, ani na jego brzegach' (nie zostałoby uczynione), wskutek czego port, przybijanie do brzegu czy żegluga nie stałyby się mniej dogodne".

Nie znamy w całości treści interdyktu wspomnianego przez Labeona. Umiejscowienie wypowiedzi Labeona w toku przedstawienia przez Ulpiana problematyki związanej z interdyktem *ne quid in flumine publico* świadczyć może o związkach logiczno-strukturalnych między oboma interdyktami. Być może, jak twierdzi M. Fiorentini (2003, 347–348), Labeon sugeruje własną formułę interdyktu, którego miałby udzielić pretor w formie *interdictum utile*. Za taką interpretacją przemawia fakt, że w przedstawieniu Ulpiana brak jest osobnego interdyktu słu-

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[15] Możliwość wznoszenia obiektów na brzegach morskich potwierdzona jest u innych jurystów; Celsus podnosi, że jednak w ten sposób nie można pogarszać użytku (*deterior usus*) innych osób, por. cyt. wyżej D. 43.8.3 pr. Podobnie Scaevola wskazuje na ograniczenia płynące z charakteru *usus publicus*, D. 43.8.4. *Scaevola libro quinto responsorum: Respondit in litore iure gentium aedificare licere, nisi usus publicus impediretur*. – „Odpowiedział, że zgodnie z *ius gentium* wznosić budynki na brzegu morza, o ile nie utrudniłoby to jego publicznego użytku". Pomponiusz jednak zaznacza, że przed budową należałoby otrzymać dekret pretora, w którym zezwoliłby na wzniesienie budowli. Zob. D. 41.1.50. *Pomponius libro sexto ex Plautio: Quamvis quod in litore publico vel in mari exstruxerimus, nostrum fiat, tamen decretum praetoris adhibendum est, ut id facere liceat: immo etiam manu prohibendus est, si cum incommodo ceterorum id faciat: nam civilem eum actionem de faciendo nullam habere non dubito*. – „Chociaż to, co wzniesiemy na brzegu morskim, który jest wspólny dla wszystkich albo na samym morzu, staje się naszą własnością, to jednak należy otrzymać postanowienie pretora zezwalające nam na dokonanie tego. Co więcej, jeśli ktoś dokonałby tego ze szkodą dla pozostałych, należy mu tego zabronić, nawet siłą. Nie mam bowiem wątpliwości, że nie przysługuje mu żadna skarga przewidziana przez *ius civile*". Co do podejrzeń interpolacji tekstu por. Fiorentini (2003), 335 i nn.

żącego ochronie morza i brzegów morskich. Być może w czasach Ulpiana brak było środków pretorskich, służących zapewnieniu swobody żeglugi morskiej. Jurysta zaś, widząc potrzebę interwencji, proponował rozstrzygnięcie oparte na sprawdzonych rozwiązaniach interdyktu *ne quid in flumine publico*.

Zestawiając stosowany analogicznie interdykt *ne quid in loco publico* z treścią interdyktu *ne quid in mari*, dojść możemy do wniosku, że ten drugi był bardziej szczegółowy. Miał na celu rozwiązanie konkretnych problemów związanych z utrudnieniem szlaku dla żeglugi, przybijaniem do brzegu, korzystaniem z portu. Brak w nim wzmianki o *damnum*. Zapewne wynika to z tego, że utrudnienie żeglugi stanowi jednocześnie szkodę w rozumieniu utraty korzyści z użytku (*deterior usus*). Cel publiczny wydaje się być tu bardziej eksponowany niż w przypadku *ne quid in loco publico*. Przytaczany przez Labeona interdykt wydaje się mieć charakter prohibitoryjny. Wskazywać może na to miejsce, które zajmuje wzmianka o nim w przyjętym przez Ulpiana porządku omówienia interdyktu *ne quid in flumine publico*. Ulpian bowiem w następnej kolejności omawia interdykt restytutoryjny, dotyczący tej samej sytuacji. Niewykluczone, że w sytuacji określonych zrealizowanych działań na morzu czy brzegu morskim ubiegać by się można o edykt restytutoryjny, jeśli pretor nie podjąłby innych działań z urzędu.

Si maris prioprium ius ad aliquem pertinet – szczególne uprawnienia na morzu

Zachowany w Digestach Justyniana fragment księgi trzynastej Komentarza do edyktu Paulusa informuje, że jednostka mogła dysponować wyłącznym tytułem do korzystania z morza.

> D. 47.10.14. *Paulus libro tertio decimo ad Plautium: Sane si maris proprium ius ad aliquem pertineat, uti possidetis interdictum ei competit, si prohibeatur ius suum exercere, quoniam ad privatam iam causam pertinet, non ad publicam haec res, utpote cum de iure fruendo agatur, quod ex privata causa contingat, non ex publica. Ad privatas enim causas accommodata interdicta sunt, non ad publicas.* – „Oczywiście, jeśli ktoś miałby jakieś szczególne uprawnienie względem morza, przysługuje mu interdykt *uti possidetis*, gdyby zabraniano mu jego wykonywania, ponieważ rzecz tyczy się już sprawy prywatnej, nie publicznej, tak jakby sprawa dotyczyła prawa korzystania, dla którego istnieje podstawa prywatna, nie publiczna. Interdykty odnoszą się bowiem do spraw prywatnych, nie publicznych".

Fragment ten zamieszczony został przez kompilatorów justyniańskich pod tytułem, gdzie przedstawione są zagadnienia dotyczące skargi z tytułu umyślnego naruszenia osobowości (*actio iniuriarum*). Interdykt *uti possidetis* dotyczył nieruchomości i służył do utrzymania naruszonego posiadania (D. 43.17). Wydany nakaz pretora skierowany był do obydwu stron sporu. W sprawie prywatnych korzyści (*prioprium ius*), które ktoś czerpałby z morza, przysługuje zdaniem jurysty interdykt służący ochronie posiadania. Nie chodzi tu jednak o ochronę uprawnień otrzymanych przez jednostkę ze strony państwa w drodze koncesji, np. wyłącznych uprawnień do połowu ryb na określonym obszarze morza. W ta-

kim przypadku przysługiwałby interdykt *de loco publico fruendo* (por. Fiorentini, 2003, 351 i nn.; Klingenberg, 2004; Purpura, 2004, 178). Chodzi tu raczej o sytuację zajęcia odcinka morskiego, np. przez założenie zastawnych sieci czy hodowli (farmy) ostryg[16]. Jeśli taka aktywność nie ogranicza korzystania z morza przez innych (brak przesłanki *damnum*), nie tylko jest dozwolona, ale podlega ochronie na podstawie interdyktu *uti possidetis* (Purpura, 2004, 178).

Ochrona wolności połowów – interdykt czy *actio iniuriarum*?

Odmiennie rozwiązano kwestię działań sprowadzających się do zakazu czy przeszkodzenia (*prohibitio*) w uprawianiu rybołówstwa czy żeglugi. W tych przypadkach nie przysługiwał interdykt, lecz inny środek prawny.

> D. 43.8.2.9. *Ulpianus libro sexagensimo octavo ad edictum: Si quis in mari piscari aut navigare prohibeatur, non habebit interdictum, quemadmodum nec is, qui in campo publico ludere vel in publico balineo lavare aut in theatro spectare arceatur: sed in omnibus his casibus iniuriarum actione utendum est.* – „Jeśli komuś nie pozwolono łowić ryb w morzu albo żeglować, nie będzie miał on interdyktu, podobnie jak ten, komu zabroniono gry na publicznym placu albo kąpieli w publicznej łaźni czy oglądania widowisk w teatrze. We wszystkich tych przypadkach należy skorzystać ze skargi z tytułu umyślnego naruszenia cudzej osobowości".

Czyny polegające na uniemożliwianiu rybołówstwa czy żeglugi rzecznej spotykały się z reakcją pretora w interdykcie *ut in flumine publico navigare* liceat („aby umożliwiono żeglugę na rzece publicznej")[17]. Podobne działania, które miały miejsce na morzu, mogły stanowić podstawę do wniesienia *actio iniuriarum*.

Dopuszczalność zastosowania *actio iniuriarum* jest wynikiem twórczej pracy rzymskiej jurysprudencji. Informacje o kontrowersji przekazuje nam Ulpian, podkreślając autorytet Pomponiusza.

> D. 47.10.13.7. *Ulpianus libro quinquagensimo septo ad edictum: Si quis me prohibeat in mari piscari vel everriculum (quod Graece* σαγήνη *dicitur) ducere, an iniuriarum iudicio possim eum convenire? Sunt qui putent iniuriarum me posse agere: et ita Pomponius et plerique esse huic similem eum, qui in publicum lavare vel in cavea publica sedere vel in quo alio loco agere sedere conversari non patiatur, aut si quis re mea uti me non permittat: nam et hic iniuriarum conveniri potest.* (…) *Et quidem mare commune omnium est et litora, sicuti aer, et est saepissime rescriptum non posse quem piscari prohiberi: sed nec aucupari, nisi quod ingredi quis agrum alienum prohiberi potest* (…) – „Jeśli ktoś zabrania mi łowienia ryb w morzu

[16] Na temat wykorzystania tzw. *Lex sane si maris* w argumentacji w konflikcie między Wenecją a Genuą zob. Fredona (2018).

[17] D. 43.14.1. *Ulpianus libro sexagensimo octavo ad edictum. pr.: Praetor ait: „Quo minus illi in flumine publico navem ratem agere quove minus per ripam onerare exonerare liceat, vim fieri veto. Item ut per lacum fossam stagnum publicum navigare liceat, interdicam".* – „Pretor stanowi: »zabraniam stosowania przemocy, by powstrzymać kogoś przed płynięciem statkiem lub łodzią po rzece publicznej bądź by uniemożliwić komuś załadunek lub rozładunek przy jej brzegu. Nakazuję również umożliwienie żeglugi przez publiczne jezioro, kanał, staw«".

albo ustawiania sieci (zwanej po grecku σαγήνη), czy mogę go pozwać skargą z tytułu umyślnego naruszenia cudzej osobowości? Są tacy juryści, którzy uważają, że mogę wystąpić z powództwem, a wśród nich Pomponiusz. Wielu sądzi, że podobny jest również przypadek osoby, której nie dopuszcza się do kąpieli w publicznej łaźni czy zasiadania na widowni teatru albo też nie pozwala się w jakimś innym miejscu znajdować się, zajmować miejsce, przebywać, a także jeśli ktoś zabrania mi używania mojej własnej rzeczy. (…) Nie ulega wątpliwości, że morze jest wspólną rzeczą wszystkich, tak jak brzegi i jak powietrze, wydawano zatem bardzo często reskrypty, że nikomu nie wolno zakazywać łowienia ryb ani chwytania ptaków, chyba że zabroniono komuś wstępu na cudzy teren (…)".

Problemem, nad którym dyskutowali rzymscy juryści, była kwestia rozszerzenia zastosowania *actio iniuriarum* na sytuacje, w których jednostka pozbawiona była możliwości korzystania z rzeczy należących do *res communes omnium*. Ulpian podkreśla, że zastanawiano się również nad zastosowaniem tego środka do sytuacji modelowej, a więc służącej ochronie korzystania przez jednostki z dóbr publicznych, takich jak łaźnie, teatry czy nawet sposobności korzystania z własnej rzeczy[18]. Daje też dwa argumenty wynikające z *auctoritas*. Pierwszy, przywołujący opinię Pomponiusza za przyznaniem skargi, drugi – podkreślający istnienie reskryptów cesarskich dotyczących kwestii łowienia ryb (morskich) i chwytania ptaków, jako zasobów naturalnych pochodzących z morza i powietrza, a więc rzeczy wspólnej dla wszystkich ludzi. Niewątpliwie, reakcja części jurysprudencji na zakazy korzystania z *res communes omnium* w postaci udostępnienia powództwa z tytułu zniewagi świadczy o dostrzeżeniu problemu i pomysłowości we wprowadzeniu adekwatnego środka prawnego.

Wnioski

W prawie rzymskim nie przewidziano środków prawnych służących wyłącznie ochronie swobody żeglugi czy możności korzystania z zasobów morza.

Morze i brzegi morskie należały do kategorii rzeczy, z których użytek czerpać mogli wszyscy ludzie (*res communes omnium*). Uzasadnieniem dla takiego uprawnienia jednostki było prawo naturalne, nakazujące odmienne traktowanie rzeczy, które istniały już przed założeniem państwa (*primum a natura prodita sunt*). Od rzeczy leżących w użytku publicznym odróżniało ich to, że nie można było ich wyłączyć z powszechnego użytku.

Dostrzegano jednak potrzebę zapobiegania sytuacjom konfliktowym związanym z eksploatacją morza i jego zasobów, a nadto w interesie państwa leżało wspieranie rozwoju żeglugi przybrzeżnej. Instrumentem prawnym, który umożliwiał elastyczną ochronę prawną, okazały się interdykty: stosowany w oparciu o model prohibitoryjnego *ne quid in loco publico*; *ne quid in mari inve litore*, chroniący

[18] Kamińska (2014), 82 twierdzi z kolei, że juryści jednym głosem przyznali poszkodowanym prawo do wniesienia *actio iniuriarum*.

prawo do korzystania z portu, przybijania do brzegu i swobodę żeglugi oraz *uti possidetis*, stosowany w przypadku długotrwałego korzystania – najprawdopodobniej o charakterze ekonomicznym – z danego odcinka morza. Na przypadki zakazu żeglugi czy korzystania z zasobów morza – dostrzegając problem w kontekście naruszenia swobody jednostki, zareagowano, wprowadzając ochronę wynikającą z *actio iniuriarum*.

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Bartosz Szolc-Nartowski

INTERDICTIVE PROTECTION OF THE FREEDOM OF NAVIGATION AND SEA RESOURCES IN ROMAN LAW

The Author presents issues related to the legal status of the sea and its shores in ancient Rome, the course of interdict proceedings and individual interdict as legal tools developed by the Roman jurisprudence and praetor to protect the freedom of sea navigation and the use of sea coasts and sea resources.

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ASPECTS OF SEASHORE PROTECTION IN THE LATE ROMAN EMPIRE. A BRIEF OUTLINE OF THE PROBLEM IN THE LIGHT OF IMPERIAL CONSTITUTIONS

The article presents a brief outline of late Roman activity in the field of seashore supervision. The term is assumed to mean enforcement of law in the coastal areas with the exception of piracy and barbarian raids on the shores which should be rather considered as a problems of military nature. In my short presentation I would rather like to focus on the tasks of the civilian authorities, a number of the constitutions in the Theodosian and Justinian's Code specify illegal activities on the sea and in coastal territory that were to be counteracted by the central and local Roman civilian authorities. Certain key laws are listed below in three categories but the list is not exhaustive and should be approached only as an example of the adopted solutions.

Shipping of illegal goods

As for prohibited goods, there is a relatively significant number of sources attesting to the efforts of the Roman authorities to control the shipping of goods which one the one hand could have strengthened the enemy and on the other resulted in the weakening of the Roman market. One of the examples is the constitution of Emperors Constantius and Julian dated 356 (or 352).[1] Its provisions limited or in some cases completely prohibited the use of some types of coins in trade. Coins that were not officially approved for public use became illegal. These included the copper *maiorina* and the bronze *cententionalia*. According to

[1] C. Th. 9.23.1.

the A.H.M. Jones, the prohibition was introduced in order to reduce the speculation in copper coinage.[2] As a result, the tradesmen and shipmasters carrying such coins ran the risk of confiscation. The prohibition referred to both local land portage and wider maritime transportation.

Restrictions in shipping were also introduced in other situations. In 420, emperors Honorius and Theodosius addressed a law to Eustathius, prefect of Orient (C. Th. 7.16.3).[3] It mentions – though somewhat vaguely – the *merces inlicitae* that could not be transported *ad nationes barbaras*. In the subsequent text of the constitution there is no clarification concerning such prohibited goods, but it may be found in other constitutions preserved in Justinian's and the Theodosian Codes. Undated law of Gratian, Valentinian and Valens issued in the 370s introduced a general ban on selling or supply of gold to barbarians (C. 4.63.2; a. 374?). Another constitution from that decade prohibited trade in wine, oil and sauces (*vini et olei et liquaminis*) with barbarians, even for taste (C. 4.41.1; a. 370–375). Later, in 445, the list of illegal goods was expanded to include weapons (*arcus*, *sagittae*, *spathae*) and armors (*loricae*, *scutae*): C. 4.41.2.

Also, any private cargo (*sarcina privata*) added to the public cargo shipped as a duty imposed by the *onus fiscal* was treated as unlawful, at least since 395. The constitution issued for the eastern part of Empire strictly prohibited shipmasters of the *navicularii* fleet from taking the opportunity to place a private burden upon the public cargo (C. Th. 13.8.1).[4]

Transportation of illegal or unwelcome persons

In some instances, Roman law introduced provisions pertaining to classes of persons whose transportation across the sea was prohibited. The best known is the constitution of Gratian, Valentinian and Valens issued in 378 (C. Th. 10.19.9), which states that Vindicianus, the vicar of an unknown western diocese was informed that letters had been sent to the prefects of Gaul and Italy, and indirectly to all the governors of the coastal provinces,[5] with an injunction that none of the *aurileguli* (gold miners) should be transported across the sea to Sardinia. The reason for such a provision is unclear – text of constitution mentions an indefinite "privilege of the new statute" to encourage the *aurileguli* to move to the island. The sources are silent about the privilege – was it introduced in connection with gold extraction or for any other reason, and why did it not apply? It may be conjectured that Roman authorities, faced with the invasion of Goths and the exodus

[2] *Follis*, other types of coin could be transported from one place to another in a limited amount only. *Cf.* Jones (1974), 336.

[3] PRLE 2, p. 436 (s.v. Fl. Eustathius 12).

[4] According to B. Sirks, authorities "wanted to prevent overloading, which would increase the risk of shipwreck or jettisoning of the cargo." *Cf.* Sirks (1991), 202.

[5] PLRE 1, 967 (s.v. Vindicianus 1).

of gold miners from Thrace tried to restore gold mining in the Balkans. The prohibition was general: *universorum navigatio huiusmodi hominum generi clauderetur*.[6]

There is also another constitution that indirectly points to a category of persons who were prohibited from sailing to other parts of empire. The text of the constitution of Arcadius and Honorius issued in 419 proscribes transfer of knowledge about the construction of vessels to the barbarians under the penalty of death (C. Th. 9.40.24). The nature of this provision is obvious given the fact that the Vandals had just reached the southern part of the Iberian peninsula and in consequence west African provinces, mainly Mauretania, faced the danger of invasion. Despite the lack of traces of any regulations it may be presumed – with some degree of caution – that Roman authorities closely monitored the population of skilled craftsmen and prevented them from travelling to the provinces close to barbarian encampments.

Contravention of duties by the *navicularii*

As for the *navicularii*, the members of the guild of the grain-shippers, it has been mentioned above that some of the shipmasters were obliged to transport the annona or fiscal goods without any cargo of private goods added on top of it. This is not the only example showing how the *navicularii* sought the opportunity to make additional business apart from the compulsory duty. The example of constitution of Arcadius and Honorius dated 409 AD, addressed to the prefect of the Orient Anthemius shows that the vessels of the *navicularii* sailing from Alexandria to Constantinople changed the course or dispersed among the islands under various pretexts (such as stormy weather). In consequence, the cargo was delivered to the state warehouses and granaries with delay (C. Th. 13.5.32).[7] Another law shows that fully loaded ships would postpone their departure from ports to Constantinople despite favorable weather conditions (C. Th. 13.5.34; a. 410).

The text of the constitution of Honorius and Theodosius issued in 409 AD shows that some shipmasters accepted public cargo: taxes in kind (*species fiscalia*) with malicious intent to sell it in another part of empire (C. Th. 13.5.33).

The examples described above do not exhaust the list of possible practices. The political situation was likely to involve new factors, e.g. control of mobility of some groups (gold miners for instance). It is visible, *per analogiam*, on the example of the constitution dated 408 or 409 AD which comprised the provisions of a treaty between the Romans and Persians with relation to cross-border trade (C. 4.63.4). As the text explicitly shows, in order to avoid the potential risk of espionage merchants were allowed to trade only in selected towns. Besides the marketplaces, border-crossing points were established. A similar situation occurred in the Dan-

[6] See C. Th. 10.19.6 (a. 369) about similar earlier restrictions. As for the possible reasons of these restrictions see McCormick (2001), 42.

[7] *Cf.* PLRE 2, p. 93 (s.v. Anthemius 1).

ubian provinces.[8] The provisions of the constitution refer to the inland area, but the text provides an excellent basis to consider potential cross-border control in the maritime areas. There were authorized harbors for foreign trade on the coasts of the Empire, e.g. Clysma on the coast of the Heroopoliticus Sinus (Gulf of Suez), which according to A.H.M. Jones was the "sole authorized port for the Red Sea and Indian trade" (*cf.* Jones, 1964, 827). Creation of such control-points to channel maritime traffic was more difficult in the Mediterranean for a variety of reasons (incomparably longer coastline, differences in the attitude towards foreigners among the local population and the population of the Empire, etc).

Even today, the main problem in performing of policing duties in the Mediterranean is its coastline which, especially in its northern part, is strongly expanded, with the dominance of two large peninsulas: the Apennine and the Balkan. The shores abound in numerous gulfs and bays, while the eastern Mediterranean (mostly the Aegean Sea and the eastern coasts of the Ionian and the Adriatic Sea) are dominated by variedly sized islands and archipelagos. The situation is much better in the western region of the Black Sea. Its western and southern coastline, which in the fourth century remained under direct control of Constantinople, is less extensive. The only element of topography which may have caused difficulties in patrolling the sea is the marshy area of the Danube Delta and its lagoons. In the Roman period, plenty of small coves and islands, located far from human dwellings and centers of administration, were able to provide excellent opportunities for every kind of illegal or hostile activities. It is clear and undisputable that patrolling the entirety of the coasts and open sea was beyond the capabilities of the Roman administration. The most effective and economical solution was to control the "bottlenecks" in which, because of its features, every unwelcome activity could be focused. In order to load or unload illegal cargo or to take passengers onboard, the ships had to find a suitable place whose number was limited: harbors, anchorages or safe bays situated near human settlements or transport routes. Authorities were able concentrate their activities in such areas and maximize the probability of detecting undesirable actions. When emperor Constantius prohibited the use of some coins in trade in 356 or 352 AD, he also ordered that to counteract violations of the law the officials should guard the harbors and various shores where there was customarily very easy access to ships: *portus enim litoraque diversa, quo facilior esse navibus consuevit accessus* (C. Th. 9.23.1).

It is no surprise that, according to imperial constitutions, the officials responsible for the policing of the shores were mainly province governors (*praesides provinciarum* or *rectores provinciarum,* often styled in the legal sources as the *iudices*). The aforementioned constitution of Constantius reserved the right to punish the guilty of their infringement. The constitution concerned with the problem of miners escaping to Sardinia also names the governors of the coastal provinc-

[8] On the role of *Daphnae* and *Noviodunum* as the sole marketplaces for the Roman-Goth trade see Wiewiorowski (2007), 261.

es (*provinciarum, quae mari alluuntur, iudices*) as responsible for the control of the passengers of ships sailing to Sardinia (C. Th. 10.19.9; a 378). The control over the ships of the *navicularii*, which delayed sailing under the pretext of stormy weather, was also entrusted to the *iudices* (C. Th. 13.5.34; a. 324). Nevertheless it was not a general rule. In some cases, the responsibility for the policing activities was assigned to the military commanders of the border troops (*duces*) – such a solution was delegated in some Danubian provinces.[9] On the other hand, the 409 constitution issued relating to the *navicularii* mentions *praefectus augustalis* as the official responsible for the coordination of grain transports (C. Th. 13.5.32). These measures depended on the local circumstances; in the former case, the frontier Danubian provinces were garrisoned by strong military forces, whereas in the latter the explanation lies in the special status of diocese of Egypt and its particular importance for the grain supply of Constantinople.

It is clear that in order to perform the policing duties imposed by constitutions, the governors devolved such tasks to the subordinate staff from their *officium* or cooperated with other officials. The types of the lower-grade apparitors are named in the sources rather rarely. The constitution of Constantius dated 352 (356) mentions generally *idoneos officiales* to whom the supervision of the harbors and other places accessible to ships should be entrusted (C. Th. 9.23.1). These would be local authorities (i.e. curiales of the municipalities) or members of the imperial administration. For example, the constitution issued in 420 AD mentions the *defensor civitatis* and member of the imperial bodyguard (*protector*) as persons responsible for the examination of those who were suspected of selling *illicitae merces* to the barbarians (C. Th. 7.16.3).

The survey of two constitutions devoted to the members of *corpora naviculariorum* could shed some light on this question. The first of those, issued by Constantine in 326 AD granted the *navicularii* immunity from burdens imposed as *munera publica* (*ut a collationibus et omnibus oblationibus liberati integris patrimoniis navicularium munus exerceant*) and from curial obligations (if they were *curiales*).[10] According to text, their ships should not be detained during voyage under the pretext of compulsory public services. The sanction for contravening the law was capital punishment. The text enumerates the categories of officials who should be aware of the granted concession: custodians of the shores, provosts of the imposts, tax collectors, decurions, representatives of the fisc and province governors (*litorum custodibus et vectigalium praepositis exactoribus decurionibus adque rationalibus et iudicibus*).

Immunitas of the *navicularii* was again confirmed in the constitution of Valentinian II in 386 AD (C. Th. 13.5.17). The list of the officials, who had to refrain from burdening the *navicularii* and their ships with compulsory public services, *oblationes* or tax payment in kind (*omnibus oneribus et muneribus et collationibus et*

[9] As for the control of the illegal trade across the border see Wiewiorowski (2007), 260–262.
[10] C. Th. 15.5.5. *Cf.* Sirks (1991), 142.

oblationibus) is iterated almost word-for-word after the constitution of Constantine. Every custodian of the shores, provost of the imposts, tax collector, decurion, representative of the fisc or governor of any province was subject to capital punishment if they should violate the law (*seu custos litorum seu vectigalium praepositus seu exactor vel decurio seu rationalis vel iudex cuiuscumque provinciae*).

The officials mentioned in the two constitutions were evidently entitled to control all ships entering to the harbor and impose public burdens on the owners or *magistri navis*. Even though they differed in terms of scope of their tasks, the duties involved and the position in the hierarchy of power (decurions were not even officials in the strict sense of the word), most of them were engaged in fiscal affairs: the *exactores* and the *praepositi vectigalium* were responsible for the taxes, the *rationales* collected the imperial rents, decurions often participated in the tasks of the taxation system (Jones, 1964, 414 and 430). However, very little is known about the functions of the *custodies litorum*. This designation is very interesting, since it appears only in the two above-mentioned constitutions.[11] One could speculate about the general meaning of the term, which may have denoted undefined officials to whom all matters related to the control of maritime traffic were entrusted. The term may have appeared as a *hapax legomenon* in the constitution of Constantine only to be repeated in the constitution of Valentinian II. Yet, on the other hand, *custodes litorum* are listed in the text immediately next to other well-known types of officials whose titles are precisely and strictly defined. This raises the question about the sense of using technical terminology and generalized terms in one phrase. So, if we assume that there existed a separate post of *custos litroum*, what were their duties and tasks? The competences of other officials mentioned in the two constitutions by far exceed the scope of affairs related to the maritime trade and traffic. But the titular of *custos* clearly suggests specific tasks related with the coastal and maritime activity (though the context of the quoted text associates *custodes litorum* with the fiscal sphere). In his commentary to C. Th. 13.5.5 (a. 326), Iacobus Gothofredus described *custodes litorum* as an official *qui litoribus praesidebant*; however, he did not explain what this protection could have meant (Gothofredus, 1736, 70). It is not sufficiently clear whether the competences of the *custodes* were purely administrative (*custodia* in a narrow sense of maintaining public order) or cover some tasks of quasi-military nature (*custodia* in a wider sense of ensuring protection against all types of threats).

Gianfranco Purpura links *custodes litorum* with the *curiosi cursus publicus* (Purpura, 1973, 47–48).[12] He does not concur with other scholars who recognized *custodes* as a separate type of official. In his opinion, the preserved sources do not provide adequate grounds for such conclusions. *Custodes litorum (curiosi litorum)*

[11] The text of C. Th. 10.19.9 (a. 376), which bans the carriage of miners to Sardinia mentions the *custodes* (not *litoris*) but the context is uncertain. It may well have been used in the text as a general term, not a technical one. Thus, in my opinion, it should not be taken into account.

[12] About the various tasks that were entrusted to the *curiosis* see Jones (1964), 578 f.

were the same officials as *curiosi cursus publici*, the officials who supervised public land transport. Imperial constitutions attest that *curiosi* also controlled maritime traffic (C. Th. 6.29.10–12; a. 412, 414, 415). They oversaw the coastal provinces, its coasts and seaports (*litora insuper portusque*).[13] As they controlled the wagons and stations of the *cursus publicus*, the supervision of public maritime transport may be presumed to have been a part of their responsibility.

However, the opinion about the nature of *custodies litorum* advanced by Purpura leaves room for speculation. It is also probable that *custodes litorum* may have derived from an earlier authority in charge of supervising the coast and harbors, which had existed in the past and was conveyed in the late Roman sources under a different term.

For example, jurist Paulus mentions the officials called the *limenarchae* (D. 11.4.4). Among other things, they were involved in going after fugitive slaves in order to return them to proper authorities. The term appears also in the passage of jurist Arcadius Charisius, who says that this office was held by the municipal officials as a *munus personalis* (D. 50.4.18.10) and is referred to in the constitution of Diocletian and Maximian dated 294 AD.[14] According to C.J. Fuhrmann, the *limenarchae* supervised the harbors as "civilian port officials, clearly more aquatic than terrestrial", while one inscription from Cyprus attests to the *limenarchae* as early as in the first century AD (Fuhrmann, 2011, 34, n. 43). Their tasks may have included searching the decks of ships in order to discover potential fugitives. Also, the similarities between the tasks of the *limenarechae* and duties of other officials of this kind may be considered; in the eastern, Greek-speaking provinces of the Empire, the governors of the provinces were assisted in maintaining public order by the *irenarchae*. Just as the *limenarchae*, they pursued runaway slaves and criminals. They were also responsible for the protection of local communities against bandits (Amielańczyk, 2007, 7); in other provinces of the Empire these tasks were entrusted to the *stationarii* (Amielańczyk, 2007, 7). The *stationarii* are also mentioned along with the *limenarchae* by Paulus in D. 11.4.4. Both types of officials – the *irenarchae* and the *stationarii* – may have acted as a representatives of the governors in the criminal cases. They interrogated slaves and criminals before handing them over to the local authorities. One might ask whether the *irenarchae* and the *stationarii* had their counterpart in the *limenarchae*, who were entrusted with the protection of the shores, bays suitable for ships, coastal roads and harbors? The fact that the *custodes litorum* are named only in two constitutions concerned with fiscal matter does not fully account for their role. If we accept the view that the *custodes litorum* were local coast guard officers whose function originated with the *limenarchae*, then given their skills and knowledge about local coastline they were valuable to the representatives of the fisc and supported them in their tasks. Besides, they could perform other duties, such as patrolling

[13] C. Th. 6.29.10 (a. 412). See also Di Paola (2013), 304.

[14] C. 7.16.38. The law does not mention their duties and competences.

the shore or, just as *limenarchae*, catching fugitives who tried to escape to another transmarine province. With their knowledge of local coastal environment they could have been employed – as with the fiscal official – by the governors of the provinces, e.g. to control the cargo of the ships sailing along the seashore. In my opinion, identification of the *custodes litorum* offers a subject for further research.

Whether the *custodes litorum* were *curiosi* or another, dinstinct type of official, they probably had to cooperate in order to maintain public order along the coasts. Controlling ships of the *navicularii* (and perhaps "private" vessels as well) in the harbors required less numerous personnel but if we assume that policing activities of the *custodes* included surveillance of all places suitable for ships, as C. Th. 9.23.1 (a. 356 or 352) indicates, they were probably forced to cooperate (e.g. to catch the smugglers who tried to avoid the control in the harbors). The coast of the Empire was guarded here and there by the military units (stationed in permanent garrisons or deployed temporarily due to the current political and military situation[15]). The constitutions attest to the the presence of quasi-military units called *burgarii* in some parts of Empire. Although these soldiers protected the frontier territory, they should not to be confused with the *limitanei* who had a higher status (Jones, 1964, 651). According to B. Isaac, the Syrian seashore was guarded by these irregular military units located in small fortified installations and watch-towers along the coastal roads (Isaac, 1990, 181). In Egypt, members of the *burgarii* could be civilians recruited from among the local population for guard duties (*cf.* Bagnall, 1976, 25). Late Roman legal sources confirm the existence of such units in Spain and other unnamed parts of the Empire, but there is no evidence of cooperation between them and the *cutodes litorum* (C. Th. 7.14.1; a. 398).

Officials to whom such duties were entrusted were backed by a suitable infrastructure. In the harbor cities there were the *stationes portitoris* to control the shipping or exact taxes and local customs fees. In order to enhance control, smaller outposts could be erected on the shores outside the towns. Such network of coast stations was quite well developed in the Asian provinces. Apart from the harbor posts, a network of the *custodiae* existed along the coast. Between the main *custodiae* there were about 10 Roman miles (15 km), with smaller *custodiae* located along that distance (Pascal, 2014, 165), guarded by the local militias or squads of sentinels.[16] As sources show, they were able to repel small groups of bandits.[17] Military

[15] See C. Th. 7.16.2 (a. 410).

[16] As Aubert observes (1995), 261, local militias, paramilitary units or civilian guards were involved in police activities because of "the shortage of soldiers in critical areas."

[17] In 399 AD, such militias, composed of countrymen under the command of a local landowner named Valentinus, successfully repulsed invasions of barbarians commanded by the Goth Tribigild. See Zos. V 15.1–16.3. A number of landowners were able to raise small units equipped with self-manufactured weapons; *cf.* Lewin (1993), 380. Undoubtedly, every armed force had to be authorized by the Roman Emperor (see deliberations of E. Birley on the question of legitimacy of militias formed in Britain in 410 AD: Birley (1988), 393). See also Lewin (1993), 382; Owens (1997), 493 ff.

provenance of such a network is obvious, but in the time of relative peace and developed fiscal policy its usefulness did not diminish. Some of buildings were constructed in order to watch the approach to the harbors and even facilitate navigation.[18]

A short survey of the legal sources indicates that policing the seashores and supervision of the maritime transport were within the purview of several types of officials. These were subordinated to various higher authorities (in some cases unclear, e.g. *custodes litorum*): governors of provinces, officials of the fisc or even high military commanders. At this point, one might ask whether there was some (or any) coordination of such activities; in my opinion, the question is worth researching in greater depth. Particular attention should be given to the *custodes litorum.* The opinion of G. Purpura is to some extent justified, but this justification suffers from the lack of sources to support it. This makes the question of the nature and origin of the *custodes litorum* open to further consideration and studies.

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[18] On the role of the observation towers see Ducin (1997), 155 f.

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Adam Świętoń

ASPECTS OF SEASHORE PROTECTION IN THE LATE ROMAN EMPIRE. A BRIEF OUTLINE OF THE PROBLEM IN THE LIGHT OF IMPERIAL CONSTITUTIONS

The article contains brief considerations on the legal aspects of coastal protection in the period of the late Roman Empire. The Roman authorities of the transmarine provinces were likely to face problems such as the smuggling of illegal goods or unwelcomed persons. The question is who was in fact responsible for the prevention of and fight against unlawful activities. There are only few constitutions which indirectly refer to this problem. The laws indicate that the responsibility burdened various types of officials. Only one of them – *custos litorum* – seems to be strictly connected to the marine duties. The origins and competences of *custodes litorum* are however unclear and should be subject to further research.

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USING *LEX RHODIA* IN THE CASE OF A PIRATE ATTACK

The poet Nikarchos wrote about someone who went to the prophet and asked him how to sail safely to Rhodes. The fortune teller was to answer: 'First of all, take a new ship and do not set out in the winter, only in the summer.[1] If you do, you'll get there and back, unless a pirate catches you at sea.'[2] This amusing story is the quintessence of what Antiquity thought about maritime transport. It was necessary to sail on a decent ship during the sailing season but even that did not constitute a guarantee of safety.

The sea has always been an unbridled force. It was dangerous but at the same time it allowed quick movement and facilitated trade. Therefore, the ancients, with greater or lesser enthusiasm, benefited from its merits, though often at the expense of a major risk of losing property and above all life.

The threat at sea was caused by treacherous rocks and shallows, violent gales and storms, but also by pirates.[3] We do not have a legal definition of maritime armed robbery, however, some conclusions can be drawn after analyzing non-legal texts (*cf.* Tarwacka, 2009, 22 ff.; Tarwacka, 2018b, 53 ff.). Above all, pirates were considered ruthless people who would not spare anyone.[4] It was believed that they did not respect human or divine laws, and would stop at no lawlessness. Their actions were generally carried out with the use of ships, yet they attacked not only at sea but also on land,[5] in coastal villages, cities and along routes. They

[1] On the sailing season see: Ducin (1997), 59–92; Beresford (2013), *passim*, in the context of piracy 237 ff.
[2] Nikarch. *Ep.* 11,162.
[3] On piracy see first and foremost Ziegler (1980); Pohl (1993); Ormerod (1997); Souza (1999); Rauh (2003), 169 ff.; Tarwacka (2009).
[4] Plaut. *apud Charis*. 211: *Ita sunt praedones: prorsum parcunt nemini.*
[5] Flor. *Epit*. 1.41: *sed ut quaedam animalia, quibus aquam terramque incolendi gemina natura est, sub ipso hostis recessu inpatientes soli in aquas suas resiluerunt, et aliquando latius quam prius Siciliae quoque litora et Campaniam nostram subito adventu terrere voluerunt*.

were also armed.[6] Importantly, not only active complicity in the robbery but the membership in the gang itself constituted a felony.[7] Piracy was thus a branch of organized crime.

Pirate attacks can be considered as a very important factor affecting the quality and safety of maritime transport. The risk associated with them was perceived as very high. Therefore, such a robbery was subject to legal qualifications on several levels.

> D. 39.6.3. *Paulus libro septimo ad Sabinum: Mortis causa donare licet non tantum infirmae valetudinis causa, sed periculi etiam propinquae mortis vel ab hoste vel a praedonibus vel ab hominis potentis crudelitate aut odio aut navigationis ineundae.*

Paulus recognized that the possibility of making a donation in the event of death existed not only in the case of health problems but also when in danger of imminent death at the hands of enemies, pirates, as a result of cruelty or hatred of an influential man, or an upcoming sea journey. He explained that all these situations are examples of near and violent threats: *haec enim omnia instans periculum demonstrant*.[8] Hence a pirate attack was a real danger.

What is more, the attack of sea robbers, as well as an attack of an enemy army, was classified as a *force majeure* event (*cf.* Gerkens, 2005, 109 ff.; Sobczyk, 2005, 75 ff.; Tarwacka, 2009, 139 ff.). It was most often described in source texts as *vis piratarum*,[9] *vis praedonum*,[10] *impetus praedonum*,[11] *insidiae piratarum*,[12] *casus piratarum*.[13] Other sources also point to the fact that the parties anticipated the possibility of a pirate attack.[14]

> D. 50.17.23. *Ulpianus libro vicesimo nono ad Sabinum:* (…) *animalium vero casus mortesque, quae sine culpa accidunt, fugae servorum qui custodiri non solent, rapinae, tumultus, incendia, aquarum magnitudines, impetus praedonum a nullo praestantur*.

According to Ulpianus, no contract provided for liability for the occurrence of *vis maior*, including a pirate attack. The phrase *a nullo praestantur* warrants the presumption that the parties could not extend the scope of responsibility *ad in-*

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6 Sen. *Contr*. 1.2.8: *Non est credibile temperasse a libidine piratas omni crudelitate efferatos, quibus omne fas nefasque lusus est, simul terras et maria latrocinantes, quibus in aliena impetus per arma est; iam ipsa fronte crudeles et humano sanguine adsuetos, praeferentes ante se vincula et catenas, gravia captis onera, a stupris removere potuisti, quibus inter tot tanto maiora scelera virginem stuprare innocentia est? Cf.* Lentano (2010), 92 ff.

7 Sen. *De benef*. 5.14: *Sic latro est etiam antequam manus inquinet, quia ad occidendum iam armatus est et habet spoliandi atque interficiendi voluntatem. Exercetur et aperitur opere nequitia, non incipit.*

8 D. 39.6.6 (*Paulus libro septimo ad Sabinum*).

9 D. 4.9.3.1 (*Ulpianus libro quarto decimo ad edictum*).

10 D. 35.2.30 pr. (*Maecianus libro octavo fideicommissorum*).

11 D. 50.17.23 (*Ulpianus libro vicesimo nono ad Sabinum*). *Cf.* Cic. *Ad fam*. 4,7.

12 D. 13.6.18 pr. (*Gaius libro nono ad edictum provinciale*).

13 D. 13.6.18 pr. (*Gaius libro nono ad edictum provinciale*).

14 *P. Laur*. I 6; *P. Köln*. III 147. *Cf.* Jakab (2008), 73 ff.; Alonso (2012), 47 ff.

finitum, and therefore this type of *pactum* would have been considered invalid. It seems that it would have been contrary to the principles of equity.

It is worth noting that both fragments cited above come from the commentaries to Sabinus written respectively by Paulus and Ulpianus. Therefore it may be assumed that Sabinus was interested in various cases of *vis maior* and their impact on various contractual relations.

Lack of liability was not the only issue to be resolved. One also needed to decide which party assumed the risk (*periculum*) of a *force majeure* event. As a rule, it was the owner of the item to which the contract pertained, but in some cases that rule could be altered. The contractual clause of *meo periculo* was used for this puspose, as attested both in legal texts and practice documents (more on this Tarwacka, 2016a, 147 ff.; Tarwacka, 2018a, 130 ff.).

Occurrences at sea compelled crews and passengers of ships to take remedial actions. One of the options was jettison. This very institution will be the subject of further considerations.

Jettison at sea (i.e. *iactus*, or *iactura*) is a situation in which goods transported on a ship are thrown overboard in order to relieve it in a situation of the so-called average, or danger. This question was regulated by the *lex Rhodia de iactu*, which raises many doubts among researchers,[15] who dispute the provenance of norms regulating jettison. The crux of the problem lies in whether they had been copied from the law of the island of Rhodes, or whether they are an independent creation of Roman jurisprudence (*cf.* Atkinson, 1974; De Martino, 1995, 285 ff.).

The title *De lege Rhodia de iactu* in Justinian's *Digest* (D. 14.2) raises many reservations in the doctrine, mainly due to the fact that not all fragments contained there are related to the law of jettison. The fragments of the *Basilica* (called the pseudo-Rhodian law) that refer to the *lex Rhodia* do not dispel these doubts (*cf.* Osuchowski, 1950; Płodzień, 1961, 39–40).

A legal definition of jettison was formulated by Paulus[16].

> D. 14.2.1. *Paulus libro secundo sententiarum: Lege Rhodia cavetur, ut, si levandae navis gratia iactus mercium factus est, omnium contributione sarciatur quod pro omnibus datum est.*

The law allowed a merchant who had lost his goods as a result of throwing them overboard to relieve the ship to demand the return of some of the value of such goods from other people whose property was carried on that vessel. The *actio locati* served this purpose and it was brought against the master of the ship (*magister navis*), who was in turn entitled to recourse claims (in the form of *actio conducti*) towards other *locatores*,[17] and also could retain their goods until the settlement (*retentio*).

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[15] On the *lex Rhodia* see e.g.: Osuchowski (1950); Płodzień (1961); De Martino (1995); Kofanov (2017), 309 ff.

[16] *Cf.* Paulus, *Sent*. 2.7.1: *Levandae navis gratia iactus cum mercium factus est, omnium intributione sarciatur, quod pro omnibus iactum est.*

[17] D. 14.2.2 pr. (*Paulus libro trigensimo quarto ad edictum*). *Cf.* Aubert (2007), 161–163.

According to Paulus, the reason for jettison was the need to relieve the ship (*levandae navis gratia*). Situations necessitating such an action undoubtedly included a sea storm, which was mentioned by the jurists commenting on the *lex Rhodia*: Paulus[18], Callistratus[19] and Iulianus[20].

> Curt. Ruf. *Hist. Alex.* 5.9.4: *gubernator, ubi naufragium timet, iactura, quidquid servari potest, redimit*.

Having stated that sometimes one needed to make a difficult decision, Curtius Rufus gave an example of a captain who undertook a jettison for fear of wrecking the ship. It was the captain who was responsible for the ship, the crew and the passengers, and it was him who ordered the jettison to happen.[21]

> Iuv. *Sat*. 12,33: *cum plenus fluctu medius foret alveus et iam*
> *alternum puppis latus evertentibus undis*
> *arboris incertae, nullam prudentia cani*
> *rectoris cum ferret opem, decidere iactu*
> *coepit cum ventis…*

In one of his satires, Juvenal described a sea storm during which the helmsman was no longer able to control the ship. The captain decided to end the futile struggle by carrying out a jettison. The subsequent part of the text shows that this was not a sufficient remedy: it was also necessary to cut the mast down,[22] but eventually the ship survived and the catastrophe was avoided.

It seems, however, that the crew could have been forced to get rid of unnecessary burden by other circumstances, such as the need to escape the pursuit of a pirate ship. In that case, the decisive role was played by the speed the individual vessel was able to develop, so it can be assumed that the *iactus* was often a key measure. Pirate ships were usually small and swift, unlike merchant boats; therefore, during the chase, it was necessary to accelerate as much as possible. Limiting the possibility of jettison to the event of a sea storm would be disadvantageous for sailors and merchants transporting their goods at sea. Therefore, it can be assumed that a threat from a pirate ship and the need to evade it also justified the throwing of goods overboard to relieve the ship and increase its speed.

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[18] D. 14.2.2.2 (*Paulus libro trigensimo quarto ad edictum*): *tempestate gravi orta*.

[19] D. 14.2.4.1 (*Callistratus libro secundo quaestionum*): *in tempestate*.

[20] D. 14.2.6 (*Iulianus libro octogensimo sexto digestorum*): *adversa tempestate*.

[21] In one of the jokes from the Philogelos collection (80), the goods are thrown overboard by the passengers, who also ask the hero of the joke to do likewise. It seems, however, that it was the captain who ordered the jettison, and the actions of the crew and passengers resulted from this. *Cf.* A. Tarwacka (2016a), 140–143; Tarwacka (2018a), 124–126. In the *Acts of the Apostles* (27.18–19) goods and equippment are thrown overboard by the crew.

[22] Cutting down the mast also resulted in the need to settle because it served the interest of all persons on the ship. *Cf.* D. 14.2.3. *Papinianus libro nono decimo responsorum: Cum arbor aut aliud navis instrumentum removendi communis periculi causa deiectum est, contributio debetur*.

Literary texts contain many references to pirate chases. In his *Imagines*, Philostratus, an orator from the turn of the second century AD, describes a painting depicting the myth of Dionysus and the pirates.[23] The description of the pirate ship seems to reflect reality, not just a mythical tale. The Tyrrhenian ship was decorated with bright colours, eyes were painted on the bow, and the stern had the shape of a fish tail, which made the ship look like a sea monster. It is obvious, then, that one could spot the pirate ship from a distance. It was supposed to cause fear and panic but it could also have been a warning and a signal to flee as soon as possible.

It happened sometimes that pirates carried out reconnaissance at a port and looked for a ship that carried valuable cargo, and then they followed it to corner it on the high seas. If the crew or the passengers recognized the threat, they had a chance to escape. Such a situation was described by Plautus in his comedy *Bacchides*.[24] The slave Chrysalus was recounting a fictional adventure with the pirates to old Nicobulus. Mnesilochus, Chrysalus' master, and at the same time Nicobulus' son, was to collect the debt, following his father's orders. Having loaded gold on the ship, the slave realized (as he claimed) they were being tracked by a pirate ship, actually sent by an embittered debtor. The pirates prepared an ambush to loot the gold, and as soon as the ship sailed out of the harbor, they began chasing it, rowing 'quicker than the wind and birds'. In such a situation, the decision was made to return to the port, and the following day, in front of pirates' eyes, the gold was taken to Diana's priest and deposited there (*cf.* Zabłocki, 2015; Zabłocki, 2018). This fictitious tale suggest considerable acumen of sea robbers, who were able to obtain information about valuable cargoes. It is also worth noting that no robberies were carried out in ports, where there were many people: the pirates set an ambush at sea, where they had an advantage; above all, they were able to develop a higher speed than other ships. However, the behaviour of the potential victims is also very interesting: they returned to the safe harbor and disposed of the cargo which could have become the cause of the attack, depositing it for safekeeping.

The theme of a pirate ambush is also found in Heliodor's *Aethiopica*.[25] The band's leader, in love with the beautiful heroine, asked when the Phoenician ship would leave the port. The pirates followed the ship for a long time but were unable to capture it: the merchant vessel was larger and with the favorable wind the surface of her sails ensured high speed. However, the wind abated which gave the sea robbers the advantage of the sea as they were able to sail very quickly by rowing, in which the small size of their ship proved an asset. When it became clear that the pirates would catch up with their victims, there was a confusion on the merchant ship: some were hiding, some wanted to fight, and others sug-

[23] Philostr. *Imag*. 1.19.
[24] Plaut. *Bacch.* 277–307.
[25] Heliod. *Aeth*. 5.155; 5.159–160.

gested fleeing in the small boats. Given the absence of wind, jettison would not have been justified. However, it is interesting to obtain the description of human behaviour in the face of imminent danger.

It also happened that an attacked crew took up a fight against the pirates, sometimes with good results. In his *Memorabilia*, the jurist Massurius Sabinus described the case of Marcus Octavius Herrenus, who was engaged in commercial activity and, attacked by sea robbers, managed to withstand their assault.[26] The success was to be credited Hercules, to whom he made an offering, and consequently, Octavius build the hero a temple.

Pirate attacks were usually aimed at extorting a ransom. If one of the passengers paid it, the question arose whether and to what extent the others should participate in the loss suffered. Here, the Digest quotes the text of Paulus, who in turn draws on the opinion of Servius, Ofilius and Labeo in this matter.

> D. 14.2.2.3. *Paulus libro trigensimo quarto ad edictum: Si navis a piratis redempta sit, Servius Ofilius Labeo omnesque conferre debere aiunt: quod vero praedones abstulerint, eum perdere cuius fuerint. nec conferendum ei qui suas merces redemerit.*

In this passage, three cases are analyzed: the ransoming of a ship from the hands of the pirates, the seizure of property, and the ransoming of their own goods only by one of the merchants. In the first situation, everyone should contribute to the ransom paid for the entire ship. This is due to the fact that the payer acted in the common interest and hence they are entitled to the reimbursement of the costs. The phrase *omnes* must be understood as referring to all the passengers as well as the owner of the ship, who undoubtedly was interested in ransoming the ship too (*cf.* Aubert, 2007, 163). The *ratio legis* here is identical with the regulation governing jettison, where one of the merchants loses their goods to save all the others (*cf.* Płodzień, 1961, 113 and 114). The basic premise justifying the claim for the reimbursement of the costs incurred is acting in the common interest. In the second case examined in the source text, a person whose property was looted by the pirates cannot claim compensation. The prerequisite of acting in the common interest is not met in this situation. The same applies to the third case: it would be unfounded to refund the costs to the merchant who ransomed only his goods because he acted only in his own interest (*cf.* Moschetti, 1983, 881).

It should also be noted that the text includes two different terms denoting the criminals: *piratae*, which unambiguously means pirates, and *praedones*, which may mean both sea and land robbers. The view expressed in the literature is that the latter term means the robbers the merchant met when he came ashore and that, therefore, only paying the ransom to the pirates, not the land robbers, was subject

[26] Macrob. *Sat.* 3.6.11: *Marcus, inquit, Octavius Herrenus, prima adolescentia tibicen, postquam arti suae diffisus est, instituit mercaturam, et bene re gesta decimam Herculi profanavit. Postea, cum navigans hoc idem ageret, a praedonibus circumventus fortissime repugnavit et victor recessit. Hunc in somnis Hercules docuit sua opera servatum. Cui Octavius impetrato a magistratibus loco aedem sacravit et signum, Victoremque incisis litteris appellavit.*

to settlement (*cf.* Ashburner, 2001, 254). This opinion, however, seems inconsistent with the *ratio legis*. It is evident that the settlement took place only when someone suffered a loss by acting *removendi communis periculi causa*. In ancient times, as already observed, pirates prowled both land and sea. Therefore, it does not seem that the key issue was the place where the ransom was paid. When the merchant or passenger ransomed the entire ship, everyone benefited from it and should therefore participate financially, proportionally to the value of their saved goods transported on the ship. If, on the other hand, the pirates robbed a part of the cargo, the loss was incurred by the owner.

The problem of ransom in the context of pirate raids features quite often in literary texts, but in most cases it concerns buying out kidnapped citizens from the hands of sea robbers, not a ship or the goods it carried.

The most notorious case related to this issue is, of course, the famed episode of the pirates kidnapping Julius Caesar, probably in 75 or 74 BC.[27] Caesar got into the hands of the sea robbers most likely during a trip to Rhodes, where he was to study under the tutelage of the rhetoric master Molon.[28] For almost forty days, he was held near the island of Farmacusa, after which a ransom of fifty talents was paid for him and he was released. He immediately gathered a fleet, apprehended his captors and crucified them all. Ancient authors emphasized Caesar's courage and the composure he kept while being among the pirates. According to Plutarch, when the robbers demanded a ransom for him in the amount of twenty talents, he laughed at them and raised the sum to fifty.[29] When Caesar's slaves managed to collect the ransom in the cities of Asia Minor, he forced the pirates to provide hostages for those cities before he allowed the payment of money.[30] In this case, however, the ransom surely concerned the person of Caesar, not the ship or goods.

The same applies to the cases of kidnapping described in rhetorical exercises. Prisoners would write letters home asking for the payment of ransom. Sometimes relatives brought the desired sum (at the same time exposing themselves to

[27] A thorough analysis of sources with a view to dating this event was conducted by A.M. Ward in his two articles: Ward (1975) and Ward (1977). In the first of these, the researcher argued that the kidnapping of Caesar is more likely to have taken place in 81 BC, but in the second one he strongly opted for 75/74 BC. Osgood (2010), 334–336 supported the dating of the event to 74 or the turn of 74/73 BC. *Cf.* also Gelzer (1968), 23 ff.; Tarwacka (2009), 119 ff.; Tarwacka (2016b), 238 ff.

[28] *Cf.* Suet. *Div. Iul*. 4.1; Plut. *Caes.* 3.1.

[29] Plut. *Caes.* 2.1.

[30] The ransom was paid out of the public money of these communities; Vell. Pat. 2.42.2: *publica civitatium pecunia redemptus est*. Gelzer (1968), 23–24, decided that Caesar had blamed these cities for inadequate protection of the coasts and that is why he had demanded the money. Still, Osgood (2010), 329 ff., rightly noted that Caesar was known in this area and had a large clientele.

enslavement as pirates did not always keep their word[31]), and sometimes no response came and then the kidnapped were sold as slaves or even killed.[32]

It should be assumed that the two cases described, i.e. paying the ransom for a ship and goods and buying out prisoners from the hands of pirates, constitute two institutions governed by completely different laws. The opinion of Servius, Ofilius and Labeo quoted by Paulus concerns only the ransom for things, which, moreover, is consistent with the legal structure of the jettison institution, which did not provide for the settlement in respect of free person's life, but only of items, as *corporum liberorum aestimationem nullam fieri posse*.[33] Buying out a prisoner would not fulfill the condition of acting in the common interest because it was an individual advantage.

In conclusion, therefore, the regulations on participation in the loss incurred by persons traveling by ship were very consistent. The settlement was possible only in the case of acting in the common interest. In the event of jettison, its purpose was to relieve the vessel and increase its handling and speed. The potential causes included a sea storm and the risk of shipwreck, as well as – apparently – being pursued by pirates. However, if the ransom was paid to the pirates, reimbursement was possible only if everyone benefited from it, and therefore when the entire ship was ransomed. The settlement did not encompass individual items ransomed separately as well as the property that sea robbers had seized.

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[31] *Cf.* Sen. *Contr.* 7.4.1. Seneca admitted that even the fathers of the kidnapped were afraid of the arrival of pirates: *eo loco* (…) *in quem venire etiam patres timuerunt* (Sen. *Contr.* 1.6.2).

[32] Sen. *Contr.* 7.4.5.

[33] D. 14.2.2.2 (*Paulus libro trigensimo quarto ad edictum*).

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Anna Tarwacka

USING *LEX RHODIA* IN THE CASE OF A PIRATE ATTACK

The regulations on participation in loss incurred by persons traveling by ship were very consistent. The settlement was possible only in case of acting in the common interest. A jettison was carried out in order to relieve the vessel and increase its handling and speed. The cause could be a sea storm and the risk of wrecking the ship, but also, it seems, a pirate chase. In such case a person who suffered a loss could demand reimbursement from the ship's captain who could then sue other passengers. However, if the ransom was paid to the pirates, reimbursement was possible only if everyone benefited from it, and therefore when the entire ship was ransomed. Individual items ransomed separately and what the sea robbers had seized were not subject to the settlement.

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SEPTIMIUS SEVERUS – RESTITUTOR CASTRORUM (ET PORTUS) OSTIENSIUM[1]

I. Ostia und sein Hafen vor den Severern – Abriss der Geschichte

Die Einwohner von Ostia waren überzeugt, dass ihre Stadt die erste Kolonie Roms war. Als ihr Gründer galt traditionell Ancus Marcius, so dass die Gründung der Stadt auf das siebte Jahrhundert v. Chr. datiert wurde[2], obwohl archäologische Forschungen, die in den neunziger Jahren des zwanzigsten Jahrhunderts durchgeführt wurden, es uns ermöglichen, die Gründung von Ostia auf die Wende vom sechsten zum fünften Jahrhundert v. Chr. zu datieren (Adembri, 1996).

[1] Abkürzung: PIR² – *Prosopographia Imperii Romani Saec I. II. III*, Berlin 1933–2015².

[2] Cicero schreibt, dass Ancus Marcius *ad ostium Tiberis urbem condidit, colonisque formavit* (Cic. *Rep.* 2.18.33; 2.3.5). Titus Livius präzisiert die Lage der Stadt, indem er schreibt, dass *in ore Tiberis Ostia urbs condita, salinae circa factae* (Livy, *Per.* 1.33.9). Auch Strabon behauptet, dass Ostia das Werk von Ancus Marcius sei (Strabon 5.3.5). Nach Aurelius Victor war der Grund für die Anlage der Kolonie durch Ancus die Absicht, Rom über den Seeweg besser zu versorgen: *Ostiam coloniam maritimis commeatibus opportunam in Ostia Tiberis deduxit* (Aurel. Vict. 5.3). An die Gründung der Stadt durch Ancus Marcius erinnert Servius: *hic [Ancus] Ostiam fecit (Ad Aen.* 6.815), und ebenfalls Eutropius: *Ancus Marcius* (…) *apud ostium [Tiberis] civitatem supra mare sexto decimo militario ab urbe Roma condidit* (Eutr. 1.5). Am vorsichtigsten ist Plinius, der nur behauptet, das Ostia ein „römischer König" gründete (Plin. NH 3.56). Dionysios von Halikarnassos erklärt die Wahl des Ortes und den Namen der Stadt (Dion. Hal. 3.44.4). Er gibt auch die Information, dass die Stadt im Jahre 134 nach der Gründung Roms angelegt wurde, d.h. im Jahre 619 v. Chr.

F. Zevi schließt jedoch optimistisch nicht aus, dass Spuren einer noch älteren Siedlung an einem noch nicht untersuchten Ort gefunden werden können, weiter östlich der antiken und modernen Stadt[3].

Ursprünglich war Ostia ein Militärlager mit einer Größe von 194 mal 125 Metern (Mar, 1991). Es war von Mauern aus Tuffsteinblöcken umgeben, die später beim Bau des Forums verwendet wurden. Zwei Hauptstraßen, *cardo* und *decumanus*, führten zu vier Toren. Die Hauptfunktion des Militärlagers war der Schutz der Küste und der dort befindlichen Salinen. Etwas später wurde Getreide in Ostia gelagert, und eben dann wurde die Funktion als Getreidespeicher von Rom vorrangig für diesen Ort.

Im Jahr 267 v. Chr. wurde das Amt des *quaestor classicus* in Ostia eingerichtet (Chandler, 1978). Die Gründung dieses Amtes erhöhte den Rang der Stadt, und einige Forscher (z.B. W. Harris) glauben, dass dies mit der Entwicklung der römischen Kriegsmarine, der Erweiterung des Hafens (Goiran [*et al.*] 2014) und der Vorbereitung auf den Krieg mit Karthago verbunden werden sollte (Harris, 1976). Titus Livius beschreibt die Abfahrt eines Lebensmittelkonvois von Ostia nach Spanien im Jahr 217 v. Chr.[4] und erwähnt, dass 215 v. Chr. Schiffe, die nach Taranto fuhren, von Ostia aus starteten[5]. Es wurde jedoch darauf hingewiesen, dass der damalige Flusshafen vor einem ernsthaften Problem stand: Aufgrund seiner Lage konnte er wahrscheinlich nicht mehr als zwanzig Schiffe gleichzeitig aufnehmen. Wenn man für das Entladen eines Schiffes von etwa 250 Tonnen 6 bis 8 Tage ansetzt, heißt das, dass der Hafen ineffizient und dauerhaft verstopft war[6]. Caesar plante, dieses Problem durch den Ausbau des Hafens und die Regulierung der Tibermündung zu lösen, aber sein Tod führte zur Aufgabe dieser Pläne[7].

Seine Blütezeit erlebte Ostia nach dem Ende der Bürgerkriege. Bis zum Ende der Julianisch-Claudischen Dynastie war die Infrastruktur von Ostia an die neuen Standards der Epoche, an das neue politische Modell „angepasst" worden. Das Forum wurde umgebaut und der Tempel der Roma und des Augustus errichtet. Zwischen der Westseite des *decumanus* und der *via della Foce* wurden der Markt und das *macellum* erneuert. Während der Herrschaft von Augustus, Tiberius und Claudius wurden in Ostia drei riesige Speicher gebaut. Tiberius errichtete auch ein Aquädukt für die sich dynamisch entwickelnde Stadt. Dank der Bemühungen von Marcus Agrippa konnten die Einwohner von Ostia auf attraktive Weise die öffentliche Pracht des erneuerten Staates dank der Schaffung eines neuen Theaters erfahren (Cooley, 1999).

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[3] Zu dieser Theorie siehe: Zevi (2001), 5–6, besonders Note 16. Die neuesten Zusammenfassungen zu den Forschungen auf dem Gebiet von Ostia: Pavolini (2016).

[4] Livy, *Per*. 22.11.

[5] Livy, *Per*. 23.38.

[6] Archäologische Forschungen, die die Existenz eines Hafens am Tiber belegen, siehe: Heinzelman, Archer (2002).

[7] Plut. *Caes.* 58.10.

Zweifellos muss als größte Investition dieser Zeit, die sich direkt auf die Entwicklung der Stadt auswirkte, der von Augustus begonnene, aber zu seinen Lebzeiten unvollendete Umbau des Hafen, angesehen werden. Erst 42 n. Chr. kam Kaiser Claudius auf diesen Plan zurück[8]. Der Ausbau dauerte zwölf Jahre und sein Abschluss fiel bereits in die Zeit der Herrschaft Neros. Der 52 Hektar große Ankerplatz wurde über einen Kanal mit dem Tiber verbunden. Zwischen den Wellenbrechern wurde eine künstliche Insel aufgeschüttet auf der ein Leuchtturm errichtet wurde (Weiss, 2013).

Die nächste Phase der beschleunigten Monumentalisierung der Stadt fällt unter die Herrschaft von Domitian. Auf dem Forum wurde eine Basilika[9] und auf der anderen Seite des *decumanus* eine Curia gebaut (Balty, 1991, 121–127, 375–376, 614). Ende des ersten Jahrhunderts begannen sich auf der erweiterten *Piazza di Corporazzioni* Vertreter von Kollegien und Korporationen, Händler und Seeleute zu treffen. Diese Zeit wird als architektonische Revolution bezeichnet (Kockel, 1992, 109)[10]. Es war vor allem der reibungslos funktionierende Hafen, der für die Entwicklung Ostias unter der Herrschaft Domitians wichtig war. Die signifikante Zunahme des Volumens der Getreidelieferungen in den Hafen war auch mit einem Aufwärtstrend und der rasanten Entwicklung der Stadt selbst verbunden – eine natürliche Folge davon war die Erweiterung der Hafenkais, die wiederum dazu führte, dass Ostia reicher wurde, und Zeugnis für die Größenordnung der Getreidelieferungen, ist das aus keiner anderen Stadt im Latium bekannte Ausmaß des Baus von Getreidespeichern[11].

Aus der Zeit der Herrschaft von Trajan und Hadrian gibt es Hinweise auf die älteste Geschichte Ostias, die gleichzeitig eine eigentümliche „Legitimation" ihrer Macht darstellen[12]. Eben dies könnte der Grund für die Errichtung eines Denkmals für Ancus Marcius in Ostia gewesen sein[13]. 132/133 errichtete Ostia ein Reiterstandbild für Kaiser Trajan, um ihm für seine Fürsorge, die Verschönerung und die Erweiterung der Stadt zu danken[14]. Der Dank für die Wohltaten des Kaisers

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[8] Suet. *Claud.* 20.

[9] Die Basilika wird im Allgemeinen in die Zeit Domitians oder Trajans datiert. Für eine Datierung in die Zeit Domitans sprachen sich aus: Meiggs (1960), 66; Freyberger (1990), 24–26; für eine Datierung in die Zeit Trajans: Becatti (1953), 123; Pensabene (1973), 62; Balty (1991), 121. Keiner der Autoren führt jedoch überzeugende oder entscheidende Beweise für seine Einschätzung an.

[10] Kockel (1992), 109. Diese ist eine Paraphrase für den Begriff „Bauboom", den für das Ostia des 2. Jahrhunderts M. Heinzelmann in die Diskussion einführte. Der ausführliche Artikel zu diesem Problem: Heinzelmann (2002).

[11] Speicher finden sich in allen Teilen der Stadt. Besondere Bedeutung hatten jedoch die sogenannten Grandi Horrea. Zu ihrer Geschichte und den Phasen ihres Ausbaus (1.–3. Jh. n. Chr.): Bukowiecki, Rousse (2007); Bukowiecki, Monteix, Rousse (2008); Boetto, Bukowiecki, Monteix, Rousse (2016).

[12] Dies ist charakteristisch für die Herrschaftszeit Hadrians und nicht nur an der Baupolitk in Rom, sondern im gesamten Reich sichtbar. Siehe u.a.: Boatwright (1989).

[13] CIL XIV 4338: *A[nco] / Mar[cio] / reg[i R]o[m(ano) / quart[o a R]omulo / qui a[b urbe c]ondit[a / pri]mum colon[iam c(ivium) Rom(anorum)] / dedux[it]*. Mehr zu den Inschriften: Zevi (2000).

[14] CIL XIV 95: *Imp. Caesa[ri divi] / Traiani Par[thici f] /divi Nervae [nepoti] / Traiano Had[riano] / Aug., pontifici m[aximo] / trib. potest. XVII, cos. III, p.p / colonia Ostia / conservata et aucta / omni indulgentia et / liberalitate eius.*

(die leider nicht in der Inschrift erwähnt werden) stand wahrscheinlich im Zusammenhang mit dem Umbau des zentralen Teils der Stadt zwischen Forum und Tiber (Boatwright, 1997; Boatwright, 2000). Während der Herrschaft von Hadrian wurden auch Bauarbeiten auf einem großen Gebiet vom Forum bis zum Fluss und vom *cardo Maximus* bis zur *Via degli Horrea Epagathiana* durchgeführt[15]. Der nördliche Teil des *cardo* wurde zur Haupt- und Repräsentationsstraße von Ostia. Erst damals wurde das „alte" Capitol (Bagdeley, 1929; Albo (2002) abgerissen und an seiner Stelle ein neuer Tempel gebaut. Der Tempel dominierte nun nicht nur den Platz, es wird angenommen, dass er von fast jedem Punkt der Stadt aus sichtbar gewesen sein mus (Boatwright, 1997). Ostia war in dieser Hinsicht keine Ausnahme, da sowohl Trajan als auch Hadrian in anderen Städten im Latium ebenso kostspielige urbane Initiativen unternahmen (Boatwright, 1989).

Eine der kaiserlichen Initiativen war jedoch von besonderer Bedeutung für das Funktionieren Roms und hatte einen großen Einfluss auf die Geschichte Ostias. In den Jahren 101–104 ließ Trajan außerhalb des Hafens von Claudius ein sechseckiges Innenbecken mit einem Durchmesser von 600 Metern bauen, das ebenfalls durch einen Kanal mit dem Tiber verbunden war[16]. Man kann sagen, dass sich zu dieser Zeit das „Hafenleben" entwickelte, verursacht durch die Schaffung einer Art „Trastevere", in dem eine Reihe von Gebäuden gebaut wurden. Die „alte" Bevölkerung der Stadt wurde zu einer Minderheit in der riesigen Menge von schnell ankommenden Neuankömmlingen. Der weitere Umbau der Stadt war mit der Verbreiterung der Straßen, dem Bau neuer Wohngebäude (*insulae*) verbunden – Ostia war damit nicht nur die „Kornkammer Roms", sondern auch ein nahezu unabhängiges Handelszentrum. Die rasante Entwicklung der Bauten im Zentrum von Ostia im zweiten Jahrhundert n. Chr. war dagegen mit den privaten Interessen seiner Bewohner verbunden.

Menschen kamen in die Stadt, um den Kai und die Schiffe zu bedienen, die den Hafen anliefen. Es wurden Maklerbüros und Kaufmannsvereinigungen gegründet. Dies führte zu einer natürlichen Entwicklung der gesamten Stadt. Die Erweiterung des Hafens entschied über die intensivierte Bautätigkeit und den Wohlstand von Ostia. Die Stadt erhielt einen kosmopolitischen Charakter, was vor allem darauf zurückzuführen war, dass sie zum „Tor Roms" wurde. Mit der Hafenerweiterung wurden nicht nur die Lagerhallen in der Stadt erweitert und ausgebaut – große *horrea*, sondern es entstanden auch Handelsvertretungen, und staatliche Ämter zur Kontrolle der Versorgung (Zevi, 2000). Der Bedarf an Wohnungen für Hafenarbeiter, Hotels, Tavernen und öffentliche Bäder stieg. Die Bauarbeiten sind am besten im westlichen Teil der Stadt zu sehen, zwischen der *Via della Foce* und dem Fluss und westlich der *Via degli Horrea Epagathiana*. In diesem

[15] Man darf nicht vergesen, dass über 50% aller ergrabenen Gebäude in die Regierungszeit Hadrians datiert werden. Im Jahre 132/133 stellte die Stadt dem Kaiser CIL XIV 95 auf. Zur Tätigkeit Hadrians in den Städten des Reichs: Boatwright (2000), zu Ostia: 29–30, 67–68, 86–87, 125–126.

[16] Juv. *Sat.* 12.75.

Teil der Stadt wurden die Gebäude des Badehauses und *Horrea Maensores* gebaut oder modernisiert. Auch das Stadtgebiet um die Neptunbäder (*Terme di Nettuno*) und die Kaserne (*Caserma dei Vigili*) wurde am Ende der Herrschaft Hadrians umgebaut. Es war Hadrian, der Ostia zwei Millionen Sesterzen für den Beginn des Baus des städtischen Badehauses versprach, das Antoninus Pius fertigstellte[17].

* * *

Die Nähe Roms beeinflusste zweifellos die Entwicklung Ostias, seine Funktionen als Schutz der Küste und als Getreidespeicher Roms. Dies wiederum war mit dem Hafencharakter der Stadt verbunden (siehe z.B.: Bruun, Zevi, 2002).

Seit Beginn ihrer Existenz entwickelten sich die Stadt und ihr Hafen als *vitae parallelae* – jede Renovierung oder Erweiterung des Hafens beeinflusste die Entwicklung der Bauten und den wirtschaftliche Wohlstand von Ostia[18].

Nicht anderes war es auch während der Herrschaft der Severer, die für Ostia eine Zeit der Reparaturen, der Umbauten und der Modifikationen war, insbesondere im Zusammenhang mit den Arbeiten im Hafen von Ostia.

II. Septimius Severus und Ostia

Die Herrschaft von Septimius Severus[19] war eine Zeit der besonders günstigen Entwicklung sowohl der Kolonie als auch des Hafens von Ostia. Bevor ich jedoch zur ausführlichen Besprechung der Rolle Ostias in der Politik dieses Herrschers eingehe, möchte ich kurz auf die Verbindungen des zukünftigen Kaisers zu diesem Zentrum in den Jahren vor Beginn seiner Herrschaft hinweisen. Aus den Informationen über die ersten Lebensjahre von Severus erfahren wir, dass der aus der Hafenstadt Lepcis Magna stammende zukünftige Herrscher des Imperiums sich als Jugendlicher, wahrscheinlich um 162, auf eine Reise nach Rom machte, um dort die nächsten Stufen des senatorischen *cursus honorum* zu nehmen[20]. Obwohl uns die Details dieser Reise nicht bekannt sind, können wir mit hundertprozentiger Sicherheit davon ausgehen, dass der junge Lucius die Reise auf dem Seeweg zurücklegte, von Lepcis Magna bis zum Hafen von Ostia. Damals hatte er wahrscheinlich die Gelegenheit, die Stadt und den Hafen an der Tibermündung zum ersten Mal zu sehen und kennenzulernen. Er musste auch den Hafen von Ostia nutzen, und dies wahrscheinlich auch viele Male später, wie z.B. 173 n. Chr.,

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[17] CIL XIV 98: *Imp. Caesar divi Hadriani fil., divi Traiani Parthici nep., divi [Nervae] / pronepos, T. Aelius Hadrianus Antoninus Aug. Pius, ponti.max. trib. Potes[t II cos II] / thermas in quarum extructionem divos pater suus HS XX polli[citus erat] / adiecta pecunia quanta amplius desiderabatur, item marmoribus ad omnem o[rnatum perfecit].*

[18] Siehe auch die Bemerkungen von: Heinzelmann (2010). Die neuesten Veröffentlichungen zu den archäologischen Ausgrabungen im Gebiet des Portus: Keay, Paroli (2011); Keay (2012b).

[19] Die wichtigsten Biographien von Septimius Severus: Kotula (1987); Birley (1999); Spielvogel (2006). Siehe auch PIR² S, Nr. 487; Kienast, Eck, Heil (2017), 148–152.

[20] SHA *Sev.* 1.5. Siehe Kotula (1987), 124. Datierung: PIR² S, Nr. 478, S. 191.

als er – nach seiner Wahl zum Legaten des Statthalters der Provinz *Africa proconsularis* – auf eine Seereise von Rom nach Afrika ging[21]. Wir können also sicher sein, dass es dem zukünftigen Kaiser, wenn auch nur flüchtig gelungen ist, das römische „Fenster zur Welt" kennenzulernen, und sich der strategischen Bedeutung von Ostia für Italien und insbesondere für Rom bewusst war.

Kommen wir nun zu den frühen 90er Jahren des zweiten Jahrhunderts n. Chr. In der Nacht zum Jahresende 192 wurde Kaiser Commodus, der letzte Herrscher der Antoninischen Dynastie, ermordet[22]. Der neue Kaiser Pertinax[23], ein erfahrener Offizier der römischen Legionen, war sich bewusst, dass die Aufrechterhaltung der Sicherheit der Getreideversorgung Roms, die durch Ostia erfolgte, von äußerster Wichtigkeit war, um die Ruhe des römischen Plebs zu gewährleisten. Um die Getreidebestände zu inspizieren, reiste Pertinax Anfang März 193 nach Ostia. Vom kaiserlichen Besuch an der Tibermündung berichtet uns Casius Dio, dessen Bericht leider nicht im Original, sondern in den mittelalterlichen Auszügen von Johannes Xiphilinos erhalten ist[24]. Es ist mehr als sicher, dass der Kaiser dort einen ritterlichen Beamten getroffen hat (Birley, 1999, 93), der als *procurator ad annonam Augg. Ostiis*[25] im Namen der kaiserlichen Herrschaft für die Sicherheit des nach Rom kommenden Getreides verantwortlich war. Während dieser Zeit war dies, übrigens seit langer Zeit C. Iulius Avitus Alexianus[26]; dass er als *procurator ad annonam Augg. Ostiis* diente, ist durch eine in Split in der römischen Provinz Dalmatien gefundenen Inschrift gesichert[27]. Privat war Alexianus der Schwager von Julia Domna, die wiederum – wie wir sehr gut wissen – seit einigen Jahren die Frau von Septimius Severus war[28]. Alexianus war damit ein naher angeheirateter Verwandter des zukünftigen Kaisers.

Die Ergebnisse des kaiserlichen Besuchs in Ostia sind jedoch nicht im Detail bekannt, außer dass Pertinax unterbrechen ihn musste, nachdem er erfahren hatte, dass die Prätorianer einen gewissen Falco zum Kaiser ausgerufen hatten[29]. Kurz nach seiner Rückkehr nach Rom wurde der Herrscher ermordet und sein

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21 SHA *Sev.* 2.5.

22 Cass. Dio 73.22.1–6; Hdn. 1.17.8–12; SHA *Comm. Ant.* 17.1–2.

23 Zu Pertinax – siehe PIR² H, Nr. 73; Kienast, Eck, Heil (2017), 145–146.

24 Cass. Dio 74.8.2.

25 Es geht hier um Marcus Aurelius und Commodus.

26 Zu C. Iulius Avitus Alexianus vgl. Cass. Dio 79.30.2. Siehe PIR² I, Nr. 192; Barbieri (1952), 70, Nr. 286; vgl. auch Birley (1999), 175; Okoń (2017), Nr. 563, 144–145.

27 ILJug. III 2076: *C(aio) Iulio [Avito Ale]/xiano [praef(ecto) coh(ortis) --- Ulp(iae)] / Petraeo[r(um) trib(uno) leg(ionis) ---] / praef(ecto) eq(uitum) [al(ae) --- **proc(uratori)] / ad anno[nam Augg(ustorum) Ostiis**] / c(larissimo) v(iro) prae[t(ori) sodali Titiali] / leg(ato) leg(ionis) III[I Fl(aviae) leg(ato) pro pr(aetore) pro]/vinciae [Raetiae co(n)s(uli) co]/miti Imp[p(eratorum) Severi et Anto]/nini in B[ritannia praef(ecto)] / aliment[orum comiti Imp(eratoris)] / Antonin[i in Mesopotamia (?)] / praef(ecto) ali[ment(orum) II leg(ionis) pro pr(aetore)] provin[ciae Dalmatiae] / procon[suli prov(inciae) Asiae (?)] / praesidi [clementissimo] / M(arcus) Aure[lius ---] / trib(unus) coh(ortis) [I |(miliariae) Dalmatar(um?)] / Anto[ninianae -------].*

28 Die Ehe zwischen Septimius Severus und Julia Domna, über die uns antike Quellenberichte informieren, wurde im Jahre 187 in Lugdunum (heute Lyon) in Galien geschlossen; vgl. Levick (2007), 31.

29 Cass. Dio 74.8.2–3.

Tod markierte den Beginn eines langen Bürgerkriegs im Reich[30]. Hier fehlt der Platz, um den Verlauf der ersten Monate des *bellum civile* zu diskutieren[31]. Es genügt zu sagen, dass Rom Anfang Juni von der Armee eines der Usurpatoren besetzt war, der zweifellos Septimius Severus war, und der ephemere Kaiser Didius Julianus teilte das Schicksal von Pertinax und starb ermordet[32]. Der gerade erwähnte Alexianus, der Prokurator für Versorgung in Ostia, stellte sich zweifellos sofort auf die Seite von Severus, wie man an seiner weiteren glänzenden, noch viele Jahre dauernden Karriere (auch während der selbstständigen Regierung von Caracalla) erkennen kann[33].

Als weitere Merkwürdigkeit können wir hier feststellen, dass der Marsch von Septimius Severus nach Rom, offiziell *expeditio Urbica* genannt[34], interessanterweise, obwohl er auf dem Landweg stattfand, maritime Akzente hatte. Erstens wird in den Quellen auf die rasche Besetzung des Hafens von Ravenna durch Severus hingewiesen, dank der die in die Hauptstadt marschierenden Truppen ihre hintere Flanke sicherten[35]. Zweitens wissen wir, dass Kaiser Didius Julian, der sich darauf vorbereitete, Rom vor den anrückenden Armeen des Severus zu verteidigen, in Misenum stationierte Matrosen der Flotte zur Verteidigung der Stadt einsetzte[36].

Der neue Herrscher, der jetzt vor einer bewaffneten Auseinandersetzung mit Pescennius Niger und in weiterer Perspektive Clodius Albinus stand, war sich natürlich ähnlich wie zuvor Pertinax der entscheidenden Bedeutung der Getreidelieferungen nach Rom für die Aufrechterhaltung der Ruhe in der Stadt und in diesem Zusammenhang der strategischen Lage von Ostia bewusst, durch die das afrikanische Getreide die Metropole am Tiber erreichte. Bei der Vorbereitung der *expeditio felicissima Asiana* (so wurde die Expedition gegen Niger offiziell und euphemistisch genannt)[37], befahl Septimius Severus unter anderem den ihm treuen Truppen, die Provinz Afrika schnell zu besetzen, um zu verhindern, dass die Getreidelieferungen nach Ostia und Rom durch die Anhänger von Pescennius Niger unterbrochen würden[38]. Wir wissen nicht, ob Alexianus, der jetzt in den Senatorenstand erhoben wurde, weiter auf seinem Posten als Prokurator *ad annonam* in Ostia blieb. Aber selbst wenn er ausgetauscht worden wäre, können wir nicht daran zweifeln, dass der neue Kaiser einen anderen vertrauenswürdigen Mann für diese wichtige Aufgabe geschickt hätte.

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30 Cass. Dio 74.9–10; Hdn. 2.5.1–9; SHA *Pert.* 11.9–13; SHA *Clod. Alb.* 1.1.

31 Dazu ausführlicher Janiszewska (2010).

32 Der Tod von Didius Julianus: Cass. Dio 74.17.4–5; Hdn. 2.12.7; SHA *Did. Iul.* 8.6–8; SHA *Sev.* 5.10–6.1; der Einmarsch der Truppen des Severus in Rom: Cass. Dio 75.1.3–5.

33 Cass. Dio 79.30.4. Vgl. auch Okoń (2009), 136.

34 Siehe ILAfr. 455 und AE 1985, 829.

35 Cass. Dio 74.17.1.

36 Cass. Dio 74.16.3.

37 Vgl. CIL II 4114 und AE 1985, 829.

38 SHA *Sev.* 8.7.

Obwohl Septimius Severus mehrere Jahre lang bis Mitte 202 n. Chr. außerhalb Roms blieb und sowohl Bürgerkriege als auch Feldzüge außerhalb der Reichsgrenzen durchführte, verlor er die Kolonie und den Hafen in Ostia nie ganz aus den Augen. So wissen wir zum Beispiel, dass der Kaiser in seiner frühen Regierungszeit den Wiederaufbau und die Erweiterung des Theaters von Ostia (das noch von Commodus begonnen wurde) beendete, was durch eine monumentale Inschrift (die heute jedoch erheblich beschädigt ist) belegt wird, die in die Außenwand des Gebäudes eingemauert wurde[39]. Ihre genaue Datierung bereitet uns einige Probleme, dennoch können wir aufgrund einiger Indizien (*trib. pot. IIII*) davon ausgehen, dass die Restaurierungsarbeiten um 197 n. Chr. abgeschlossen wurden[40]. Die Entscheidung für diese war natürlich mehr auf einen entsprechenden Propagandaeffekt als auf einen konkreten, messbaren strategischen Nutzen gerichtet.

Neben reinen Propagandamaßnahmen unternahm der neue Kaiser jedoch wichtige Veränderungen, die bereits in direktem Zusammenhang mit der Aufgabe standen, Ostia als einen äußerst wichtigen Ort für das gesamte Reich zu sichern. Diese Änderungen betrafen die in Ostia stationierten paramilitärischen Vigilkohorten (*cohortes vigilum*), die seit der Herrschaft von Kaiser Domitian dauerhaft in der Stadt präsent waren. Dieser Herrscher initiierte für diese den Bau von Ziegelkasernen im Zentrum der Kolonie Ostia. Die Kasernen, die von Hadrian grundlegend umgebaut worden waren, wurden nun auf Initiative von Septimius Severus erneut umgebaut (Baillie Reynolds, 1926, 107–108; vgl. auch Meiggs, 1960, 81; Romano, 2007; Bouke van der Meer, 2013, 20). Das war aber nicht das Wichtigste. Der neue Kaiser beschloss auch, die Zahl der an der Tibermündung stationierten Vigilkohorten zu verdoppeln. Bis zu dieser Zeit waren 320 Personen in der Kaserne stationiert. Seit der Zeit des Septimius Severus waren es 640, von denen die Hälfte – wie bis zu dieser Zeit – in der Kolonie blieb, während die andere Hälfte in den Hafen geschickt wurde. Letzteres wird durch epigraphische Funde aus Portus belegt[41].

Leider ist es schwierig, mit Sicherheit festzustellen, wann diese Änderung vorgenommen wurde. In der Fachliteratur wird davon ausgegangen, dass dies um 205 erfolgt (Rainbird, 1986, 150). Allerdings müssen wir feststellen, dass es überhaupt keine zuverlässigen Quellenmaterialien gibt, die dieses Datum bestäti-

[39] CIL XIV 114: *Imp(erator) C[aes(ar) divi M(arci) Antonini fil(ius) divi] / [Commodi frater divi Anto]nin[i Pii] / [n]ep[os divi Hadr]ian[i pro]nepos divi / Traiani a[bnepos d]ivi Ner[vae adnepos] / L(ucius) Septimius Sev[erus Pius Pe]rtinax Au[g(ustus)] / [Arab(icus) Adiab(enicus) Parthic(us) max(imus) pontifex max(imus)] / [tri]bun[i]c(ia) potest(ate) II[II i]mp(erator) [VI]II co(n)s(ul) II et / [Marc]us Aurelius Antoninus Caesar / dedicaverunt*.

[40] Siehe jedoch Epigraphische Datenbank Heidelberg (https://edh-www.adw.uni-heidelberg.de), Nr. HD032548 (Datierung: 194 n. Chr.); Bouke van der Meer (2013), 28 (Datierung: 198 n. Chr.); Bolder-Boss (2014), 114 (Datierung: 194 n. Chr.).

[41] CIL XIV 13; CIL XIV 14; Epigraphik-Datenbank Clauss – Slaby; http://www.manfredclauss.de: Nr. EDCS-13600116.

gen würden. Es kann daher nicht völlig ausgeschlossen werden, dass dies früher geschah, etwa zur gleichen Zeit, als 193 die bis zu dieser Zeit bestehende Prätorianergarde vom Kaiser aufgelöst und durch eine neue ersetzt wurde[42]. Die zweite der hier genannten Varianten erscheint mir jedoch weniger wahrscheinlich und ich erlaube mir, etwas später darauf zurückzukommen.

Zunächst ist jedoch festzustellen, dass Kaiser Lucius Septimius Severus für seine Verdienste im Zusammenhang mit der Reorganisation der Vigilkohorten in Ostia den Ehrentitel *restitutor castrorum Ostiensis* erhielt, der in einigen epigraphischen Zeugnissen aus Ostia zu finden ist. Zusammen mit ihm wurde Caracalla als Erneuerer des Lagers von Ostia geehrt, was nicht verwunderlich ist, da sein älterer Sohn seit 198 offizieller Mitregent im Reich war und den Titel eines *Augustus* trug. Die oben genannten Inschriften wurden auf Betreiben von Caius Laecanius Novatillianus, Unterpräfekt der Vigilkohorten, und M. Flavius Raesianus, einem Tribun der zweiten Vigilkohorte in Ostia, angebracht, der gleichzeitig die Funktion des Befehlshabers (im Rang eines *praepositus*) aller an der Tibermündung stationierten Soldaten ausübte. Sie datieren aus dem Jahr 207 n. Chr.[43]

An dieser Stelle möchte ich die Auffassung zum Ausdruck bringen, dass die Reorganisation der Garnison und die Erweiterung der Kaserne der Vigilkohorten in Ostia im Zusammenhang mit dem bevorstehenden Feldzug nach Großbritannien (*expeditio felicissima Britannica*) durchgeführt wurde, dessen Ziel war, die nördlichen Teile der Insel, die noch nicht erobert waren, endgültig der römischen Herrschaft zu unterwerfen[44]. In dieser Kampagne sollte der Flotte eine besondere Rolle zukommen, denn – anders als bei allen früheren Expeditionen von Septimius Severus – mussten die gesamten römischen Expeditionsstreitkräfte und damit nicht nur die kämpfende Truppe, sondern auch die Ausrüstung und Verpflegung mit Kriegs- und Handelsschiffen nach Britannien gebracht werden. Bei der bevorstehenden Kriegsexpedition sollten Ostia und der nahe gelegene Hafen sicherlich eine wichtige Rolle spielen, weshalb Fragen im Zusammenhang mit der

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42 Die Auflösung der Prätorianergarde durch Septimius Severus: Cass. Dio 75.1.1.

43 CIL XIV 4381: *Imp(eratori) Caesari / L(ucio) Septimio Severo / Pio Pertinaci Aug(usto) / Arabico Adiabenico Parthico maximo / Felici pontifici max(imo) trib(unicia) pot(estate) XV imp(eratori) XII / co(n)s(uli) III p(atri) p(atriae) divi Marci Antonini Pii / Germanici Sarmat(ici) fil(io) divi Commodi / fratri divi Antonini Pii nepoti / divi Hadriani pronepoti divi / Traiani Parthici abnepoti / divi Nervae adnepoti / **restitutori castrorum / Ostiensium** / sub Cn(aeo) M(arcio) Rustio Rufino pr(aefecto) vig(ilum) e(gregio) v(iro) / cura[[m agentibus]]«ntibus» / C(aio) Laecanio Novatilliano subpraef(ecto) et / M(arco) Fl(avio) Raesiano trib(uno) coh(ortis) II vig(ilum) / praeposito vexillationis*; CIL XIV 4387: *Imp(eratori) Caesari / M(arco) Aurelio Antonino / Pio Aug(usto) Felici / design(ato) III / trib(unicia) potest(ate) X co(n)s(uli) II Imp(eratoris) Caesar(is) / L(uci) Septimi Severi Pii Pertinacis / Aug(usti) Arabici Adiabenici Parthici / maximi p(atris) p(atriae) filio divi Antonini / Pii Germanici Sarmatici nepot(i) / divi Antonini Pii pronepoti / divi Hadriani abnepoti / divi Traiani Parthici et divi / Nervae adnepoti **restitutori / castrorum Ostiensium** / sub Gn(aeo!) M(arcio) Rustio Rufino pr(aefecto) vig(ilum) e(mentissimo) v(iro) / curantibus / C(aio) Laecanio Novatilliano subpr(aefecto) / et M(arco) Fl(avio) Raesiano trib(uno) coh(ortis) II vig(ilum) prae/posito vexillationis.*

44 Zu den Zielen der von Severus unternommenen Expedition nach Britannien siehe Królczyk (2016), 199–203.

Sicherheit geregelt werden mussten. Eine solche Feststellung wird auch durch die anderen Schritte der Römer in Ostia auf Initiative von Septimius Severus vollauf bestätigt. Denn gerade damals wurden die Getreidespeicher im Zentrum von Ostia, die so genannten *horrea grandi*, erheblich erweitert. Sie wurden noch in der Zeit von Claudius errichtet, auf Befehl von Hadrian und Commodus umgebaut, um während der Herrschaft des Septimius Severus erheblich erweitert zu werden (Meiggs, 1960, 549).

Im Bereich des Portus wiederum wurden in dieser Zeit die so genannten großen *horrea* des Septimius Severus (*Grandi Magazzini di Settimio Severo*) direkt am Bett des Tibers erbaut. Das große Gebäude, dessen längere Seite etwa 190 m lang war, konnte riesige Mengen an Getreide aufnehmen (vgl. Keay, 2012a, 46). Severus wurde also nicht umsonst posthum dafür gelobt, dass er – nach Aussage des Berichts der „Historia Augusta" – bei seinem Tod dem römischen Volk eine Getreideversorgung für sieben Jahre hinterließ[45].

Die wichtige Rolle, die die Flotte bei der bevorstehenden Kampagne spielen sollte (und auch tatsächlich spielte), sowie die römischen Häfen (einschließlich des Hafens von Ostia) können auch durch die Münzemissionen bestätigt werden, bei denen maritime Themen auftauchten. An dieser Stelle sollten wir auf die Denare von Septimius Severus und Caracalla aus dem Jahr 207 mit dem Bild einer Galeere mit Rudern achten[46], und vor allem auf die Münzen von Caracalla, die 208 n. Chr. datieren, auf deren Rückseite eine Galeere mit Matrosen auf rauer See abgebildet wurde. An Bord des Schiffes befinden sich *vexillum* und Kampfzeichen, was eindeutig auf den militärischen Zweck der Reise hinweist[47].

In einem gewissen Zusammenhang mit den vorstehenden Ausführungen steht auch eine uns mittelbar durch epigraphische Quellen überlieferte Information, die besagt, dass für den Bedarf der geplanten Kampagne mit dem Bau neuer Schiffe im großen Maßstab begonnen wurde. Die erwähnten Zeugnisse dieser Aktivität sind uns aus der Provinz *Germania Superior* bekannt (siehe dazu Herz, 1985). Inschriften, die in den dortigen Limeskastellen im Taunus (Obernburg[48], Trennfurt[49] und Stockstadt[50]) gefunden wurden, belegen, dass die Soldaten der Mainzer Legion *XXII Primigenia* am Fällen des für den Schiffbau notwendigen Holzes (*lignatio*) beteiligt waren, der vermutlich in einer Werft in *Mogontiacum* erfolgte. Von besonderer Bedeutung ist die Aussage einer der Inschriften aus dem Kastell Obernburg aus dem Jahr 206 n. Chr. (Speidel, 1992, 149, Nr 1). Aus ihrem

[45] SHA *Sev.* 8.5: *Rei frumentariae, quam minimam reppererat, ita consuluit, ut excendens vita septem annorum canonem p. R. relinqueret.*

[46] BMC V, *Septimius and Caracalla*, Nr. 541A und 557.

[47] BMC V, *Septimius and Caracalla*, Nr. 859 = RIC IV 1, *Caracalla*, Nr. 437; ebenfalls RIC IV 1, *Caracalla*, Nr. 426. Vgl. Robertson (1975), 374.

[48] Speidel (1992), 149, Nr. 1; CIL XIII 6623 (= ILS 9119 = Speidel [1992], 149, Nr. 2). Vgl. Pferdehirt (1995), 59–60.

[49] CIL XIII 6618 = Speidel (1992), 150, Nr. 3.

[50] CIL XIII 11781 = Speidel (1992), 150, Nr. 4.

Inhalt erfahren wir, dass die Aufsicht über die *vexillatio legionis XXII Primigeniae piae fidelis agentium in lignariis*, dh. über die Soldaten, die die Bäume fällten, Clodius Caerellius ausübte, *centurio frumentarius* der in Mesopotamien stationierten *legio I Parthica,* die durch persönliche Entscheidung von Septimius Severus nach Deutschland geschickt worden war. Dies ist ein eindeutiger Hinweis darauf, dass es sich nicht um eine lokale Schiffbauaktion handelte, sondern um eine viel umfassendere Angelegenheit. In Frage kommt nur die geplante *expeditio Britannica* (Herz, 1985, 428). Die besprochene Inschrift erlaubt es uns auch, eindeutig mit dem Jahr 206 n. Chr. einen *terminus post quem* für den Beginn der Vorbereitungen für die bewaffnete Expedition zu bestimmen. Obwohl wir keine erhaltene Quellenüberlieferung haben, können wir hypothetisch davon ausgehen, dass der Bau neuer Schiffe auch in Ostia erfolgte.

Im Zusammenhang mit der *expeditio Britannica* der Jahre 208–211 kann am Ende dieser Überlegungen ein weiteres Problem erwähnt werden. Wieder einmal müssen wir auf die besondere Rolle bei der bevorstehenden Flottenexpedition achten, die nicht nur Nahrungsmittel- und Waffenlieferungen sicherstellen musste, sondern vor allem die Überfahrt des Kaiser selbst und der *domus imperatioria*, des kaiserlichen Hauptquartiers, und nicht zuletzt der Truppen, die sich an dem Feldzug beteiligen sollten. Neben der britischen Flotte (*classis Britannica*), deren Beteiligung an der Kampagne offensichtlich war, wurden weitere Einheiten mit dieser wichtigen Aufgabe beauftragt, wie eine Inschrift aus der Stadt Rom klar zeigt, die leider teilweise beschädigt ist. Sie erwähnt den Namen eines uns unbekannten Präfekten der britischen Flotte, der gleichzeitig die germanische Flotte (*classis Germanica*), die pannonische Flotte (*classis Pannonica*), die mösische Flotte (*classis Moesiaca*) und höchstwahrscheinlich auch die pontische Flotte (*classis Pontica*) befehligte[51]. Diese außergewöhnliche Situation, d.h. die Konzentration des Kommandos über mehrere Seestreitkräfte in einer Hand, müssen wir sicherlich in die Zeit der britischen Expedition unter der Leitung des Kaisers aus Lepcis Magna verweisen (Pflaum, 1960, 695–696; Reed, 1975–1976, 97; Konen, 2000, 384–385)[52].

In der Zusammenfassung dieser Überlegungen ist darauf hinzuweisen, dass die Aktivität von Septimius Severus in Bezug auf Ostia und Portus signifikant und mehrdimensional ist. Dieser Kaiser, der selbst aus einem Hafenzentrum in Afrika stammte, war sich der Bedeutung Ostias für Rom und das Römische Reich als Ganzes hervorragend bewusst, wie die Reihe von Maßnahmen an der Tibermündung zeigt, die er insbesondere bei seinen Vorbereitungen auf die *expeditio felicissima Britannica* intensivierte. Septimius Severus verdiente zweifellos den epigraphisch beglaubigten Titel eines *restitutor castrorum Ostiensium*. Außerdem

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[51] CIL VI 1643: *[---] / praef(ecto) class(ium) Brit(tannicae) et [Germ(anicae) item] / Moesic(ae) et Pannonic(ae) [et Pontic(ae?)] / proc(uratori) et praesidi Alpium [Cottiarum(?)] / subpraef(ecto) class(is) praet(oriae) [Misenens(is)] / trib(uno) leg(ionis) XVI Fl(aviae) et praep[o]s(ito) a[lae ---].*

[52] Es sollte jedoch darauf hingewiesen werden, dass Dietmar Kienast anderer Meinung ist, der die Inschrift mit den Markomannenkriegen in Verbindung bringt: Kienast (1966), 44–45.

haben wir wahrscheinlich das Recht, den obigen Titel nicht nur auf das Gebiet Kasernen der Vigilkohorten Ostias zu beschränken, sondern ihn auch auf die gesamte Kolonie sowie auf den benachbarten Portus auszudehnen.

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SEPTIMIUS SEVERUS – RESTITUTOR CASTRORUM (ET PORTUS) OSTIENSIUM

The activity of Septimius Severus in relation to Ostia and Portus is significant and multidimensional. The emperor, who himself came from a city-port of Lepcis Magna, was well aware of the importance of Ostia for Rome and the Roman Empire as a whole. This can be demonstrated by the series of activities undertaken at the mouth of the Tiber. These activities were intensified in particular during the preparations for the *expeditio felicissima Britannica*. Septimius Severus undoubtedly deserved the epigraphically certified title of *restitutor castrorum Ostiensium.*

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LEX CLAUDIA DE NAVE SENATORUM – POSSIBILITIES OF NEW INTERPRETATIONS[1]

The *lex Claudia* presented in the work of Livy was a prohibition which in its essence limited the earning capacity of senators. Livy places it in the broader context of his statement: "Of the consuls designate, Flaminius, to whom the legions wintering at Placentia had been assigned by lot, dispatched an edict and a letter to the consul, commanding that these troops should be ready in the camp at Ariminum on the Ides of March. It was here, in his province, that he designed to enter on the consulship, for he remembered his former controversies with the senators, which he had waged when a tribune of the plebs, and later as consul – in the first place about his consulship, which they tried to annul, and again concerning his triumph. He was also hated by the senators on account of an unprecedented law which Quintus Claudius the tribune of the plebs had introduced, despite the opposition of the senate, with the backing of Gaius Flaminius alone of all that body, providing that no senator or senator's son should own a sea-going ship of more than three hundred amphoras burden – this was reckoned to be sufficient to transport the crops from one's fields, and all money-making was held unseemly in a senator. The measure, which was vehemently opposed, had been productive of great resentment on the part of the nobles against Flaminius, who had advocated its enactment; but had procured for him the favour of the plebs and afterwards a second consulship."[2]

Modern research on this legal provision attempts to perform a multi-aspect analysis of the prohibition, especially in the context of available knowledge of economic relations in Rome in the third century BC (*cf.* Hill, 1952, *passim*; Shatz-

[1] Completion of this text was possible thanks to the author's stay at the Library of Universität Bremen in May 2018.
[2] Livy, *Per.* 21.63.1–4 (transl. B.O. Foster).

man, 1975, *passim*; Baltrusch, 1989, 33–35), in order to underscore its importance in terms of limiting maritime trade conducted by senators. Most works devoted to this issue are only perfunctorily concerned with the methodology of research on the legal provisions of the republican period (including *lex Claudia*), or dispense with this kind of reflection altogether. As a result, *lex Claudia* is analyzed and interpreted in the context of systemic legal solutions adopted by the Roman state (*cf.* Grziwotz, 1985, *passim*; Kunkel, 1995, 612), or in the context of the propaganda exposure of the less significant arguments used in political struggles. Both of these broadly outlined directions should obviously not be questioned, but one should be aware of the limitations arising from excessively simple analogization of political and social relations in Rome in the third century BC and in the first century BC, given that the majority of literary sources, available in a wide representation contributed to the existence of permanent change in the perception of the earlier history of Rome (see in details: Kienast, 1973, *passim*; Develin, 1985, *passim*; Momigliano, 1986). Obviously, if Roman legislation also served political purposes, there is no doubt that the *Lex Claudia* quoted by Livy is a good example of that. Therefore, it is not possible to separate the interpretation of the *lex Claudia* law from the activity of Gaius Flaminius, and especially to ignore the controversy over his political activity. In turn, these issues are rooted in the course of the Second Punic War, which now cannot be considered without the adoption of a critical methodology in the study of literary sources, which may lead to the redefinition of particular elements of military, political and social history, and therefore Roman legislation as well. The brief text translated here, based on an examination of previous studies on *lex Claudia*, aims above all at identifying elements on which further research on the law can rely, thus indicating the theoretical possibilities of a new interpretation of *lex Claudia de nave senatorum* that derives from the findings of previous research.

The *lex Claudia* was originally described only in Livy's piece of work that discussed the law in the context of the Second Punic War and C. Flaminius's activities, one of the most contentious politicians of the Roman times (*cf.* Lippold, 1963, 150; Brizzi, 1984; Oebel, 1993, 9–11). While presenting the events at the end of 218 BC, Livy emphasizes that Flaminius was elected consul for the next year and that he was assigned to take responsibility over the legions, then quartering near Placentia. The elected consul sent a letter to Tiberius Sempronius Longus, the consul in office, with a command to have the army in encamped at Ariminum by the beginning of the official year (the Ides of March) since it was there that C. Flaminius decided to take the office.[3] Livy explains the rationale behind the unusual decision taken by Flaminius (the consul refused to enter the office in Rome) in a broader digression. He believed that C. Flaminius took such a decision due to a long-standing conflict with the Senate. As Livy explains, this contention started

[3] Livy, *Per*. 21.63.1: *Consulum designatorum alter Flaminius, qui eae legiones, quae Placentiae hibernabant, sorte evenerant, edictum ad litteras ad consulem misit, ut is exercitus idibus Martiis Arimini adesset in castris.*

when C. Flaminius was holding the tribunate and lasted throughout Flaminius's first consulship. At that time, attempts were initially made to deprive Flaminius of his office and later he was denied the right to the triumph.[4]

By way of an aside, Livy discusses the *lex Claudia*, claiming that C. Flaminius fell into the senate's disfavor when Quintus Claudius, the tribune of the plebs, pursued a new act contesting the senatorial class. Alone among the senators, C. Flaminius is believed to have supported the tribune. This law reduced the tonnage of senators' ships to 300 amphorae, which was sufficient to maintain agricultural operations yet prevented the senators from participating in trade activities. The law substantiated that the trade was unworthy of senators. According to Livy, the issue sparked violent hatred of the nobles towards Flaminius while winning him the esteem of the plebs and finally leading Flaminius to a victory in the rivalry for the consulate. Livy himself emphasizes that the law was not in fact that dangerous for the landholders of the state grounds as they were not involved in trade operations.

The fact that the *lex Claudia* is discussed in a specific part of Livy's work seems to shed a positive light on the historicity of this account (*cf.* Händl-Sagawe, 1995, 396). Even considering the lack of possibility of attesting the information regarding the law with a justified direct parallel (excluding suggestions) in any other work, the description presented by Livy specifies the limit of the vessel tonnage and outlines how the law was first deliberated and finally included in the Roman legislative procedures. All of this prompts a wider discussion on the law and its relationships with Caius Flaminius's political activities.

In the context of preliminary considerations, the moment of introducing the law seems quite significant. The correct interpretation of the law depends to a certain extent on the chronology which, in this case, is subject to controversy. Most researchers accept the chronology of Livy and date *lex Claudia* to 218 BC (*cf.* Jenny, 1936, 3; Meyer, 1975, 96; Lippold, 1963, 93; Bleicken, 1968, 31; El Beheiri, 2001, 57). The option of 219 BC, argued mainly by Z. Yavetz, constitutes a separate position in research dictated by an entire scientific theory of research. These chronological discrepancies have material consequences. If the law had been adopted in 219 BC,[5] its political goals could have been radically different than in 218 BC, i.e. during the Second Punic War.

For Z. Yavetz, the outbreak of the Second Punic War was conducive to the aggravation of political antagonisms, but it did not change the fact that Flaminius remained politically isolated: "After the outbreak of the Second Punic War, rela-

[4] Livy, *Per*. 21.63.2: *hic in provincia consulatum inire consilium erat memori veterum certaminum cum patribus, quae tribunus plebis et quae postea consul prius de consulatu, qui abrogabatur, dein de triumpho habuerat*.

[5] Yavetz (1962), 325, explains that *lex Claudia* was passed in 219 BC, because from 287 BC *Plebiscita* were considered as *leges* therefore the term *lex Claudia* appears frequently. Owing to fact that presumably date of Claudius' tribunship was in 219 BC See: Broughton (1953), 238; Gundel (1979). Arguments for year 220 BC see: Willems (1878), 202.

tions between Flaminius and the Fabii became strained even more, but Flaminius was not supported by Aemilii Scipiones in the Plebiscitium Claudianum, for it explicitly said that Flaminius remained isolated in the senate: *uno patrum adiuvante C. Flaminio*" (*cf.* Yavetz, 1962, 327). According to Yavetz, Flaminius' actions are coupled with political antagonism (*cf.* also Bleicken, 1968, 40–41; Scullard, 1973, 53–55). Still, T. Frank contends that Flaminius' actions, reflected in the legislation, made him a defender of the senatorial dignity and traditional lifestyle (Frank, 2004, 64), which in the period of the Second Punic War would systematically decline, ultimately reaching the catastrophic dimensions known from the work by Sallustius (*cf.* Büchner, 1960, *passim*; Bonamente, 1975; Astin, 1978, 91–95; Conley, 1981). On the other hand, F. De Martino pointed to Flaminius' stubbornness in his consistent efforts to curb the lawlessness of the senate, which was also manifested in the systematic attempts to free the republican regime from religious restrictions that in fact benefited the oligarchy (De Martino, 1964, 126). F. Cassola perceived Flaminius as a unifier of the rural plebs against the municipal plebs (Cassola, 1962, 227–228), while J. Seibert believed that electing Flaminius as tribune played the role of a catalyst in the senatorial policy (Seibert, 1993, 88). However, A. Pelletier indicated a certain statutory pragmatism associated with the outbreak of the Second Punic War and drew attention to the possibility of a statutory security for heavy ships that might have been needed in the face of the war with Carthage (Pelletier, 1969). These theories suggest an element of a broader plan, which would have essentially intended to strengthen the internal situation in Italy, in Flaminius's activities to champion *Lex Claudia*. *Lex Claudia de nave senatorum*, according to the theory posited by J.C. Domínguez Pérez, was to contribute to the limitation of commercial activities and the inflow of foreign goods, mainly Greek ones, and thus to encourage the revival of native production in Italy (Domínguez Pérez, 2005). R. Develin, despite certain idealization of Flaminius, denies him participation in a deliberate, broader scheme, bringing the circumstances to the foreground: "We cannot attribute to Flaminius any grandiose game plan, we cannot fit him into a factional niche and we cannot build a popular movement around him (…). Flaminius was above all an individual and a talented one of proven integrity, a man willing to stand up for his beliefs and oppose restrictive convention when it obstructed the interest of the state, in short, a man prepared to follow his own counsel, whatever the consequences."[6]

Therefore, several theoretical possibilities were considered in modern science which could have resulted in the proceedings concerning the specific *lex Claudia* provision. New research postulations were formulated, referring even more to the attempts to raise awareness of the research restrictions resulting from the optic adopted in the late Republic, especially the perception inherent in Cicero's works, as pointed out by N. El Beheiri (2001). However, M. Wolny tried to link

[6] Develin (1979), 277, 273: "But we are trying too hard to fit Flaminius into a pattern, to impose supposition of total consistency, making no allowance for the influence of contingent circumstances?"

Flaminius' advocacy of *lex Claudia* with the previous stages of his political career and to identify another element that may have contributed to of Flaminius's rising popularity and prestige as a Roman politician in the legal domain (Wolny, 2007). Perhaps it is worth looking at the theory and practice of the functioning of the law and try to find any pertinent references or allusions, though not in the late Republic, but in the contemporary literary sources of the Second Punic War.

The phrase written by Livy (*ne quis senator cuive senator pater fuisset maritimam naves*) implies that the law applied to all senators, without exceptions, and their sons were prohibited from owning *maritimam navem* with a displacement exceeding 300 amphorae (approximately 8 tonnes). As rightly assumed by H. Wildt, the term *maritime naves* means sea-going vessels exclusively (Wildt, 1994, 178). The text of the act warrants the conclusion that *maritime naves* were restricted in terms of carrying capacity. Furthermore, Wildt aptly states that from an objective point of view it was relatively easy for the agents involved in trade, to get around those rules – the clients could take the place of the senators. Admittedly, it was Th. Mommsen (1976, 854) who claimed that the wording *questus omnis* points to different legal implications of this law, whereby it aimedat preventing the senators from leasing the ships. However Z. Yavetz (1962, 341) took a more reserved standpoint observing that that was not necessarily true.

It was believed that vessels with a carrying capacity of 300 amphorae were sufficient to ship crops, yet the average agricultural production level was the starting point as the specific volume of freight had been set. Consequently, one was allowed to operate a higher number of smaller ships on a wider scale; however, was it cost-effective? Answering this question may reveal the rationale behind the backlash on the part of the senators.

Undoubtedly, in C. Flaminius's times, the senators were not supposed to receive financial benefits from many kinds of activities, but to treat trade as unworthy of their profession instead, as suggested by Livy, and rule by decency. Agricultural activities were thought to be the best and the fairest form of financial investment, which is reflected both in Cato and Cicero. Nevertheless, perusal of the texts of these authors demonstrates that the trade was not all neglected (*cf.* El Beheiri, 2001, 58). For Cato, trade was merely hazardous while Cicero differentiated between small-scale and large-scale trade. This offers evidence that at some earlier point in time in the Roman juridical history, appropriate legal regulations on trade activities conducted by senators must have come into existence. As assumed by H. Wildt (1994, 178), it is possible that since the *Lex Claudia*, there was an ongoing process that influenced Cato and Cicero, which would render justice to the normative impact of the actual state of affairs.

Ironically, this seems to be corroborated by the information found in Maccius Plautus's comedy entitled *Mercator*, which mentions a ship with 300 metretes,

meaning a carrying capacity of more than 300 amphorae.[7] As calculated by H. Hill, the metrete equaled 8–9 gallons given that one Roman amphora would be 2/3 of the former's volume. The ship mentioned by Plautus could have had a displacement of 8.5 tonnes, which justifies the contemptuous expression to describe it, name *ludicrously small* (*cf.* Hill, 1958). It may be noted that the passus comes from a theatre play whose author set it in the Greek environment to place the sensitive issue of earning money from trade in a different reality. He presented the issue in the Greek realities (hence the metrete), but it was readily understandable for his audience since the reference to recent law was very clear.

In view of the scarcity of sources, especially legal sources concerning the history of Rome in the third century BC, as well as significant limitations of the Roman literary tradition of the first century BC and later, it seems an absolute necessity to go beyond the work of Plautus, which was a kind of response to the current problems of the Roman society. Plautus used a variety of methods to entertain the viewer. However, to achieve this effect he most often used either ready-made patterns,[8] or resorted to the situational humour that Romans understood. In relation to Plautus' work, it is also interesting that there is no clear allusion to the activity of Gaius Flaminius. It is all the more intriguing that, considering the scale of negative assessments of this politician – also due to his involvement in the *lex Claudia* – one should expect a greater resonance of these events in the Roman custom, which should have reflected in the literature of that period. Undoubtedly, this leads to the conclusion that negative overtones in Flaminius's portrayal result from the qualities he was attributed posthumously and derive directly from the consul's defeat in the Battle of Lake Trasimene (*dies ater*). In line with the Greek literary tradition, C. Flaminius's defeat was understood as punishment for haughtiness. According to Polybius, the consul's haughtiness owed to excessive trust in his own strength whilst being unaware of political and military incompetence, quickness, audacity, brashness, covetousness, vaingloriousness, and conceit.[9] The posthumous appraisal of C. Flaminius tallied with political contestation that lent it harsher and more radical features, as if indicating a political conflict. However, Livy unarguably approaches this dispute from the standpoint of the turbulent historical events of the late Republic, namely the bloody political strife that was so typical of the Gracchean times.

In science, this state of affairs has been known for a long time, and attempts have been made to demonstrate that the conflict between Flaminius and Quintus

[7] Plaut. *Merc*. 73–79: *Postquam recesset vita patrio corpore, / agrum se vendidisse atque ea pecunia / navem, metretas quae trecentas tolleret, / parasse atque ea se mercis vectatum undique, / adeo dum, quae tum haberet, peperisset bona / me idem decree, si ut decerem me forem*, in translation: "After life had left his father's body, he had sold the farm and with money bought a ship of fifteen ton burden and marketed his cargoes of merchandise everywhere, till he had at length acquired the wealth which he then passed. I ought to do the same, if I where what I ought to be" [trans. Nixon (1924), 80].

[8] Fron an example of this method, see: Krahmalkov (1988).

[9] Polyb. 2.33.7–8; 3.80.3–4, 81.9–10, 82.3, 83.7, 84.6.

Fabius Maximus was exaggerated. What is more, attempts have also been made to suggest that, in fact, these politicians worked closely together, as R. Develin emphasizes: "Servilius, consular colleague of Flaminius in 217, is seen as an opponent; hence it is argued that the same votes which elected Flaminius consul also made Fabius' dictator on Flaminius' death. None of these arguments is very strong, though we are to feel their cumulative effect. Still, the cumulation of weak units does not make for overall strength." Further, Develin argues: "Fabius had in fact a part in the application of the *lex Flaminia* after Flaminius' death" and "The strongest evidence for their association is the possibility that Flaminius was *magister equitum* under Fabius as dictator in 221" (Develin, 1979, 269–270).

The excessive exposure of Flaminius' denunciations in the narratives of the late Republic may result from an antithetic juxtaposition which is well-known in literature: Flaminius appears in this scheme as a popular politician, a demagogue, a self-righteous and unmanageable man opposed by the conservative Fabius, a stable politician who does not act under the influence of emotions and is guided by reason. Decoding this "scheme of contradictions" between Flaminius and Fabius does not necessarily preclude the conjecture of a hidden friendship or cooperation between the seemingly quarrelling politicians. In fact, at the time of Flaminius' activity, crowned by the enactment of the *lex Claudia*, Fabius may have been neutral towards him. It was only the death of the consul at the Battle of Lake Trasimene that is likely to have changed the perception of this figure, as it may have contributed to the spread of his opinions concerning Flaminius' strategic skills. In this case, the deceased politician had no counter-argument at all.

C. Flaminius's political activity, manifesting in the support for the *Lex Claudia*, may have stemmed from his broader political programme. An inquiry into the nature of Flaminius's advocacy of other laws, such as *Lex Flaminia de agro Gallico et Piceno* or *Lex Metilia* could offer insights into that programme, and yield more conclusions. The perception of C. Flaminius has undoubtedly changed, not only in Roman historiography but also in modern research (as scholars disentangle family and corporate relationships and their impact on Roman politics, a mode of inquiry pursued by T.R.S. Broughton or, in particular, Z. Yavetz). Having been ascertained, the fact that a relationship existed between Flaminius and the circle of the Aemilii and their patrons reveals a feature of his political activity. Other features include innovativeness and competitiveness of the political programme, in which the need to democratize the republican system – which came to the fore in the period of the Gracchi reforms – had its roots (*cf.* Earl, 1963, *passim*).

The dispute surrounding Flaminius was triggered by the devastating defeat he had suffered, which ultimately must have led to the dissatisfaction of the critics – who became his political opponents – of all Flaminius' undertakings, including the promotion of the *lex Claudia*. For this reason, the phrase *invisus etiam patribus erat ob novam legem* is an unquestionable part of the literary convention and does not reflect the actual assessment of this legal provision. Despite the ex-

tensive scientific debate to date, further research on the discussed law still offers much in terms of potential findings. Leaving aside the rather perplexing issue of the system of mutual protection of high-ranking Roman officials, consideration the economic situation of Italy at the beginning of the Second Punic War opens up a possibility for new interpretations in further scientific inquiry on the law. This constitutes a challenge requiring new comprehensive research, also including sources that are less often taken into account (mainly Plautus' work).

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Miron Wolny

LEX CLAUDIA DE NAVE SENATORUM – POSSIBILITIES OF NEW INTERPRETATIONS

The Author indicates that the evaluation of the *Lex Claudia de nave senatorum* issued by Livius was basically dependent on the portrait of Gaius Flaminius, the protector of the provision. The posthumous estimate of G. Flaminius portrait coincided with political contestation that gave it harsher and more radical features, as if indicating a political conflict. However, Livy unarguably sees this dispute via the prism of turbulent historical events of the late republic, namely the bloody political conflicts that were so typical in the times of the Gracchi. Based of his previous research, the Author postulates that a comprehensive review of Plautus' works provides an unconventional source of better recognition of Roman customs reflecting social and economic relations.

TRADYCJE PRAWA MORSKIEGO

MARITIME LEGAL TRADITION

GDAŃSKIE STUDIA PRAWNICZE 2019, NR 3

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LOS RIESGOS DEL MAR EN EL *NOMOS RHODION NAUTIKOS*[1]

Como es bien sabido, el *Nomos Rhodion Nautikos* es una colección de textos de Derecho marítimo bizantino de origen privado que finge ser una verdadera ley: sin embargo, como han escrito Jan Lokin y Nicolaas van der Wal, "il est inimaginable qu'un empereur byzantin ait publié une si évidente et enfantine manipulation de l'histoire sous forme de loi" (Van der Wal, Lokin, 1985, 74)[2].

Como ha sido ampliamente subrayado por los estudiosos, el Imperio bizantino era ante todo un Imperio marítimo[3]. Durante siglos fundó su poder e influencia, como anteriormente el Imperio romano (Por todos, Rostovtzeff, 1972, I, 285–311; Chic García, 2009, 421–468), sobre el dominio del Mediterráneo: el control de las grandes rutas fluviales (Nilo, Danubio, Marica, Halys, etc.) y marítimas (conectando las costas del sur de Italia, parte de Sicilia, Dalmacia, el Épiro y el Peloponeso, Licia y las Cícladas, etc.) permitía una fuerte reducción de costes y fomentaba el desarrollo del comercio, proporcionando dos productos esenciales para la sociedad romano-bizantina: el pesado y la sal (Morrisson, 2005, 213–214; Laiou, Morrisson, 2007, 13–16). Como consecuencia, el interés por la elaboración de un Derecho marítimo tenía su punto de partida en el interés público, tanto por

[1] Este artículo se inscribe en el marco del proyecto de investigación titulado "El autor bizantino II" (Investigador principal: Juan Signes Codoñer. Universidad de Valladolid), subvencionado por el Ministerio de Economía y Competitividad de España (Referencia: FFI2015-65118-C2-1-P).

[2] Sobre esta obra hay una nutrida bibliografía a partir del nacimiento de la bizantinística jurídica a fines del siglo XIX, y sobre todo desde la aparición de la edición crítica del texto a cargo de Walter Ashburner (*cf.* infra nota 14); entre otras obras cabe señalar las siguientes: Azuni (1805), 527; Pardessus (1828), 209; Mortreuil (1843), 387; Zachariä von Lingenthal (1892), 16; Dareste (1905); Perugi (1914); Kreller (1921), 257; Wenger (1953), 687; Pieler (1979), 432, 441; Van der Wal, Lokin (1985), 73; Letsios (1996); Schminck (1999); Khalilieh (2006); Humphreys (2014), 179; Troianos (2015), 107.

[3] Esto no deja de ser un lugar común: *vid.* al respecto, por todos, Ahrweiler (1967).

razones de defensa nacional como por razones económicas. La reglamentación jurídica de la navegación y de todas las diferentes formas de transporte por vía marítima fue siempre una preocupación agobiante para el legislador romano y bizantino. Pero al mismo tiempo, también se desarrollaron diversas tradiciones que gradualmente penetraron en el Derecho vigente, constituyendo una fuente importante del Derecho comercial de la época (Gaurier, 2004; Cerami, Di Porto, Petrucci, 2004, 266 y nota 25 (con lit.)).

La isla de Rodas fue un centro importante para el comercio[4] y, fuera de toda duda, su Derecho tenía una posición dominante en la disciplina de los intercambios comerciales en el espacio mediterráneo. Parece ser cierto que las reglas jurídicas consuetudinarias de la isla de Rodas gozaban de gran aprecio entre los marinos que utilizaban las vías comerciales marítimas de la época[5]. Durante el periodo helenístico, Rodas se sacudió el dominio macedonio tras la muerte de Alejandro y estuvo gobernada con bastante independencia por parte de una oligarquía local de base comercial[6], que consiguió imponer una suerte de hegemonía marítima en la zona del Egeo hasta la entrada en escena de Roma, en principio aliada de los rodios. Tras la conquista romana (batalla de Pidna del 168 a. C. y *foedus* del 164 a. C.), la isla se convirtió en un importante centro de irradiación cultural: Rodas era visitada por miembros de la aristocracia y de los sectores sociales más elevados de la metrópolis, que acudían a la escuela de retórica que estaba en aquel tiempo en auge[7]. Por este medio fueron exportados al mundo romano muchos saberes filosóficos y, asimismo, otros conocimientos, como fueron las reglas del Derecho marítimo de los rodios. Por consiguiente, no resulta en modo alguno extraño que realmente existiera una ley marítima (ya fuera "ley" en sentido formal o exclusivamente material) procedente de la isla de Rodas que hubiera sido tan importante como para que los mismos juristas romanos de los tres primeros siglos de nuestra era se refirieran a ella con valor normativo (*lex Rhodia*), dándole así la autoridad del propio Derecho romano[8].

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[4] Ya desde la época de Alejandro Magno, por su posición geográfica estratégica en el levante mediterráneo, Rodas se destacó como estación intermedia en el tráfico comercial de trigo destinado al mar Egeo, y posteriormente también en el tráfico de armas, lo que facilitó su conversión en cabeza del comercio oriental en sustitución de Atenas: *vid.* Chic García (2009), 389.

[5] Chic García (2009), 389. Sobre Rodas en época helenística y romana, *vid.* entre otros, Berthold (1984); Engberg-Pedersen, Gabrielsen, Hannestad y Zahle (eds.) (1999); Aragón Pérez (2012).

[6] Aranda García (2016). El régimen político era formalmente una democracia, pero tanto Polibio como Diodoro y Cicerón alaban su carácter "moderado": Polyb. 33.16.3; Diod. 20.81.2; Cic. *Rep*. 3.35.48. Sobre el tema, *vid.* Berthold (1984), 22.

[7] La primera escuela de retórica en Rodas fue fundada por Esquines en torno al año 338 a.C. Se convirtió en alternativa exitosa frente a Atenas sobre todo en la época de dominación romana: *vid.* Enos (2004), esp. 187; Vanderspoel (2007), 127–133.

[8] La *lex Rhodia* era ya conocida por los juristas romanos en el s. I a.C.: Alfeno Varo (puesto que un texto suyo sobre el tema es recogido por Paulo en un pasaje de su *epitome* a los Digesta de Alfeno, *vid.* D. 14.2.7), pero también Servio Sulpicio Rufo, Aulo Ofilio y Labeón (D. 12.2.2 pr. y D. 12.2.2.3). *Cf.* Huvelin (1929), 185.

No es, por tanto, nada sorprendente el hecho de que se mencionen de modo particular estas reglas en dos pasajes del Digesto (D. 14.2.1 y D. 14.2.9). El primero está extraído de una obra del jurista romano Paulo (s. III) y el segundo, en cambio, de Volusio Meciano (s. II)[9], que presumiblemente escribió una monografía sobre la *lex Rhodia de iactu*:

> D. 14.2.1. *Paulus libro secundo sententiarum*: *Lege 'Rhodia' cavetur, ut si levandae navis gratia iactus mercium factus est, omnium contributione sarciatur quod pro omnibus datum est.*
>
> D.14.2.9. *Volusius Maecianus ex lege Rhodia*: Ἀξίωσις Εὐδαίμονος Νικομηδέως πρὸς Ἀντωνῖνον βασιλέα· Κύριε βασιλεῦ Ἀντονῖνε, ναυφράγιον ποιήσαντες ἐν τῇ Ἰταλίᾳ διηπράγημην ὑπὸ τῶν δημοσίων τῶν τὰς Κυλάδας νήσους οἰκούντων. Ἀντονῖνος εἶπεν Εὐδαίμονι· ἐγὼ μὲν τοῦ κόσμου κύριος, ὁ δὲ νόμος τῆς θαλάσσης. τῳ νόμω τῶν Ῥωδίων κρινέσθω τῳ ναυτικῷ, ἐν οἷς μήτις τῶν ἡμετέρων αὐτῷ νόμος ἐναωτιοῦται. τοῦτο δὲ αὐτὸ καὶ ὁ θειότατος Αὔγουστος ἔκρινεν.

Pese a que se hayan expresado dudas en cuanto a la autenticidad de estos fragmentos, con la sospecha de que pudiera tratarse de intervenciones de los compiladores justinianeos[10], lo cierto es que, en todo caso, por las razones precitadas, estas reglas de Derecho marítimo de los rodios no debían de ser desconocidas para los juristas romanos. Con todo, en ninguno de los dos fragmentos se especifica el contenido de la "ley" de los rodios a la cual se está haciendo referencia. Por este motivo, con independencia de que en la *inscriptio* del título segundo del libro XIV del Digesto se hable de una *lex Rhodia de iactu*, no hay ninguna prueba cierta de que el Derecho de los rodios regulase realmente de manera específica las cuestiones referidas al abandono de las mercancías (*iactus*) para la salvación de la nave que sufre una avería seria. Por otra parte, la cuestión más genérica de la recepción por el Derecho romano de normas procedentes de un ordenamiento extranjero, incluso con un carácter complementario (como resulta de los pasajes del Digesto referidos a esta cuestión), no crea particulares dificultades, puesto que constituía un fenómeno nada inusual. Sin embargo, desafortunadamente, no es posible formular ninguna hipótesis sobre la datación de esa recepción de las normas procedentes de los rodios.

La conexión de la regulación de los "temas" del Derecho naval en las fuentes del Derecho romano a través del recurso a la tradición de los rodios continuó también en el Imperio bizantino. El texto al que nos referimos en esta sede (el *Nomos Rhodion nautikos*) constituye sin duda la más importante colección de disposiciones de Derecho marítimo de todo el período del Imperio bizantino. Se podría pensar a primera vista que este texto reproduce fielmente el texto original de las normas marítimas de los rodios. Sin embargo, teniendo en cuenta su estilo y su te-

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[9] Discípulo de Salvio Juliano y maestro de Derecho del futuro emperador Marco Aurelio; desarrolló una importante carrera oficial, como miembro del *consilium* con Antonino Pío (SHA *Ant. Pius* 12.1) y con los *divi fratres* (D. 37.14.17 pr.).

[10] *Vid. Index Interpolationum*, s h. l. *Cf.* Rhodolakis (2007), 51.

nor, es imposible que el *Nomos Rhodion nautikos* que nos han dejado los bizantinos sea idéntico a la auténtica *lex Rhodia* antigua, aun cuando su compilador – en la última versión que ha llegado hasta nosotros – pretenda hacernos creer que bajo tal título nos está transmitiendo efectivamente ese texto.

En la edición crítica del texto que aún hoy se maneja (Ashburner, 1909, 1–56), la colección está estructurada en un proemio y dos partes. El proemio (preámbulo o prólogo, que los autores antiguos llamaban habitualmente '*confirmationes imperiales*'), nos ha llegado en dos versiones manuscritas de diferente extensión. En él se nos relata que una redacción de las leyes marítimas de los rodios fue ordenada sucesivamente por Tiberio y aprobada por diversos emperadores romanos (hasta Trajano). Se ha sostenido a menudo, con razón, que se trata de un texto espurio, añadido con posterioridad a la primera redacción, y no de un componente auténtico de la obra original[11]. El texto debió de haber sido redactado, o bien en el siglo XI como ejercicio de una escuela de retórica, o bien en la escuela de Derecho (*Didaskalío ton nomon*) del patriarca Juan VIII Xifilino[12], o incluso en la Italia meridional, concretamente durante el tercer quinquenio del siglo X (Troianos, 2015, 108)[13]. En cualquier caso, el griego del *Nomos Rhodion nautikos* está demasiado cargado de elementos vulgares y ajenos a la lengua clásica como para considerarlo un texto original rodio antiguo; incluso en ciertos capítulos la terminología, la estilística y la sintaxis resultan tan oscuras que apenas se puede adivinar exactamente su alcance y contenido, incluso en comparación con otros elementos de evolución ulterior del griego bizantino (Van der Wal, Lokin, 1985, 73–74).

La primera de las dos partes de que se compone el texto auténtico contiene 19 capítulos (*kephálaia*), que afectan a cuestiones referidas a la colocación de los equipajes, la distribución de los espacios de la nave, las medidas de seguridad para el personal, la carga y los objetos de valor, así como el préstamo marítimo. Se trata, en general, de disposiciones muy breves, a veces de una sola oración simple. Esta parte fue elaborada seguramente antes de la codificación de Justiniano.

La segunda parte, en cambio, compuesta por 47 capítulos, constituye el núcleo fundamental de la colección, y regula fundamentalmente la temática del transporte por vía marítima. En ella se prevén asimismo cuestiones de carácter penal, la custodia de los objetos de valor, cuestiones de préstamo marítimo, el contenido del contrato de transporte marítimo, los presupuestos para el rechazo de la carga y la distribución de los daños en caso de avería, y, finalmente, la salvación de parte de la carga del naufragio y el montante de la compensación que debe recibir quien se haya sufrido la privación de algunos de sus objetos preciosos por el su-

[11] Solamente Godefroy (1654) cap. IX sostuvo en vano su autenticidad.

[12] Patriarca de Constantinopla entre 1064 y 1075, tras una carrera como juez y, posteriormente, nomophylax de la Escuela de Derecho de la capital del Imperio en los años 40 del siglo XI. Fue autor de una notable cantidad de escritos jurídicos relevantes: *cf.* Kazhdan (1991). Sobre la escuela jurídica constantinopolitana del s. XI, *vid.* ahora Chitwood (2017), 150–183.

[13] Todas estas tesis han sido objeto recientemente de graves objeciones, con válidas argumentaciones, por parte de Rhodolakis (2007), 93.

ceso. Esta segunda parte, acompañada de Apéndices, ya presenta un aspecto más complejo y es fruto de una reelaboración de disposiciones contenidas en el Digesto en muchos casos, Sin embargo, no está claro cuándo se realizó exactamente la redacción final de esta segunda parte: según la opinión más extendida debió de hacerse entre los años 600 y 800 (Ashburner, 1909, cxii–cxiv; Humphreys, 2014, 185)[14]. En todo caso, el griego más o menos vulgar del texto parece corresponder propiamente al del periodo entre el 650 y el 800.

Desde el punto de vista sustancial, el conjunto de las normas del *Nomos Rhodion nautikos* se considera hoy un texto bastante avanzado, si se compara con el Derecho romano, por su tendencia a adaptarse a las exigencias del mercado, teniendo en cuenta los diferentes factores económicos y los intereses, a menudo muy enfrentados, de los diversos grupos sociales. Se ha sostenido (Triantaphyllopoulos, 1964) ue la norma en cuestión tendría como idea central la seguridad recíproca y la comunidad de intereses frente a los peligros del mar por parte del armador del buque, el cargador y los pasajeros, y tiene como objetivo en realidad la tutela del comercio marítimo, muy afectado en ese momento por el mal de la piratería.

Las disposiciones del Digesto relativas al Derecho marítimo fueron recogidas en el libro 53 de los Basílicos. Sin embargo, al mismo tiempo, en el título VIII de este libro se introdujo también en su totalidad (pero sin el proemio) el *Nomos Rhodion nautikos*. El motivo formal por el que este texto fue incorporado a los Basílicos es la referencia que se hace en D. 14.2.1 y D. 14.2.9 a las disposiciones de la *lex Rhodia* como regla vinculante, pero seguramente los motivos de fondo de los compiladores de época macedonia obedecen más bien al hecho de que se trataba de normas aplicadas en la práctica desde hacía siglos en el Mediterráneo oriental Los elementos de prueba más fiables hacen pensar que esa incorporación del texto de la obra a los Basílicos fue realizada probablemente en el momento de composición original de esta obra en tiempos de León VI el Sabio (886–912) y no en una fase sucesiva, como se sostuvo en el pasado (Mortreuil, 1843, 401; Schminck, 1999, 171–173). El *Nomos Rhodion nautikos* se encuentra recogido, por tanto, en todos los textos derivados de los Basílicos (*Synopsis maior Basilicorum*, *Tipoucitus*, *Ecloga Basilicorum*, etc.), pero también en otras obras compilatorias del periodo bizantino medio y tardío (v. gr. *Synopsis minor Basilicorum*, *Ponima nomikon*, *Hexabiblos*…). Hay diversos manuscritos que transmiten el texto del *Nomos Rhodion nautikos* junto con otros supuestos *nomoi* del mismo periodo iconoclasta (*Nomos georgikos*, *Nomos stratiotikos*). Una nueva edición crítica reciente del libro 53 de los Basílicos – y por tanto también del texto ahí recogido del *Nomos Rhodion Nautikos* – se debe a Rhodolakis (2007)[15], con traducción al griego moderno.

[14] El estudioso alemán Andreas Schminck (1999) la retrasa hasta el primer mandato del patriarca Focio, es decir, entre el 858 y 867, pero es una tesis poco aceptada; *cf.* Burgmann (2009), 56.

[15] *Cf.* supra nota 13.

Por lo que se refiere al tema central de la romana *lex Rhodia de iactu*, que es la cuestión de la regulación de la distribución de daños producidos como consecuencia de la "echazón" (*iactus*) al mar de mercancías transportadas por la nave en casos de grave peligro, cuando es el único medio de salvarla o alcanzar el éxito de la empresa, el *Nómos Rhodion Nautikos* contiene un buen número de disposiciones, de modo que la regulación de estos supuestos de avería también constituye el núcleo normativo de esta colección legislativa. Pero esta colección no toma prestado prácticamente ningún elemento de la legislación justinianea. En el Derecho romano es un principio conocido ya por los jurisconsultos de finales de la República según el cual, cuando, a consecuencia de una tempestad u otra perturbación marítima, se deba sacrificar una parte de la carga que se encontraba en el navío para salvar la nave o el grueso de la carga, la pérdida debe ser soportada proporcionalmente por los propietarios de las cosas salvadas. La regla romana viene perfectamente enunciada en el citado texto de Paulo, extraído del libro segundo de sus *sententiae* y recogido en D. 14.2.1.

Este principio se puso en práctica en Roma por medio de las acciones que nacían del contrato de *locatio conductio*: en virtud de la *locatio operis faciendi* concertada entre el armador de la nave y los propietarios de las mercancías objeto del transporte, el dueño de las *merces* sacrificadas tendrá la *actio conducti* para reclamar su parte correspondiente a la indemnización debida por los dueños de las mercancías salvadas. Esto viene regulado por el mencionado texto de Volusio Meciano recogido en D. 14.2.2, que pretende ser un fragmento de la auténtica *lex Rhodia*: (…) τῳ νόμω τῶν Ῥωδίων κρινέσθω τῳ ναυτικῷ, ἐν οἷς μήτις τῶν ἡμετέρων αὐτῷ νόμος ἐναωτιοῦται.

En definitiva, según esto, la norma establecía una comunidad de riesgos entre los demandados (los propietarios de las mercancías salvadas) y los demandantes (los propietarios que han sufrido daños patrimoniales como consecuencia de la situación de necesidad) con base en el principio de un trato igualitario (*aequitas contributionis*).

La legislación bizantina, según se desprende de la deficiente transmisión del libro 53 de los Basílicos, admitió sin grandes variaciones la regulación romana. El principio de la comunidad de riesgos se encuentra recogido asimismo en los Basílicos (B. 53.3.1): (…) κοινοποιεῖται γὰρ ἡ ζημία τῆς διὰ τὴν κοινὴν σωτηρίαν ἀποβολῆς. El caso típico sigue siendo en las leyes bizantinas el de la avería gruesa y la echazón. Sin embargo, el *Nomos Rhodion nautikos* se aparta en diversas prescripciones de las reglas de la tradición, lo que ha hecho decir al mayor estudioso de esta fuente (Walter Ashburner) lo siguiente: "the Sea-Law (…) has an entirely different doctrine of contribution" (Ashburner, 1909, cxi), y esta diferencia de tratamiento es la que más ha hecho dudar a los estudiosos que el texto fuera verdaderamente parte originaria de los Basílicos. Pero el núcleo de esa colección sigue siendo el de las normas que regulan los casos de la avería gruesa y la echazón, y también son las que han tenido mayor influencia en diversas

normas de Derecho marítimo medieval y moderno (como p. ej. en oriente, el *Khalilieh* islámico; en occidente, las *Tabule di Amalfi* [*Consuetudines Amalfitanae*], *Notules commerciales d'Amaldric*, *Statuti Ancoritani*, *Consuetudines Bari*, *Statuta di Cattaro*, *Leges Genuenses*, *Breve Curiae Maris Pisanae*, *Llivre del Consulat del Mar*, *Costums de Tortosa*, etc.).

La más importante de las normas del *Nomos Rhodion nautikos* que regulan esta materia *sensu proprio* es N.N. III 9:

> Ἐάν περὶ ἐκβολῆς βουλεύσηται ὁ ναυκληρός, ἐρεπωτάτω τοὺς ἐπιβάτας οἷς χρήματα ἐστιν ἐν τῷ πλοίῳ. ὅ, τι δὲ ἐάν γένηται, τοῦτο ψήφοον ποιείτωσαν. συμβελλέσθωσαν δὲ εἰς συμβολὴν καὶ τὰ χρήματα· στρώματα δὲ καὶ ἱμάτια καὶ σκεύη πάντα ἐκτιμάσθω, καὶ ἐὰν γένηται ἐκβολή, τῷ ναυκλήρῳ καὶ τοῖς ἐπιβάταις μή πλείονος λίτρας μιᾶς, κυβερνήτῃ δὲ καὶ πρωρεῖ μή πλείονος ἡμιλίτρου, ναύτῃ γράματα τρία. παῖδες καὶ εἴ τις ἄλλος συμπλέει μὴ ἐπὶ πράσει ἀγόμενος κατὰ τιμὴν ὤν· ἐὰν δὲ τις ἐπὶ πράσει ἄγηται κατὰ δύο μῆνας. κατὰ τοῦτο δὲ καὶ ἐὰν χρήματα ἀφαρπαγῇ ὑπὸ πολεμίων ἢ ληστῶν ἢ στρατεία κοινὴ σὺν τῶν διαφερόντων τοῖς ναύταις, καὶ ταῦτα εἰς τὸν συμψηφισμὸν εἰσερχέσθωσαν καὶ κατὰ τὸ αὐτὸ συμβαλλέσθω. εἰ δὲ σύμφωνον κερδοκοινωνίας ἐστὶ, μετὰ τὸ ἅπαντα συμψηφισθῆναι τὰ ἐν τῷ πλοίῳ καὶ τὸ πλοῖον, κατὰ τὸ κέρδος ἕκαστος ἐπιγινωσκέτω καὶ τὴν προσγενομένην ζημίαν.

En la práctica esta regla significaba que, en caso de que ciertas mercancías (ropas de cama, vestidos, utillaje, etc.) fuesen afectadas por la echazón, las pretensiones de compensación por parte de determinadas personas no debían sobrepasar los límites establecidos en la norma, a saber, en caso del capitán o los pasajeros, una *litra* (equivalente a 60 monedas de plata); en el caso del timonel y los oficiales, media *litra*; y en el caso de los marineros, tres *grammata* (piezas de plata equivalentes a 1/12 de una onza de oro) (Grierson, 1999; Entwistle, 2002, 611). La regla se aplicaba también en caso de robo por asalto de enemigos o piratas.

La regulación de N.N. III 38 trata de los daños y la echazón en caso de un barco cargado con trigo y fletado por un comerciante:

> Ἐάν πλοῖον πεφορτωμένον σῖτον ἐν ζάλῃ καταληφθῇ, ὁ ναύκληρος διφθέρας παρεχέτω καὶ οἱ ναῦται ἀντλείτωσαν. εἰ δὲ ἀμελήσωσι καὶ βραχῇ ὁ φόρτος ἐκ τῆς ἀντλίας, οἱ ναῦται ζημιούσθωσαν, εἰ δὲ ἀπὸ ζάλης ὁ φόρτος ἀδικηθῇ, ἐπιγυνωσκέτωσαν τὴν ζημίαν ὅ τε ναύκληρος καὶ οἱ ναῦται ἅμα τῷ ἐμπόρῳ, τὰς δὲ ἕξ ἑκατοστὰς τῶν σωζομένων κομιζέσθω ὁ ναύκληρος ἅμα τοῦ πλοίου καὶ τοῖς ναύταις. ἀποβολῆς δὲ εἰς θάλασσαν γενομένης, ὁ ἔμπορος πρῶτος ῥιπτέτω καὶ οὕτως οἱ ναῦται ἐπιχειρείτωσαν. μετὰ δὲ τοῦτο μηδείς τῶν ναυτῶν σύλα ποιήσῃ· εἰ δὲ ποιήσῃ, διπλᾶ ἀποδιδότω ὁ ἐπιβαλλόμενος καὶ τοῦ κέρδους παντὸς ἐκπιπτέτω.

Un caso especial de reparto de daños entre el armador del buque y el que ha contratado el transporte, cuando este se trata de un comerciante o una sociedad, se regula en N.N. III 27:

> Ἐάν πλοῖον ἀπέρχεται εἰς γόμον ἐμπόρου ἢ κοινωνίας, συμβῇ δὲ τὸ πλοῖον παθεῖν ἢ διαφθαρῆναι κατὰ ἀμέλειαν ναυτῶν ἢ τοῦ ναυκλήρου, ἀκίνδυνα εἴτω τὰ φορτία τὰ ἐν ὅρια κείμενα. εἰ μαρτυρηθῇ ὅτι ζάλης γενομένης ἀπώλετο, εἰς συμβολὴν ἐρχέσθωσαν τὰ σωζόμενα τοῦ πλοίου ἅμα καὶ φορτίοις, τὰ δὲ ἡμίναυλα κατεχέτω ὁ ναύκληρος. ἐὰν δὲ τις ἀρνήσηται τὴν

κοινωνίαν καὶ ἐλεγχθῇ ὑπὸ μαρτύρων τριῶν, τὴν μὲν κοινωνίαν ἀποδιδότω, τῆς δὲ ἀρνήσεως τὴν τιμωρίαν ὑπομενέτω.

En las reglas del *Nomos Rhodion Nautikos* se tratan diversos casos que pueden producirse durante el transporte, desde el cargamento durante el flete del barco hasta la llegada a puerto y la descarga. En este contexto son importantes las normas establecidas en N.N. III 29–31:

29. Ἐάν ὁ ἔμπορος ἐν τῷ τόπῳ ὅθεν συγγράψονται μὴ παράσχῃ τὰ φορτία πληρωθείσης τῆς προθεσμίας, καὶ συμβῇ ἀπὸ πειρατείας ἢ πυρκαιᾶς ἢ ναυαγίου ἀπώλειαν γενέσθαι, ἐφορᾶν πᾶσαν τὴν ζημίαν τοῦ πλοίου τὸν ἔμπορον. ἐὰν δὲ μὴ πληρωθέντων τῶν ἡμερῶν τῆς προθεσμίας συμβῇ τι τῶν εἰρημένων, εἰς συμβολὴν ἐρχέσθωσαν.

30. Ἐάν ὁ ἔμπορος φορτώσας τὸ πλοῖον, χρυσίον δὲ ἔσται μετ᾽ αὐτοῦ, καὶ τι τῶν κατὰ θάλασσαν κινδύνων σθμβῇ παθεῖν τὸ πλοῖον καὶ ὁ φόρτος ἀπόληται καὶ τὸ πλοῖον διαλυθῇ, τὰ ἐκ τοῦ πλοίου σωζόμεθα καὶ τοῦ φόρτου εἰς συμβολὴν ἐρχέσθωσαν, τὸ δὲ χρυσίον τοῦ ἐμπόρου ἐκκομιζέτω μεθ᾽ ἑαυτοῦ, δεκάτας δὲ ἀποδιδότω. ἐὰν δὲ μὴ τι τῶν σκευῶν τοῦ πλοίου κατασχὼν ἐσώθη, τὰ ἡμίναυλα ἀπὸ τῶν ἐγγράφων παρεχέτω· εἰ δὲ τι τῶν σκευῶν τοῦ πλοίου κατασχὼν ἐσώθη, πέμπτας πιφερέτω.

31. Ἐάν ὁ ἔμπορος φορτώσῃ τὸ πλοῖον καὶ τι συμβῇ τῷ πλοίῳ, τὰ σωζόμενα πάντα εἰς συμβολὴν ἐρχέσθωσαν ἑκάτερα· τὸ δὲ ἀργύριον ἐὰν σώζηται, πέμπτας ἐπιδιδότω· ὁ δὲ ναύκληρος καὶ οἱ ναῦται βοηθείας παρεχέτωσαν εἰς τὸ σῶσαι.

Las reglas que determinan la parte de los bienes valiosos (sobre todo oro y plata) contenidas en los κεφάλαια 30 y 31 forman parte más bien de las normas que regulan el salvamento, ya que se observan importantes diferencias con el tratamiento que se da a los demás casos de despojo de mercancías, compensación de daños y tratamiento de los damnificados.

También son relevantes los casos contenidos en N.N. III 33, 35 y 39:

33. Ἐάν ὁ ναύκληρος θείς τὰ φορτία ἐπὶ τῷ τόπῳ τῶν συνθηκῶν καί τι πάθῃ τὸ πλοῖον, τὸ μὲν ναῦλον εἰς πλῆρες εἰσκομιζέσθω ὁ ναύκληρος ὑπὸ τοῦ ἐμπόρου; τὰ δὲ ἐν ὄρια ἐκβεβλημένα ἀκίνδυνα εἶναι ὑπὸ τῶν συμπλεόντων τοῦ πλοίου μετὰ τοῦ πλοίου, τὰ δὲ εὑρισκόμενα ἐν τῷ πλοίῳ ἅμα τοῦ πλοίου εἰς συμβολὴν ἐπχέσθωσαν.

35. Ἐάν πλοῖον ἐκβολὴν ποιήσηται τῆς καταρτίας αὐτομάτως ἀποβαλλομήνης, πάντες οἱ ἔμποροι καί τὰ φορτία καί τὸ πλοῖον σωθέντα εἰς συμβολὴν ἐπχέσθωσαν.

39. Ἐάν πλοῖον μεστὸν σίτου ἢ οἴνου ἢ ἐλαίου ἁρμενίζον βουλήσει τοῦ ναυκλήρου καί τῶν ναυτῶν χαλασάντων τὰ ἄρμενα καί εἰσέλθη τὸ πλοῖον εἰς τόπον ἢ ἐν ἀκτῇ μὴ βουλομένου τοῦ ἐμπόρου καί συμβῇ ἀπόλειαν γενέσθαι τοῦ πλοίου, τὸν δὲ γόμον ἢ τὰ φορτία σωθῆναι, ἀκίνδυνον εἶναι τὸν ἔμπορον ἐκ τῆς ζῆμίας τοῦ πλοίου, ἐπειδὴ οὐκ ἐβούλετο εἰσελθεῖν εἰς τὸν τόπον ἐκεῖνον. εἰ δὲ ἁρμενίζοντος τοῦ πλοίου εἴπῃ ὁ ἔμπορος τῷ ναυκλήρῳ· ἐν τῷ τόπῳ τούτῳ χρῄζω εἰσελθεῖν, τοῦ τόπου μὴ ἐγκειμένου ἐν τοῖς ἐγγράφοις, καί συμβῇ ἀπώλειαν γενέσθαι τοῦ πλοίου τὰ δὲ φορτία σωθῆναι, ἀπολαμβανέτω ὁ ναύκληρος τὸ πλοῖον σῶον ἀπὸ τοῦ ἐμπόρου. εἰ δὲ βουλήσει τῶν ἀμφοτέρον ἀποβάλληται τὸ πλοῖον, πᾶντα εἰς συμβολὴν ἐρχέσηωσαν.

Una regulación importante del *Nomos Rhodion nautikos*, que ha de observarse como una medida de precaución para salvaguardar la seguridad del tráfico marítimo, es la contenida en N.N. III. 36:

> Ἐάν πλοῖον ἀρμενίζον ἕλθῃ ἐπάνω πλοίου ἑτρου ὁρμοῦντος ἢ χαλάσαντος τὰ ἄρμενα ἡμέρας οὔσης, πᾶσαν τὴν συντριβὴν καί τὴν ἀπώλειαν ἐφροσᾶν τόν τε ναύκληρον καί τοὺς ἐμπλέοντας. λοιπὸν δὲ καί τὸ φορτίον εἰς συμβολὴν ἐρχέσθω. εἰ δὲ ταῦτα γυκτὸς οὔσης συμβῇ, ὁ τὰ ἄρμενα χαλάσας πῦρ ἀπτ. εἰ δὲ καί πῦρ οὐκ ἔχει, χραυγὰς παρεχέτω. εἰ δὲ ἀμελήσας ποιῆσαι· καὶ συμβῇ ἀπώλειαν, ἑαυτὸν ἀπώλεσεν, εἰ ταῦτα οὕτως μαρτυρηθῶσιν. εἰ δὲ καί ὁ ἀρμενιστὴς ἀμελήσας καὶ ὁ βιγλεοφόρος ἀποκοιμηθῇ, ὡς εἰς βράχη ἀπώλετο ὁ ἀρμενίζων καὶ ὅν κρούσει ἀζήμιον φυλλαττέτω.

La doctrina romana sobre la colisión y el abordaje se distingue de las líneas directrices trazadas en el *Nomos Rhodion nautikos* fundamentalmente en que se concede una acción contra los oficiales de proa y el timonel de la nave embestida (D. 9.2.29). Esta regulación romana sí fue admitida, en cambio, en los Basílicos (B. 53.2.8)[16].

Puesto que los presupuestos de una *derelictio* formal no se cumplen si se arroja la mercancía para salvar la nave en caso de peligro en el mar, estos objetos no son contados entre las *res derelictae* según el Derecho romano; es decir, que a pesar de la pérdida de la posesión de los bienes, estos permanecían en propiedad de sus dueños y, por tanto, si estos bienes eran sustraídos o robados, no podían ser objeto de usucapión (*res furtivae*). Estos principios del Derecho romano determinan también la tendencia de la regulación del *Nomos Rhodion nautikos* en N.N. III 46 y, sobre todo, N.N. III 47:

> 46. Ἐάν κάραβος ἀπὸ ἰδίου πλοίου τὰ σχοινα διαρρήξας ἀπὸληται ἅμα καὶ τοῖς ἐμπλέουσιν ἐν αὐτῷ, ἐάν οἱ πλοντες ἀπὸλωνται ἢ ἀποθάνωσι, τὸν μισθόν τὸν ἐνιαυσιαῖον ἀποδιδότω ὁ ναύκληρος εἰς πλῆρες τοῦ ἐνιαυτοῦ τοῖς τούτων κληρονόμοις. ὁ δὲ τὸν κάραβον ἀποσώζων σὺν τῶν ἐφολκίων, καθὼς ἐν ἀληθείᾳ εὑρίσκει, πάντα ἀποδώσει, λαμβάνων οὗ ἀποσώζει τὸ πέμπτον μέρος.
>
> 47. Ἐάν χρθσίον ἢ ἀργύριον ἢ ἕτερόν τι ἐκ βυθοῦ ἐπαρθῇ ἀπὸ ὀργυιῶν ὀκτώ, λαμβνέτω ὁ ἀποσώζων τὸ τρίτον μέρος. ἀπὸ δὲ ὀργθιῶν δεκαπέντε, λαμβνέτω ὁ ἀποσώζων τὸ ἥμισυ διὰ τὸν κίνδυνον τοῦ βυθοῦ. τῶν δὲ ἐκριπτομένων ἀπὸ θάλασσης εἰς γῆν καὶ εὑρισκομένων ἐπὶ πῆχυν ἕνα, λαμβανέτω ὁ ἀποσώζων δέκατον μέρος τῶν ἀποσωζομένων.

Los bienes arrojados en caso de avería o naufragio permanecen en propiedad de sus dueños según la regla romana también en los Basílicos (B. 53.3.8; cfr. B. 53.3.23)[17]. El robo de bienes procedentes de un naufragio es perseguible penalmente también según esta codificación (B. 53.3.19; 25; 31; 35; 43; 48). En cambio, León VI el Sabio, en su *Nov.* 64 (Noailles, Dain, 1944, 234–237), cita una ley antigua

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[16] Ἐάν πλοῖον καταποντίσῃ ἕτερον ἐρχόμενον κατ' αὐτοῦ, ἐνάγεται ὁ πωρεὺς ἢ ὁ κυβερνήτης· εἰ δὲ ἐξ ὑπερβολῆς χειμῶνος τοῦτο γέγονεν, οὐκ ἐνέχεται ὁ δεσπότης. Εἰ δὲ δι' ἀμέλειαν τῶν ναυτῶν συνέβη, ἀρκεῖ ὁ Aquilios (= D. 9.2.29.4).

[17] B. 53.3.8; *cf.* B. 53.3.23.

según la cual el robo de bienes procedentes de un naufragio se castiga con la pena de muerte:

> Ἐκεῖνο δὲ λίαν θαυμάζω πῶς ὁ τὰ ἐκ θαλαττίου κινδύνου ἀποκρυπτόμενος τοσοῦτον ἔδοξεν ἁμαρτεῖν ὥστε θάνατον ἐπάγειν αὐτῷ τὴν τοιαύτην ἁμαρτίαν. Ὅτι μὲν γὰρ ἁμαρτίαν οὐ μετρίαν τολμᾷ, ἐκείνους ἀποστερῶν τῶν ἰδίων οἷς ἴσως καὶ παρ' ἑαυτοῦ ἐπαρκῶν τις εἰς ἔλεον καταστὰς οὐκ ἂν ἥνπερ φέρουσι διὰ τῶν ἐγκάτων ὀδύνην καταπραΰνων ὀφθείη – εἰκὸς γὰρ πολλὴν ζημίαν καὶ τῶν ὄντων ἀποβολὴν ὑπομεῖναι – τοῦτο τῶν φαινομένων ἐστίν. Ὅτι δὲ χρὴ ζωῆς ἀποστερεῖσθαι τοὺς καθ' ὧν ἡ ἔκπληξις ἔχει τὴν χώραν, τοῦτο συνιδεῖν οὐκ ἔχω. Τί γὰρ τοσοῦτον ἀφείλετο, ὃ γένοιτ' ἂν ἰσοστάσιον ψυχῆς ἧς τὴν εἴσπραξιν κατακρίνεται; Κάκιστος μὲν οὖν καὶ ἀλιτήριος ὁ τοιούτου κέρδους ἐλάττων, τοῦτο δὴ τὸ παρ' ἐνίων γινόμενον, περισυλῶν τεθνηκότας· οὐ μὴν ἡ πονηρία τοιαύτης ἀξία δίκης. Οὐ γὰρ δίκαιον ἀντὶ πράγματος ὑλικοῦ καὶ ῥέοντος ἄϋλον καὶ ἀθάνατον πρᾶγμα τὴν ψυχὴν λαμβάνειν. Εἰ γὰρ πολλάκις οὐδὲ ἐν πράγμασιν ὕλης τιμωμένη ἡ ζημία πολλὴν τὴν ὑπερβολὴν ἔχει ἵνα μὴ τῷ ὑπερβάλλοντι ὥσπερ τινὰ περίοδον ἡ ἀδικία λαμβάνῃ, πῶς οὕτως ἀστάθμητος ζημία καταλάβοι τοὺς ἀποκρυψαμένους τὰ τῶν ναυαγούντων, οὐκ οὔσης τῆς ὑπερβολῆς λόγῳ ῥητῆς ἣν πρὸς τὸ ἀδίκημα ἡ εἴσπραξις ἀποφέρεται;
>
> Κελεύομεν οὖν καὶ τοῦτο μηκέτι οὕτως εὐθύνεσθαι, ἀλλ' ἀντὶ τοῦ παρακατασχεθέντος εἴδους ἀποτιννύειν τετραπλοῦν τὸν ἀποκρυψάμενον, καὶ τοιαύτῃ δίκῃ ὁρίζεσθαι τὸ ἁμάρτημα.

Que se sepa, no había en tiempos de León ninguna ley de ese tipo en vigor, por lo que se presume que esa norma debía de ser de origen consuetudinario, pero no tenemos constancia de ello. Todo lo que afecta al castigo de estos delitos es bastante poco claro, especialmente porque el texto literal del libro 53 de los Basílicos no ha sido transmitido y hay que basarse en las restituciones del mismo que pueden hacerse a través de otras fuentes. De ahí que tampoco podamos asegurar si esa norma antigua formaría parte del tenor original del *Nomos Rhodion nautikos*, si bien nada de eso encontramos en el estado actual de su transmisión.

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Francisco J. Andrés Santos

LOS RIESGOS DEL MAR EN EL *NOMOS RHODION NAUTIKOS*

The article is aimed to present a brief discussion of several chapters of the *Nomos Rhodion Nautikos* concerning the obligation of contribution for different persons taking part in a contract of carriage by sea, in case some of the goods had to be thrown overboard by the ship's master to save the vessel. It is shown how deep the differences between the Roman regulation and the Byzantine one could be, and it is attempted to explain the reasons why these differences might have emerged.

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THE ROLLS OF OLÉRON, MARITIME ASSIZES OF THE KINGDOM OF JERUSALEM AS A HERITAGE OF THE RHODIAN SEA LAW IN THE ANGLO-NORMAN WORLD IN THE CASES OF MURDERS, ROBBERIES, AND MARITIME PIRACY

The Rhodian Sea Law was a milestone in the medieval maritime law of Europe (Benedict, 1909, 223–225; Rhodes, 1909, lx–lxiv). The legacy left by the ancient Greeks and Romans was codified in Byzantium and, after a few centuries, it was brought by the Crusaders to the Anglo-Norman world. This transition took place within the Kingdom of Jerusalem, where maritime law became an important element of the local collection of laws. Having settled in the Levant, Crusaders came into contact with the laws adopted by the local Greeks, Armenians, and Arabs. They also brought their own law with them. Therefore, the kings of Jerusalem had to bring order in the legal disarray, which they did. The Assizes of Jerusalem are a collection of numerous medieval legal treatises containing the law of the Crusader Kingdom of Jerusalem and the Kingdom of Cyprus, which were finally compiled in the thirteenth century in Old French and in Greek (Beugnot, 1841, V–XXX; Beugnot, 1843, V–XX). The earliest laws of the Kingdom were promulgated at the Council of Nablus in 1120, but these laws were later replaced by the assizes. There are nine treatises in the Assizes of Jerusalem, and they concern themselves with two kinds of law: the Feudal Law, to which the Upper Court of Barons was amenable; and the Common Law which was applied at the Court of Burgesses. The latter is the older of the two and was drawn up before the fall of Jerusalem. It regulates civil law issues, such as contracts, marriage, and property, and touches on some which fall within the purview of special courts, such as the "Ecclesiastical Court" for canonical affairs, the "Cour de la Fonde" for com-

merce, and the "Cour de la Mer" for admiralty cases. The sea was a window into the world for the Kingdom of Jerusalem. It was also important to regulate the maritime relationship between the Christians in the Holy Land and their Muslim neighbors. Particular attention was paid to the contraband that some captains and sailors admitted. In the forty-seventh paragraph of the Assizes of Jerusalem, one finds an intriguing thread dedicated to this issue, which is worth mentioning here in its entirety:

> Article XLVII
> *S'il avient que un marinier ou un marchant, qui que il soit, porte aver deveé en terre de Sarasins, ci com est se il i porte armeure, haubers et chauces de fer, ou lances, ou abalestre, ou heaumes, ou verges d'acier-ou dç fer, et il en peut estre ataint en la cort de la chaene par les mariniers ou par les marchans qui là estoient, qui ce virent qu'il vendi et aporta as Sarasins celuy aver deveé, et ce que il porta monta plus d'un marc d'argent en amont, tout can que il a si deit estre dou seignor de la terre, et deit estre jugé par l'autre Cort des Borgés à pendre par la goule, puis que les jurés de la chaene auront receu devant iaus les garens de ceste chose, et ce est dreit et raison par l'asize* (Beugnot, 1843, 45, § XLVII).[1]

A smuggler deliveringiron to the Muslims was called a bad Christian. This section also specified the value of property made of iron which could be sold to Muslim at no more than one silver mark. Of course, the punishment for contraband imposed by the Court of the Burghers was death by hanging. This paragraph also encouraged seafarers and merchants to denounce such dishonest traffickers. At the same time, feudal lords were allowed to confiscate their possessions. The next paragraph included a direct reference to the problem of piracy and robbery which could be committed by sailors:

> Article XLVIII
> *Ici orrés la raison de seluy aveir c'on baille à porter sur mer, et il avient que les corsaus li tolent can que ü porte, et dou sien et de l'autruy, ou que le vaisseau se brise et pert tout.*
> *S'il avient que un home baille à un autre home de son aver à porter sur mer, à gaaing en aventure de mer et de gens, et il avient que corsaus l'encontrent et li tolent tout can que il porte, ou il fait mauvais tens, et brise le vaisseau et pert tout, la raison coumande qu'il en est atant quite, et ne li en deit riens amender. Mais cil ala au veage là où il dut aler, sein et sauf, et puis qu'il fu en terre fist aucune meslée ou tua aucun home, et por ce le sire de la terre prent tout ce que il a, le dreit coumande qu'il est tenus de rendre as gens tout ce qu'il porta dou leur, car il n'est pas dreis que les bounes gens qui li baillèrent le leur por bien faire, le deient perdre par sa failie et folie. Mais*

[1] Translation according to Twiss (1876), 510–513, § 5: *Here you shall have the law as regards a bad Christian, who carries forbidden goods to the land of the Saracens, and what the magistrate ought to do to the man who carries them. If it happens that a mariner or a merchant, whichever it may be, carries forbidden goods to the country of the Saracens, such for instance as armour, coats-of-mail, ironpieces, lances and projectiles, axes or spears of steel or iron, and he is arraigned in the Court of the Chain by the mariners or by the merchants who were there, who knew that he sold and delivered to the Saracens those forbidden goods, and what he carried amounted to more than a mark of silver, all that he possesses ought to be confiscated to the lord of the land, and he ought to be condemned by the other Court of the Burghers l to be hanged, after the jurors of the Court of the Chain have had before them sufficient warrantors of the matter, and this is justice and law according to the assise.*

tout enci corne il fist le mau par sei, si le conpere par sei. Et cil avint que il resut l'aveir des bones gens à porter sauf en terre, il est tenus de l'amender coument qu'il seit puis perdus, par dreit et par l'asize; Et ce tant est chose qu'il n'a de quei paier celui de cui il porteit laver, la Cort de la chaene le deit métré en prison; et des sept jors en avant, puis qu'il sera mis en prison, li deit douner, celui ou cele por qui il est en prison, à manger au mains pain et aigue, ce plus ne li veut douner: et ce est dreit et raison par l'asize (Beugnot, 1843, 46, § XLVII).[2]

This law specifies that in the event of a ship loss or seizure of the goods on board by a corsair, the owner of the vessel should be exempted and should not incur any additional costs to compensate for lost goods. However, if he reached his destination safely, and there entered into a fight in which he killed a person, then the chattels aboard the ship would be confiscated by the master of that port. In addition, the captain would be forced to return the equivalent of the lost property that had been transported to its owners. The Assizes of Jerusalem prescribed that in the event of captain's insolvency, he should be put in jail, for at least 8 days, where bread and water should be provided to him by those who had accused him of losing the goods.

The second of the maritime laws are The Rolls of Oléron, and they were the first formal statement of "maritime" or "admiralty" laws in north-western Europe (Krieger, 1970, 72; Allaire, 2015). They were promulgated by Eleanor of Aquitaine around 1160, after her return from the second crusade and were based upon the Rhodian Sea Law. The queen is likely to have become acquainted with them while at the court of King Baldwin III of Jerusalem, who had adopted them as the Maritime Assizes of the Kingdom of Jerusalem. Eleanor of Aquitaine promulgated this law in England at the very end of the twelfth century, having been granted viceregal powers in that monarchy. They are named after the island of Oléron because this place was the site of the maritime court. They were much more elaborate in relation to their prototype from the Kingdom of Jerusalem, and contain regulations applicable to wine trade from Brittany and Normandy to

[2] Translation according to Twiss (1876), 512–515, § 6: *Here you shall have the law as regards the property, which is committed to an agent to carry upon the sea, and it happens that corsair capture what he is carrying both of his own and of other persons' goods, or that the vessel is wrecked and all is lost. If it happens that a person commits to another person some of his property to carry on the sea to make gain within a common adventure upon the sea, and it happens that corsair meet with it and capture all which he is carrying, or bad weather overtakes him and his vessel is wrecked and all is lost, the law ordains that he is altogether discharged, and ought not to make good anything. But if he arrives on his voyage whither he ought to go, well and safe, and after he has come to land, he has got into any brawl or killed any person, and thereupon the lord of the land l takes all which he has; the common law commands that he is bound to restore to the owners all the property which he was carrying; for it is not right that the honest people who entrusted to him their property to employ profitably should lose it from his folly, but he must bear the evil by himself since he has brought it upon himself. And if it happens that he has received the goods of honest people, to carry them safe to land, he is bound according to justice and by the assise to make them good, notwithstanding they are subsequently lost. And if it should be the case that he has nothing wherewith to pay him whose goods he was charged to carry, the Court of the Chain ought to commit him to prison, and he or she, by whom he has been cast into prison, ought to supply him with bread and water eight days in hand, if he or she is not willing to give him more, and this is justice and law according to the assise.*

England (Frankot, 2007, 159). In the time of Eleonora, there were 24 articles, but this was not the end of the evolution of this maritime law, which in 1266 had 47 articles (Allaire, 2015, 80). They comprise as many as 8 articles that pertain to the problem investigated here. The first one is particularly intriguing:

> Article VI
> *If any of the mariners hired by the master of any vessel, go out of the ship without his leave, and get themselves drunk, and thereby there happens contempt to their master, debates, or fighting and quarreling among themselves, whereby some happen to be wounded: in this case the master shall not be obliged to get them cured, or in any thing to provide for them, but may turn them and their accomplices out of the ship; and if they make words of it, they are bound to pay the master besides: but if by the master's orders and commands any of the ship's company be in the service of the ship, and thereby happen to be wounded or otherwise hurt, in that case they shall be cured and provided for at the costs and charges of the said ship.*[3]

This law specifies the status of seafarers who, without the captain's permission, leave the deck of his ship, get drunk and start a brawl between them, which ends in injuries inflicted on one another. The article absolved the captain from the responsibility for their treatment, as well as entitled the master to punish the seafarers. An exception is made for a situation in which a seaman was wounded on duty, because then the captain had to provide him with proper medical care at the expense of his ship. This article is also the only one that can be associated with Eleanor's times. Later ones were added to this law only in 1266. Why is this date so crucial? Because then the Duke of Brittany John I (1237–1286) – within the principality under his rule – began to rely on this law and the court on the Oleron island to solve legal matters related to activities at sea (Barbier, 1949, 16–18). This is one of the oldest versions of this source. Other versions written in England originate mostly from the time of Edward I (1272–1307), and later centuries. The laws added subsequently significantly expanded the range of legal competence that the courts had on the Oleron island, which is why they have to be adduced at this point. The next four articles are concerned with the role of pilots, sea robbery, and wrecking of the ships.

> Article XXIII
> *If a pilot undertakes the conduct of a vessel, to bring her to St. Malo, or any other port, and fail of his duty therein, so as the vessel miscarry by reason of his ignorance in what he undertook, and the merchants sustain damage thereby, he shall be obliged to make full satisfaction for the same, if he hath wherewithal; and if not, lose his head.*

> Article XXIV
> *And if the master, or any one of his mariners, or any one of the merchants, cut off his head, they shall not be bound to answer for it; but before they do it, they must be sure he had not herewith to make satisfaction.*

[3] Translation of The Rules of Oleron according to Twiss (1871).

These two articles describe the punishment a ship pilot may have received, if he did not properly discharge the task entrusted to him. If a merchant whose goods were carried by a ship conducted by a pilot, and the latter failed in his duty, he had to make a financial contribution from his property of equal value, whereas if he did not have any, he lost his head. The death penalty could be carried out personally by either the captain, the seamen or the merchant himself, but only when they had made sure the pilot had no goods or money for compensation. The two other articles specify what awaits both the pilots and the feudal lords when they act in collusion in order to bring the ship down and plunder the shipwreck.

Article XXV

If a ship or other vessel arriving at any place, and making in towards a port or harbor, set out her flag, or give any other sign to have a pilot come aboard, or a boat to tow her into the harbor, the wind or tide being contrary, and a contract be made for piloting the said vessel into the said harbor accordingly; but by reason of an unreasonable and accursed custom, in some places, that the third or fourth part of the ships that are lost, shall accrue to the lord of the place where such sad casualties happen, as also the like proportion to the salvors, and only the remainder to the master, merchant and mariners: the persons contracting for the pilotage of the said vessel, to ingratiate themselves with their lords, and to gain to themselves a part of the ship and lading, do like faithless and treacherous villains, sometimes even willingly, and out of design to ruin ship and goods, guide and bring her upon the rocks, and then feigning to aid, help and assist, the now distressed mariners, are the first in dismembering and pulling the ship to pieces; purloining and carrying away the lading thereof contrary to all reason and good conscience: and afterwards that they may be the more welcome to their lord, do with all speed post to his house with the sad narrative of this unhappy disaster; whereupon the said lord, with his retinue appearing at the places, takes his share; the salvors theirs; and what remains the merchant and mariners may have. But seeing this is contrary to the law of God, our edict and determination is, that notwithstanding any law or custom to the contrary, it is said and ordained, the said lord of that place, salvors, and all others that take away any of the said goods, shall be accursed and excommunicated, and punished as robbers and thieves, as formerly hath been declared. But all false and treacherous pilots shall be condemned to suffer a most rigorous and unmerciful death; and high gibbets shall be erected for them in the same place, or as high as conveniently may be, where they so guided and brought any ship or vessel to ruin as aforesaid, and thereon these accursed pilots are with ignominy and much shame to end their days; which said gibbets are to abide and remain to succeeding ages on that place, as a visible caution to other ships that shall afterwards sail thereby.

Article XXVI

If the lord of any place be so barbarous, as not only to permit such inhuman people, but also to maintain and assist them in such villainies, that he may have a share in such wrecks, the said lord shall be apprehended, and all his goods confiscated and sold, in order to make restitution to such as of right it appertaineth; and himself to be fastened to a post or stake in the midst of his own mansion house, which being fired at the four corners, all shall be burnt together, the walls there of shall be demolished, the stones pulled down, and the place converted into a market place for the sale only of hogs and swine to all posterity.

The pilots mentioned in this law, deliberately bringing the ships onto the rocks, where the shattered vessels were plundered by feudal lords under the guise of helping them. In order to counter this, the law prohibited any seizure of property from shattered ships by feudal lords and their men, under pain of excommunication, as well as imposing penalties otherwise applicable to robberies and thefts, considering perpetrators to be culpable of crime of equal severity. In addition, if any lord was deliberately involved in the operation, his land property was to be confiscated or sold, and he should be tied to a stake and burned in the midst of his own property, whose walls should later be destroyed, and a market for selling pigs should be built in their place. The pilot should be hanged on high gallows, where his body was to hang until it completely decayed, to warn the passing ships. Also, in order to counteract this danger, Article 29 of this law provided appropriate guidance to the lords on whose land a ship crashed:

> Article XXIX
> *If any ship or other vessel sailing to and fro, and coasting the seas, as well in the way of merchandizing, as upon the fishing account, happen by some misfortune through the violence of the weather to strike herself against the rocks, whereby she becomes so bruised and broken, that there she perishes, upon what coasts, country or dominion soever; and the master, mariners, merchant or merchants, or any one of these escape and come safe to land; in this case the lord of that place or country, where such misfortune shall happen, ought not to let, hinder, or oppose such as have so escaped, or such to whom the said ship or vessel, and her lading belong, in using their utmost endeavors for the preservation of as much thereof as may possibly be saved. But on the contrary, the lord of that place or country, by his own interest, and by those under his power and jurisdiction, ought to be aiding and assisting to the said distressed merchants or mariners, in saving their shipwrecked goods, and that without the least embezzlement, or taking any part thereof from the right owners; but, however, there may be a remuneration or consideration for salvage to such as take pains therein, according to right reason, a good conscience, and as justice shall appoint; notwithstanding what promises may in that case have been made to the salvors by such distressed merchants and mariners, as is declared in the fourth article of these laws; and in case any shall act contrary hereunto, or take any part of the said goods from the said poor, distressed, ruined, undone, shipwrecked persons, against their wills, and without their consent, they shall be declared to be excommunicated by the church, and ought to receive the punishment of thieves; except speedy restitution be made by them: nor is there any custom or statute whatsoever, that can protect them against the aforesaid penalties, as is said in the 26th article of these laws.*[4]

Thus, lords should not hinder the salvage of the wrecked ships; on the contrary, they had to join the rescue operation voluntarily, without seizing the possessions of the survivors. In such case, a lord might have been rewarded for his help, but within reasonable limits. Any derogation was to be punished with the full power referred to in Article 26. However, not only the feudal lords, but also their subjects living on the coast engaged in plundering of the survivors. In order to regulate this, Article 31 of this maritime law was created:

[4] See also Chircop (2005), 173–174.

Article XXXI

If a ship or other vessel happens to be lost by striking on some shore, and the mariners thinking to save their lives, reach the shore, in hope of help, and instead thereof it happens, as it often does, that in many places they meet with people more barbarous, cruel, and inhuman than mad dogs, who to gain their monies, apparel, and other goods, do sometimes murder and destroy these poor distressed seamen; in this case, the lord of that country ought to execute justice on such wretches, to punish them as well corporally as pecuniarily, to plunge them in the sea till they be half dead, and then to have them drawn forth out of the sea, and stoned to death.

The role of a feudal lord was reduced to administering punishment to those of his subjects who had committed various crimes against the survivors and their property. The punishment for such offenses included half-drowning in the sea, followed by stoning to death. The last intriguing article from this set of laws defined the exceptions to the rule of helping survivors of a shipwreck.

Article XLVII

This is to be understood only when the said ship or vessel so wrecked, did not exercise the trade of pillaging, and when the mariners thereof were not pirates, sea-rovers, or enemies to our holy Catholic faith; but if they are found to be either the one or the other, every man may then deal with such as with rogues, and despoil them of their goods without any punishment for so doing.

It follows, that goods owned by pirates, sea robbers, and enemies of Christianity were an exception to the requirement of aid and the ban on seizure of property. If their property was thrown onto the shore, or still remained in the wrecks, it could be taken by anybody without adverse consequences.

The abovementioned maritime laws, applied in the twelfth and thirteenth centuries in the Anglo-Norman world, were not a verbatim iteration of the Rhodian Sea Law, but rather its variation. Financial compensation for lost property as a result of pirate activities was derived from that maritime law and translated into The Rolls of Oléron and the Maritime Assizes of the Kingdom of Jerusalem. Article XLVIII of the Maritime Assizes of the Kingdom of Jerusalem may be cited as evidence, as it also addresses financial responsibility for a pirate attack; its antecedent appears to be included in Chapter 4 of the Rhodian Sea Law (Rhodes, 1909, Appendix 3, § 4, p. 13). There is also the captain's responsibility for the goods on board who sailed into waters where pirates operated. If he did that despite the admonition of the passengers, he had to pay compensation for the losses. If the passengers were guilty, the loss was theirs to bear. In The Rolls of Oléron, such reservations are formulated in relation to shipping pilots, and represent an addition from a later period.

Article XLVII of the Maritime Assizes of the Kingdom of Jerusalem was inspired by Chapter 8 of the Rhodian Sea Law (Rhodes, 1909, Appendix 3, § 4, p. 15). The main difference, however, is that in the law from Rhodes there is a fugitive captain who escaped to the neighboring country with his employer's gold, while in the Assizes the matter concerns a weapons smuggler. In both cases, the punishment for the act of betrayal was confiscation of property, to which the Crusaders

added the death penalty by hanging. The Rolls of Oléron strictly penalize acts of piracy committed by feudal lords conniving with dishonest pilots, who led their ships onto the so that their superiors could appropriate shipwrecked property. Penalties were very cruel, though not as cruel as the actions of the lords and pilots; the latter constituted acts of piracy afflicting the trade in the great Plantagenet empire, which at the end of the twelfth century included Britain, Ireland and the west and the south of present-day France. The job of ship pilots job has always been a risky profession. These people have always been able and keen to cooperate with smugglers, pirates or other maritime criminals. It was so in antiquity, and so it is today, in the twenty first century. The Plantagenet monarchy is likely to have faced the same problem.

Queen Eleanor created a new law based on proven patterns, ensuring more lawful conduct of maritime activities on the waters surrounding the British Isles. The law she brought with her from the Second Crusade was immediately introduced in her beloved Aquitaine. However, her marriage to Henry II Plantagenet, a very imperial character, was extremely difficult as long as he lived. Henry II recognized that she possessed the strength capable of overthrowing him with the help of their own sons. The King of England did not want to share his power with his wife, either, due to the fact that the Anglo-Norman monarchy was governed exclusively by the centralized system of power and the laws of the kingdom. He owed it to his Norman forefathers. The fiefdom system in England developed after the Norman invasion, which prevented decentralization and was consciously introduced by English monarchs and supported by the Norman feudal lords. In England, feudal lordship was not identified with local officials, as the fief hierarchy was two-tiered (including royal vassals, tenants and their vassals, subtenants). Significantly, the degree of the second degree was valid for the king and thus formed the principle that the vassal's vassal was one's vassal as well. Hence the new maritime law was introduced in England only after his death, when Eleanor became the regent of her son Richard, who set off on a Crusade and later to the war in France. We must remember that in the twelfth-century Anglo-Norman English society the tradition of piracy and ransacking wrecks, a remnant of the Viking period, was still alive. Eleanor changed that state of affairs and laid the foundations for England's later trade power at sea.

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THE ROLLS OF OLÉRON, MARITIME ASSIZES OF THE KINGDOM OF JERUSALEM AS A HERITAGE OF THE RHODIAN SEA LAW IN THE ANGLO-NORMAN WORLD IN THE CASES OF MURDERS, ROBBERIES, AND MARITIME PIRACY

The essence of this paper is to illustrate the genuine link between the norms contained in the medieval twenty-four first Laws of Oléron that have survived to modern times, binding certain legal solutions in the space over the ages. The Laws of Oléron contain norms relating to contemporary maritime labour law. Certainly they are not a model fully reflected in the Maritime Labor Convention (MLC 2006). Nevertheless, these principles can be an interesting starting point for discussions on the importance of decent working conditions and the lives of seafarers on ships from a few centuries perspective and the importance of maritime safety culture.

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LEX RHODIA DE IACTU AND GENERAL AVERAGE

Lex Rhodia in Roman Law

The second title of Book XIV of the Digest, entitled *De lege Rhodia de iactu*, has a special status within the *Corpus Iuris Civilis*. The entire legal adaptation that relates to D. 14.2 is based on the same legal principle: no one can enrich themselves at the expense of another.[1] If the goods of one of the merchants were thrown out of the ship to reduce the load on the ship and thus save the goods of other merchants traveling on the same ship, then the merchants whose goods were saved would gain an unfair property advantage compared to those whose goods were sacrificed. *Lex Rhodia de iactu* is an interesting institute for several other reasons.

Firstly, it is an example of the ancient reception of one legal institute belonging to one legal order into another order (regardless of the fact that the extent as well as the nature of reception itself is debated in jurisprudence).

Secondly, the principle of compensation for one's property sacrificed in the interest of mutual benefit was so inspirational that it influenced later legal thinking and we can encounter applications of this principle both in modern civil law (including the new Czech Civil Code from 2012 [*Občanský zákoník*] – further also as OZ 2012 – see § 3012 of this Code) and private international law (issues of the so-called collective river accidents). *Lex Rhodia* is often mentioned as one of the examples of the so-called Roman commercial law (Huvelin, 1929, 127). In its essence, it is the earliest embodiment maritime insurance (Aubert, 2007, 157).

Thirdly, within the legal issues related to the Rhodian law, Roman lawyers came to a solution that substantially influenced other issues of private law, such as the question of abandoning the subject.

[1] D. 12.6.66.

Lex Rhodia as a reception of Greek law

In the *Lex Rhodia*, one very often sees influence of Greek law on Roman law (by name). However, this is at odds with the Roman attitude towards foreign law. For example, Cicero praises the supremacy of Roman law. If Roman law is perfect, then there is no reason to use foreign solutions. However, even in the present legal science, there exist more objections against the formal reception of Greek law. Some scholars object that such a reception is incompatible with the spirit that dominated in the closed world of the ancient city (De Martino, 1982, 72–147). This closeness is reflected especially in the rule of law, which is considered an inviolable heritage of the people, the heritage as inviolable as religion.

Nevertheless, given major influence of Greece on the antique maritime trade and the close cultural contact between Greece and Rome, it is possible to regard the use of foreign maritime and trade consuetude, commonly known as the *Lex Rhodia de iactu*. The reception of Greek law is often argued against, as the Roman legal sources refer to the island of Rhodes only in D. 14.2. And from this entire, inextensive title, only two fragments contain explicit mention of the island of Rhodes: sections D. 14.2.2 and D. 14.2.9. The first fragment comes from the jurist Paulus and describes the general principle of the Rhodian law. The second fragment is attributed to Volusius Marcianus, a lawyer from the era of Marcus Aurelius and Antoninus Pius, and represents an excerpt from the work entitled *Ex lege Rhodia.*

There were also doubts concerning the authenticity of the work, as it is not mentioned in the Florentine Index. The extract evokes the marine accident hypothesis and the shipmaster's request directed to the Emperor Antoninus who replies that the law at sea where the *Lex Rhodia* is applied does not conflict with the applicable law. Marcianus adds that Augustus had already decided in the same sense. Some of the modern authors (Wagner, 1997) limit the scope of application of the Rhodian rules only to the plunder of a shipwreck site, or to duty exemption applicable to ships driven into a port by a storm. These controversies led to the repudiation of the Greek and Rhodian origin of the "Rhodian law". Critics view this title as a law created by *a posteriori* compilers, asserting that the Rhodian law was created in the eighth century AD.

Classical Roman law therefore, according to this extreme critique, developed autonomously, even in the field of maritime law, without receiving foreign legal institutes (Ashburner, 1975, *passim*). However, we consider it proved that Roman law availed itself of the customs of Greek maritime merchants (Chevreau, 2005), which were in use in the eastern Mediterranean, and that these customs were named by way of homage to the famous Greek island by the compilers of the *Corpus Iuris Civilis*. Adoption of the "Rhodian Law" consisted in the adoption of provisions on common danger and obligation of contributing to contracts of carriage, hire and sale of goods by Roman merchants, and subsequently in inter-

pretation of these contracts by the Roman authorities, particularly the praetor. Roman law also refers to a provision in the contract as a *lex*. The thesis that the Rhodian law was adopted under emperor Augustus and confirmed by emperor Antoninus seems unlikely (Chevreau, 2005, 70).

The principle of the Rhodian Law

The core principle of the Rhodian law is stated in the following section:

D. 14.2.1. *Paulus libro secundo sententiarum: Lege rodia [rhodia] cavetur, ut si levandae navis gratia iactus mercium factus est, omnium contributione sarciatur quod pro omnibus datum est.* – "It is provided by the Rhodian Law that where merchandise is thrown overboard for the purpose of lightening a ship, what has been lost for the benefit of all must be made up by the contribution of all."

What led the Romans to accept this principle? It is likely that the Romans tried to adapt to the customs that predominated in the maritime trade in the Mediterranean. Among other things, these customary practices focus on the basic aspect. This is a fair legal regulation on the consequences of unpredictable sea dangers that endanger human life, including the risk of wreckage, pirate raid, and frequent damage and loss to property on sea routes. Roman lawyers of the classical period considered it unfair that all those who might benefit from the salvage of the ship should not participate in the salvage. This is evidenced by the lawyer Hermogenian's reference to *aequitas*.

D. 14.2.5 pr. *Hermogenianus libro secondo iuris epitomarum:Amissae navis damnum collationis consortio non sarcitur per eos, qui merces suas naufragio liberaverunt: nam huius aequitatem tunc admitti placuit, cum iactus remedio ceteris in communi periculo salva navi consultum est.* – "The contribution of those who saved their merchandise from shipwreck does not indemnify anyone for the loss of the vessel; for it is held that the equity of this contribution is only admitted when, by the remedy of jetsam, during the common danger, the interest of the others is consulted, and the ship is saved."[2]

However, it should be noted that the Romans were led to the recognition of the Rhodian law by a very practical need. If the Romans had not recognized this equity-based principle, no one would have wanted to trade with them. Thus, Roman law had to deal with changed social conditions, and Roman lawyers had to make this obligation part of the Roman legal code.

The following fragment shows how the Rhodian law is applied:

D. 14.2.2 pr. *Paulus libro trigensimo quarto ad edictum: Si laborante nave iactus factus est, amissarum mercium domini, si merces vehendas locaverant, ex locato cum magistro navis agere debent: is deinde cum reliquis, quorum merces salvae sunt, ex conducto, ut detrimentum pro portione communicetur, agere potest. servius quidem respondit ex locato agere cum magistro navis debere, ut ceterorum vectorum merces retineat, donec portionem damni praestent. Immo*

[2] See also Dostalík (2012), 121.

etsi "non" retineat merces magister, ultro ex locato habiturus est actionem cum vectoribus: quid enim si vectores sint, qui nullas sarcinas habeant? Plane commodius est, si sint, retinere eas. at si non totam navem conduxerit, ex conducto aget, sicut vectores, qui loca in navem conduxerunt: aequissimum enim est commune detrimentum fieri eorum, qui propter amissas res aliorum consecuti sunt, ut merces suas salvas haberent. – "If the merchandise was jettisoned from the ship, which was in trouble, the owners of that merchandise, if they delivered the merchandise to the transportation, should sue the captain of the ship on the base of the action of the contract of lease. And captain can use the very same action against the other passengers, for the reason that their merchandise had been saved, so they have to contribute. And Servius responded that they should sue the captain by the same action to hold the merchandise of the other passengers on the board of the ship until they will contribute. But if the captain would have not retain the merchandise on board, he is still able to use the action of the contract of lease against the passengers. What is to be done if there are passengers who have no baggage? It evidently will be more convenient to retain their baggage, if there is any; but if there is not, and the party has leased the entire ship, an action can be brought on the contract, just as in the case of passengers who have rented places on a ship; for it is perfectly just that the loss should be partially borne by those who, by the destruction of the property of others, have secured the preservation of their own merchandise."

The observed method "application of the Rhodian principle" is very interesting. Roman law did not adopt the obligation to contribute to a maritime accident but, on the contrary, used the Roman legal code, thus attempting to implement this principle by its own means. From among possible contract types, Paulus choosed *locatio-conductio*, a bilateral contract based on good faith, which was opted for because it is a contract used in maritime transport. One of the contract parties, called the *vector,* entrusts cargo to the ship's captain for carriage to a determined destination, for a specified amount or for a part of goods. This is *locatio operis faciendi* where the *vector* is the locator and *magister navis* the conductor.[3] J. Klíma emphasizes the different approaches in Roman jurisprudence with respect to provisions of the Rhodian law: "The Institute of Rhodian Law is viewed as *locatio conductio*. The carriers whose merchandise was thrown into the sea were given *actio locati* against the captain to compensate for the sustained damage. The captain had *actionem conducti* against those carriers whose goods remained intact, and at the same time he had retention right to the saved goods" (Klíma, 1923, 5).

Pernice (1898, 84) says that the Roman jurists made the need a virtue. As he notes, "The *vectores* are not in any legal relationship with one another, after executing the *iactus* they cannot sue each other, but they concluded a contract of carriage with the captain. Therefore, the injured *vector* sues the captain for damages, the captain then sues the carriers whose goods were saved for the contribution payment. Therefore, the suit of rental relation has an unusual content. But it is given by law" (Klíma, 1923, 6).

[3] Some authors, e.g. Cannata (1995), 390, consider it to be *locatio conductio rei vehendae*, as in their opinion sea transport does not constitute an *opus* according to the definition from the Digest (D. 50.16.5.1).

We emphasize that Roman lawyers fundamentally modified a contract for performance of a work – a legal relationship exists only between the captain and the injured passenger on the one hand, and the captain and the passengers whose goods were not thrown away on the other. Only the captain is a party dealing with the other passengers' mercantile consortium (*consortium*) which is created on the ship, only he has a contractual relationship with each of the *vectores*. Therefore, he is the only one able to mediate the contribution payment between individual, otherwise unconnected *vectores*.

All this corroborates the fact that only the adaptation of the principle of contribution for jettisoned property into Roman law was done on the basis of *aequitas*. These contributions are paid by the owners whose goods have been saved because the goods of the others were thrown into the sea. This is where it contrasts with the Greek law, which permits formation of a certain community among the individual merchants who have been exposed to danger. E. Chevreau (2005, 75) refers to this community as a *société de risqué*, and, as a result, the claims of those whose goods have been thrown out can be settled. Roman law was not sufficiently influenced by Greek law to allow formation of a *société de risque*, but this use of foreign law is solely in the intention of bilateral relations of the rental contract. Thus, Roman law rejected the whole idea of collective responsibility, based on a society (*société*) that mutually insured all the risks of a voyage. This idea of collective responsibility was hindered by the fact that, under Roman law, no one could be forced to participate in a social contract (*societas*) or could be forced to co-ownership (*condominium*).

Secondary issues in the Rhodian Law

However, Roman lawyers were not satisfied with the mere application of the Greek principle and they extended the term of *iactus* (lit. throwing out of the ship). In the opinion of his predecessors, Servilius, Ofilius and Labeo, Paulus claims that the obligation to contribution will apply not only to the ship's salvage from wreckage, but also to the payment of ransom to pirates (D. 14.2.2.3). Interestingly, if pirates had entered a ship and seized goods from the merchants themselves, M. Bartošek (1981, 264) thinks that the whole situation would have been deemed a *vis maior*, "and every passenger would have to bear his own damage." This fragment is the basis from which general average (*l'avarie commune*) derives.

Lex Rhodia* within the *ius commune[4]

Development of this legal institute continued in the Middle Ages, when it had a particular influence on maritime law and, subsequently, reflection related to sharing the common risk. Over the following centuries, there was a discussion in

[4] On the notion of *ius commune* see e.g. Zalewski (2016).

the course of which it was recognized that it constituted a responsibility similar to contractual responsibility (Dajczak, Giaro, Longschamps de Bérier, Dostalík, 2014, 369). In the context of this discussion, Cuiaccius (1722, 531) considers that the purpose of *Lex Rhodia* is what Paulus, a Roman lawyer, defined as follows: *Aequissimum enim est commune detrimentum fieri eorum, qui propter amissas res aliorum consecuti sunt, ut merces suas salvas haberent* (D. 14.2.2 pr.). As a foundation of the Rhodian law, the part must be considered when the storm or strong wind cause a need to relieve the ship of the load to ensure salvage and avert the common danger, therefore goods are thrown out. This loss resulting from the jettison is supposed to be compensated (*sata*) by the common contribution of the owners of all goods or articles that have been saved.

Goods are thrown out by the *magister navis* or by some of the owners of the transported goods, or by all owners together. If the goods were thrown out by the owners themselves on the base of a joint decision, then according to Cuiaccius it would be better to consider suit by order, however the use of this suit is hindered by the fact that they did not act with the intention to execute someone's order. Therefore, it is right for those owners whose goods were thrown out to sue the shipowner, and he would sue the owners whose goods were saved so that they provided a part of the compensation (*pro rata sarcire damnum jacturae dominis jactarum mercium*) (Cuiaccius, 1722, 531).

He also considers it an erroneous presumption that the obligation of contribution also arises (yet more generally) when, in order to prevent the spread of fire, neighbours destroy a neighbouring building for fear of their homes burning down, thus preventing the fire from spreading and passing through it. It is necessary for the owner of the saved buildings to compensate for the damage caused to the owner of the destroyed building. This suit would not be allowed if the buildings were demolished whereas the fire was extinguished before it reached the buildings that were pulled down (to prevent the sprad of inflagration). In this case, the neighbour responsible would be forced to pay damages by virtue of the *quod vi aut clam* interdict. If the fire reached the same level, the man whose buildings were burned would not be entitled to sue his neighbour; likewise, no action can be brought by the owner whose goods were thrown out of the ship if they acted for a just cause, that is, if the goods that were thrown out burdened the ship much more than their goods.

Cuiaccius also comments on some of the minor issues that were solved in Roman law in relation to the *lex Rhodia*: he excludes the suit pertaining to an action performed without order, because the defendant owners did not throw out their own goods to save the others having been told to do so, but after a joint deliberation and following the order of all those who sailed on the ship. According to him, the obligation of contribution also exists for those passengers who have on board only items that do not burden the ship, such as rings or pearls, as well as those passengers who have not concluded a contract of carriage with the *magister navis*.

Cuiaccius also reminds that the *magister navis* has yet another expedient besides a suit which, as Paulus says, can provide contribution: retention law. Thus, as regards those passengers who have goods, the shipowner will retain these goods on board; those who have nothing he will sue *ex locato*.

We can therefore conclude that Cuiaccius understands the duty of contribution as an obligation to avert a common danger, that this obligation is one of contractual nature. At the same time, however, he extends the obligation of contribution to those cases when the passenger does not have a contract. He is also aware of the possibility of suit in respect of action without order but excludes this possibility. He also reflects on the ongoing discussion about extending the *ex lege Rhodia* suit to cases of extreme emergency but dismisses this possibility, since there can be no action against a person who in the circumstances of extreme distress has destroyed other people's property acting for just cause.

Lex Rhodia in Austrian and Czech civil law

The tradition of the Greek maritime law institute is echoed in the Austrian Civil Code (§ 1043 ABGB). According to Sedláček (1933, 91), in § 1043 ABGB "only the first sentence is very closely related to this historical basis." From the original, exclusively maritime adaptation, the general danger to both the plaintiff and the defendant remained, as well as the fact that the plaintiff sacrifices some of their property to avert this danger. Sedláček associates this institute with the necessary action (§ 1036 ABGB). The fundamental difference, however, is that the necessary agent acts in favour of the *domina negotii*, while the one who sacrifices a part of their property acts in their own interest too, seeking to save the remaining part of their property.

The twording of the governmental draft of the 1937 Civil Code, which never came into force, does not refer directly to the *lex Rhodia*, but it recalls reimbursing the cost and payment (of up to ten per cent) to the one who saved somebody else's property from "probable devastation or loss." The influence of Roman law can also be seen in the fact that the right is construed as a retention right.[5] The explanatory report shows that the coastal law (§ 160 and § 388 of the ABGB) was deleted with the rationale that it relates only to the seashore, whereas on the banks of a river it applies only to found property.[6]

The Roman institute of the *lex Rhodia de iactu* was integrated into the concise provision of § 3014 in the new Czech Civil Code: "If a person in difficulties sacrifices a thing in order to prevent greater damage, each of the persons benefiting from the situation shall provide the victim with a proportionate compensation."

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[5] See § 152 of the Government's Draft of the Czechoslovakian Civil Code from 1937. The original document can be found here: https://digi.law.muni.cz/handle/digilaw/7035?fbclid=IwAR1raUvZSU2XK8ojS9D6kYV_Rdml1MORF2C_O1XuaXCuroj2mCRAG4Pl-04 [access: 21.06.2019].

[6] *Cf.* also the Explanatory Report to the Government's Draft of the Czechoslovakian Civil Code from 1937, p. 266.

Contemporary commentary to the Czech Civil Code rightly claims that § 3014 is based on the Roman *lex Rhodia de iactu* (and, in this context, cites the textbook of Roman law by O. Sommer), but has already "become self-sufficient" and applies to "a variety of cases of sacrificing someone else's property in an emergency, unrelated to maritime transport, irrespective of any shipping at all" (Hulmák, 2014, 2008). The commentary cites foreign (Austrian) literature, which permits the application of § 1043 of ABGB to road transport (Koziol, 2010, § 1044, marg. No. 1). It should simultaneously be noted that there is a judicial decision which finds the application of the Road Transport Act preferable to the above-mentioned provision (Wesener, 1975, 35 ff.).

In its essence, § 3014 OZ 2012 overlaps with the institute of extreme emergency, which is regulated individually in the provisions of § 2906 OZ 2012. As for the main difference between the provisions of § 3014 OZ 2012 and § 2906 OZ 2012, the commentary suggests that in the case of extreme emergency, the consequence must not be equally serious or even more serious than the damage which may have ensued, while the provisions of § 3014 OZ 2012 speak of averting greater damage.

This identification of the *lex Rhodia* with the institute of extreme emergency has a major impact on the interpretation of the cited provision. Consequently, the commentary admits the possibility of compensating for the damage in the case where "the averter sacrificed the property only for the benefit of another person" (Hulmák, 2014, 2008). If the "averter" sacrificed their own property, then the provision of § 3014 would not apply, but it would constitute an action without order.

Next, payment for damage is admissible under § 3014 OZ 2012 if the damage is caused on property that does not cause danger. An example of this use of the *lex Rhodia* is pulling out a post from the fence and its use for defence against a dangerous animal. If we were to evaluate the provisions of § 3014 OZ 2012, we may argue that its basic deficiency is deletion of the term common danger or common need (as it is known in the § 717 of Czech Civil Code of International Trade from 1963). It is that element which enables distinction between extreme need and sacrifice of property in common danger. In Text addition, the two institutes derive from a different basis.

The discussion about the nature of the § 3014 OZ 2012 continues, and a variety of different interpretations are argued. K. Eliáš combines *versio in rem* and the *lex Rhodia de iactu* as examples of so-called "false acting" (*unächte negotiorum gestio* – Zimmermann, 1872, *passim*, *actio negotiorum gestio utilis*), e.g. if someone uses a property belonging to another and reasonably believes that it is their own. Cases traditionally referred to as *lex Rhodia de iactu* are understood by K. Eliáš (2017, 1064) as being different from both damage and unjust enrichment cases. On the other hand, A. Pavlíček (1873, 124), who was the only one to address the issue of unjust enrichment in detail, understands *versio in rem* as a subtype of unjust enrichment.

As Kindl states in his brand-new commentary to the Czech Civil Code (published in June 2019), this new Czech regulation does not apply in the case of maritime transport, because there are already two special enactments in force (governing both river navigation and sea transport). At the same time, he maintains that § 3014 should apply to accidents that are not related to maritime transport, e.g. in the case of a balloon or aircraft. It also outlines the possibility of applying this provision in non-accidental situations that are close to extreme emergency. As a model case, the author mentions demolition of a house in order to block the watercourse during a flood (Kindl, 2019, 877).

As Melzer states in another commentary, the provision of § 3014 OZ 2012 is somewhat "enigmatic" (Dostalík, Melzer [in:] Melzer [*et al.*], 2018, 1639); however, it is certain that this provision is based on the principle of "none can enrich themselves at the expense of another" and is therefore a special case of unjust enrichment (along with *specificatio*, *aluvio*, *accesio* and *versio in rem*). It contains elements that are typical of the *lex Rhodia de iactu*, such as sacrificing property in need, averting greater danger or proportional compensation for damage. At the same time, however, the requirement of common danger has been deleted, which means that this provision can be understood as a special case of extreme emergency (Dostalík, Melzer [in:] Melzer [*et al.*], 2018, 1640).

If we take the view that § 3014 OZ 2012, traditionally understood as the *lex Rhodia de iactu*, has not only dispensed with the question of the damage schedule in a maritime (river) accident, but also removed the concept of common emergency – as the commentary literature suggests (see above) – then we may accept that it may be used to compensate for damage that is caused to a third party when averting danger within the framework of extreme emergency (§ 2906 OZ 2012).

Moreover, § 3014 OZ 2012 (*lex Rhodia*) is considered by some Czech authors to represent unjust enrichment in a broader sense ("liability outside the condictiones") and it is a question of whether and to what extent unjust enrichment regulations should be applied to cases of sacrificing of someone else's property when averting greater danger (Dostalík, 2018, 200).

In conclusion, one may state that although Czech law demonstrates reception of this traditional provision of Roman law, Czech jurisprudence separated (under the influence of the Austrian school of private law) the *lex Rhodia* from its traditional maritime role and is looking for new application of this institute.

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LEX RHODIA DE IACTU AND GENERAL AVERAGE

The article deals with the issue of general average in Roman and modern law. In Roman law, it deals with the provisions of *lex Rhodia de iactu* (D. 14.2). The Author describes the *lex Rhodia de iactu* as an example of the reception of Greek law by Roman law. He describes the basic principles of solving a general average in Roman law, the influence of this solution on Pandekton law, as well as its modern adaptation in the Czech Civil Code.

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MARITIME SAFETY MODEL ACCORDING TO REGULATIONS IN ANCIENT LAW[1]

When Noah began building the Ark, he learned the principles of its construction from the Creator himself.[2] Construction of the Ark would allow him to oppose the element that is the sea and thus save the human race. Modern principles of safe shipbuilding are, obviously, far more complex than the guidelines that Noah obtained from the Creator. However, as the research conducted by scientists today proves, the Ark built by Noah corresponded to three basic parameters of safe ship construction currently required in the field of ship's structural integrity, stability and seaworthiness; what is more, construction of the Ark is in line with the modern construction standards for the largest cargo vessels.[3] It seems that the Creator knew what he was doing.

[1] The conducted research was funded by National Science Centre, Poland, under the contract UMO-2016/23/D/HS5/02447 *Maritime safety legal system*.

[2] Genesis 6.14–20 (all quotations come from the English Standard Version of the Bible available at https://www.biblegateway.com/): "Make yourself an ark of gopher wood. Make rooms in the ark, and cover it inside and out with pitch. This is how you are to make it: the length of the ark 300 cubits, its breadth 50 cubits, and its height 30 cubits. Make a roof for the ark, and finish it to a cubit above, and set the door of the ark in its side. Make it with lower, second, and third decks." Regardless of whether one treats the biblical statement as true or as a legend, this description is one of the first concerning construction of a ship. Even in the nineteenth century, the founding of Noah's Ark was dated to approx. 2300 BC. It resulted from the dating relative to the creation of the world, based on the sum of lifespans of the Old Testament prophets.

[3] This is evidenced by South Korean scientists specializing in the construction of ships in a scientific study: Hond [*et al.*] (1994). It should be emphasized that the purpose of constructing Noah's ark was not shipping understood as carriage/transportation of goods by sea from one place to another, but rather remaining on the surface of water and opposing its element.

The *perils of the sea*[4] are the cause and the unifying force of the entire human output regarding the principles of safe navigation. Since the dawn of time, the human has been navigating, first on rivers and then at sea, near the coasts and then transoceanically. Interest in the safe construction of ships is visible in one of the oldest monuments of law, the Code of Hammurabi, which referred to certain standards regarding the construction of the ship and the responsibility of the builder (Gaca, 2016, 21 and the quoted references).[5] The interest in safe navigation was due to the growing importance of sea trade in the economies of ancient empires. This economic aspect set the direction which the development of maritime law would follow for many millennia. Mercantile axiology and profit have become a determinant of the evolution of maritime law institutions since the earliest times; in consequence, ship's safety issues have turned out to be, in a sense, a tool for economic goals, not the main purpose of maritime law. Already at the beginning of considerations on the history of maritime safety, this difference in the axiology of the development of private sea law regulations should be noted, whereby the underlying premise of the regulations affecting ship's safety level was the willingness to reduce the risks of sea travel and maritime public law which aimed at the protection of universal values, the most important of which was and is the protection of human life.

For this reason, the ship continued to be the key focus of maritime law, being a specific link between civil (commercial) maritime law and the much younger public maritime law. Therefore, the sea itself was not the subject of maritime law regulations; it was the ship as a tool for navigation. As a subject regulated by law, the sea appears for the first time in an area defined as the Law of the Sea, which constitutes a part of public international law. The birth of the Law of the

[4] The English concept of *perils of the sea*, referred to in the Polish doctrine as "the hazards of the sea", is still an important concept for maritime insurance law. This concept initially referred to the extraordinary forces of nature that seafarers were forced to face while navigating, and included events occurring during the sea voyage referred to as *acts of God*, meaning only those accidents or losses that happened in situations beyond human control, as a result of natural threats of unprecedented, extraordinary strength. Over time, this concept was adopted by maritime insurance law and, as part of the concept of covering marine risks, extended also to other events related to the possibility of a fire, explosion, pirates, privateers or the need to jettison. In other words, the concept of maritime perils was defined to cover a number of marine risks related to maritime dangers and those related to shipping. See e.g. Łopuski (1982), 95.

[5] In relevant Polish literature, however, there is a divergence of views as to whether the provisions of the Code of Hammurabi applied exclusively to river navigation or to sea navigation as well. The former view is espoused by Stanisław Płodzień, while Stanisław Matysik argues for the latter. See Płodzień (1961), 24–25. The author explains that the application of the provisions of the Code of Hammurabi to river navigation results directly from paragraph 240, which in the Polish version does not contain the concept of river navigation, although it explicitly refers to it. This interpretation is also supported by the geographical location of ancient Mesopotamia, i.e. between the Euphrates and the Tigris. The name Mesopotamia itself, in Greek, meant "the land between two rivers". The other possibility, concerning the application of the Code in maritime shipping, is adopted by S. Matysik in numerous publications: e.g. Matysik (1959), 15; Matysik (1971), 24.

Sea should be dated to the seventeenth century,[6] when the issues of state power and freedom of navigation became the subject of regulations and legal treatises.[7] Until then, however, common maritime law was a kind of *ius gentium*, the law of the seas, which because of its similarities was common to all the people of the sea. It was not until the eighteenth and nineteenth centuries that these common sea customs, similar in their foundations, lost their significance. The particular interests of states promoting their own legal solutions and the jurisprudence of national courts weakened the significance of this common "law of the seas" in favour of national orders. It was also connected with the struggly for naval dominance, including the domination of a specific legal order (jurisdiction).

Currently, it is assumed that *maritime law* covers all legal norms regulating social relations connected with human activity consisting in the use of the sea (Łopuski, 1996, 24). In this approach, the fundamental criterion defining the maritime law framework is the subject and not the nature of the regulation. The scope of maritime law has continuously expanded, and the basic factor causing it to change is the progress of technology, which makes new ways of using the sea possible. Initially, marine human activity was limited to using the ship as a vehi-

[6] The most important treatises include: *Mare liberum* by Dutchman Hugo Grotius, published in 1609 (which in fact was a chapter of *De Jure Praedae*, a treatise discovered in 1865) and *Mare Clausum, seu de dominio maris libri duo* by the English jurist Jan Selden, published in 1635. Both treatises differently defined the principles of navigation on the seas and the scope of coastal states' power. The treatise of the Scottish lawyer William Wellwood, *Abridgment of All Sea-lawes*, first published in 1613 in English, and then in 1615 in Latin under the title *De Dominio Maris*, is also worth mentioning here. Both Selden and Wellwood were in favour of the concept of the *mare clausum*, where one country might have the right to rule over and control it, as in the case of land. Hugo Grotius never argued with Selden, but he made some polemical assertions in relation to the ideas of Wellwood in the aforementioned *De jure Praedae treatise*. In 1702, Cornelius van Bynkershoeck, a Dutch lawyer, formulated a compromise theory in his work *De Dominio Maris Disertatio*, according to which a state had the right to control the part of the sea that was directly related to the protection of its coast. This principle is called in the English literature the *cannonshot rule,* because it defined the range of domination and control of the coastal state at the firing distance of a cannonball. Such a distance was adopted in many national regulations, e.g. in Russia in 1787, Tuscany in 1778, Genoa in 1779 and Venice in 1779. This distance, changing with the development of military technology, was defined as 3 miles from the coast in 1782 by the Neapolitan Ferdinando Galiani in the treatise *De' doveri dei principi neutrali verso i principi guerreggianti e di questo verso i neutrali*, and it remained widely accepted for over 100 years. For more on this subject see: Treves (2015), 3–7. National regulations in this context are also mentioned by Azuni (2015), 203 ff., who also cites an anonymous verse regarding the regulation *of cannonshot rule*: "Far as the sovereign can defend his way, extends his empire o'er the wat'ry way; the shot sent thundering to the liquid plain, assigns the limits of his just domain." Azuni (2015), 216 also refers to Polish involvement in the politics of dominance in the Baltic, mentioning that in 1637 Polish king entered into a dispute with the Danish ruler over a ship sent by the Polish king to Gdansk to collect a new tax. The ship was stopped by the Danish ruler. It was probably an attempt by king Władysław IV Waza to impose a sea duty by on the inhabitants of Gdańsk, while the Danish king, Christian IV came to their aid by seizing the Polish ship. The exchange of letters between the Polish and the Danish ruler, which Azuni decribed, probably means the correspondence written by the royal canon Ludwig Crusius or Jerzy Ossoliński. See more: Kotarski (1970), 258–276.

[7] Until the seventeenth century, the "stronger wins" rule was decisive.

cle for transporting people and goods, but with the technological development, maritime law began to include distinct modes of exploitation of the, such as deep-sea mining, construction of wind farms, etc.

1. Maritime safety law with respect to development of maritime law

Given that modern maritime law is rooted in the customs and collections of laws, as well as in the continuity of many maritime law institutions and historical concepts which predominated in that domain, one necessarily has to consider a broader background of historical regulations governing maritime safety. The words of G.H. Robinson, an outstanding American lawyer of the early twentieth century, are worth quoting here: "[Maritime law is] one of the oldest and most historic branches of our jurisprudence (…)" (oquoted after: Libera, 1957, 12–13).

1.1. Ancient regulations on maritime safety

Approximately in the fourth century BC, the island of Rhodes gained increasing significance on the map of maritime trade, owing to its location. A little earlier, the first known maritime law institutions had developed in Athens, a port city with a perfect location and merchant traditions. Those were the Athenians who have been credited with improving the maritime loan institution[8] as a special type of loan, the repayment of which was only obligatory when the sea voyage was successfully completed. It was also in Athens where the *dikai emporikai*, special maritime commercial courts, operated.[9]

If we analyse the essence of *Lex Rhodia de iactu*, the first regulation regarding the compensation for merchandise thrown overboard at sea to lighten the ship, it may at first glance appear to have a purely economic purpose, in that the loss is distributed. However, one cannot help noticing that in its very essence the regulation focused on the safety of the ship (see, for example Koziński, 2001, 88).

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[8] The Phoenicians, who ruled over the Mediterranean already around the sixth century BC, are said to have coined the concept of a maritime loan. Numerous sources speak of the Phoenician ascendancy in that region, which lasted for nearly 1,000 years. They are also considered by a number of legal historians to have been the creators of the first solutions regarding the use of the sea, and thus the regulations that we would define today as the law of the sea within international public law. See Potter (1924), 11; Azuni (2015), 25.

[9] Their jurisdiction essentially covered commercial issues related to the enforcement of maritime claims, as one would name them today. Proceedings before the Athenian Courts involved, apart from the need to take into account the speed of proceedings in maritime affairs, the necessity to include ethical standards. See: Cohen (1973), 21. In addition, these courts decided in matters not only between Athenians, but also in cases involving foreigners. In a E. Cohen's monograph devoted to the institutions of Athenian maritime courts, they are referred to as "supranational", but the meaning of this term as used in the monograph differs from the modern concept of supranationalism. The author also outlines the requisites for the admission of foreigners to the Athenian Courts; for instance, the claim had to have resulted from a contract concluded in writing. In consequence, the jurisdiction of the Athenian maritime courts is defined by the author as a jurisdiction limited by *ratione rerum* as opposed to *ratione personarum.* See Cohen (1973), 89.

The practice of discarding goods which were most often a part of ship's cargo (or ship's equipment), was probably used since shipping began. *The law of jettison* was therefore nothing more than a catalogue of customs commonly used in the Mediterranean which, during the heyday of the island of Rhodes, i.e. between 304 and 168 BC, began to be called the Rhodian Sea Law (Płodzień, 1961, 23).[10] The principle of dividing the losses arising from throwing goods overboard between all persons involved in the sea voyage was subsequently adapted by Roman lawyers. Although there is no evidence of a formal reception of the Rhodian Law of Jettison into Roman law (Płodzień, 1961, 40), the Digest demonstrates that Justinian's compilers were able to collate the cases of goods thrown overboard in the form of *De lege Rhodia de iactu*, a title in Book XIV of the Digest.

The fact that the birth of the first known maritime law institution is attributed to ancient Greece is not surprising. Even a cursory knowledge of Greek mythology suffices to realize that the sea and its element was an important component of Greek civilization in antiquity, as evidenced by the adventures of Odysseus, the quest for the Golden Fleece and the flight of Icarus and Daedalus over the

[10] The author provides numerous examples of the use of jettison in antiquity, referring for instance to the biblical account of throwing Jonah overboard, preceded by a parley of seamen, and the act of throwing some of the goods overboard to lighten the ship when the storm hit. The author also quotes Cicero's analysis of the comments made by Hecato of Rhodes, who wondered what should be thrown into the sea in times of danger: "shall it be a valuable horse or a slave of no value" (English translation is taken from *The ethical writings Cicero*, translated by Andrew P. Peabody (1887, 86). These considerations, of course, would now have no justification, but at the time a slave was treated as an element of the cargo. Unfortunately, they remained valid for a long time, well into the modern period, as evidenced by the famous 1831 ruling in *Gregson v. Gilbert*, made by the renowned British lawyer, Lord Mansfield. The action concerned throwing 132 slaves overboard the *Zong* ship in order to lighten the vessel and save the shrinking supplies of drinking water, and consisting essentially in a dispute between the owners of the ship and the insurer. The owners demanded that the losses due to jettisoning of the slaves should be settled according to the rules originating from the institution of the Rhodian Law of Jettison (institution of maritime law, currently known as the *general average*); the insurer refused to pay compensation, having doubts whether there were grounds to invoke general average. The matter – shocking though it may seem today – was considered at the time mainly in economic terms. If general average had been deemed to apply, and the jettison of part of the cargo found necessary to rescue a ship, the crew and other cargo, then ship owners would have had to be compensated for each slave. If, on the other hand, it had been determined that there were no grounds to invoke general average, the owner had no right to compensation. It should be added that the insurance policy did not cover losses in cargo arising from natural causes, which in the case of cargo consisting of slaves meant losses resulting from diseases or death of slaves on board, but included losses resulting from the use of general average and thus the throwing of the cargo (slaves) overboard to rescue the ship. The adoption of such an "economic" perspective, whereby slaves were considered cargo, also meant that in the first place women and children were thrown overboard as items of lower economic value than men. In the case reports, one can even find a sentence that draws on Hecato's observation cited in antiquity by Cicero; uttered by one of the judges, it states that it is shocking to treat throwing slaves and horses overboard equally. Pragmatism led people to approach the *Zong* ship as an insurance case, perhaps atypical, in which the main subject of analysis was to examine the existence of circumstances justifying the use of general average. The case was discussed in an interesting way in Polish literature by Zajadło (2017), 52–64.

Mediterranean coast – all that attest to the great importance of the sea as a route as well as the awareness of its dangers in the Greek world.

It is also in antiquity that one can find the first mention of the institution currently referred to as an "open, safe port", enabling a ship at risk of sinking at sea to enter any nearest port.[11]

The Roman adoption of the Rhodian Law of Jettison strengthened this institution of maritime law and allows us today to find its roots in ancient Greece. The Romans were greatly impressed not only by the Greek culture and philosophy[12] but also by the acquis of maritime law and the ability to deal with the perils of the sea, including pirates who at that time plagued the Mediterranean. The Roman encounter with the Rhodians in the period of the expansion of the Roman Empire around the first century BC resulted in the acquisition and adaptation of the maritime law of ancient Greece by the former.

The Rhodian Law of Jettison as mentioned above was adopted by the Roman lawyers, as evidenced by the inclusion of regulations regarding the effects of throwing the goods overboard in Justinian's Digest (D. 14.2). The vast majority of the doctrine indicates that the source of claims for the compensation of loss resulting from throwing the goods overboard lay in the construction of a community of danger (Lat. *communio*). Such a community of danger, according to S. Płodzień (1961, 140 and the abundant sources cited there), existed between all persons interested in the cargo and the ship, and concerned the possibility of compensating for the losses suffered in common interest. The author does not unequivocally subscribe to such an interpretation of incorporation of the Rhodian Law of Jettison into Roman law, as it did not derive from the Roman lease agreement, but from the the Greek community of danger. Such a community, found in Greek sources, was not a partnership agreement in the strict sense as its essence consisted in factual activity which made its members participate in the profits and losses resulting from one or many maritime undertakings. Nevertheless, the prevalent view argued in the literature is that despite the differences in the scope of application of the Greek and Roman regulations concerning the obligation to jointly compensate for the loss resulting from jettison, the correct basis for joint compensation for jettison-related loss in Roman law is based on fairness (Lat.

[11] According to S. Matysik, who in turn relies on Pardessus' account, those were Egyptian ports which foreign ships driven by a storm could enter after making a promise that they were there due to force majeure conditions. See Matysik (1950b), 31.

[12] J.M. Kelly points out that while the military and political conquest of Greece by the Romans is a fact, something in the nature of reciprocal conquest took place in the sphere of the intellect. Kelly does not analyse Greek legacy in the field of maritime law, but indicates that law as a science did not exist in ancient Greece. It was rather perceived in terms of a theoretical domain or a rhetorical contest. Roman adoption of certain solutions in the field of maritime affairs is therefore atypical and also proves that Greek solutions in this field should be considered extremely practical. See Kelly (2006), 68–70. About Romans learning the solutions in the field of maritime law from Greek law see Osuchowski (1951).

aequitas) and in a certain community of danger (Lat. *communis periculi*), which has its counterpart in the Greek construction of the community of danger. It should be noted, however, that Roman lawyers would employ compensation for losses in conjuction with complaints arising under a lease contract (Płodzień, 1961, 50).

Roman law is presumed to be one of the three pillars of Latin civilization, alongside Greek philosophy and the Christian religion. Its achievements, also in the field of maritime law, are significant, although they mainly include civil law regulations regarding trade rules. Nevertheless, the singular trait of Roman legislation is that the effects of events or acts causing loss were regulated in a relatively detailed manner. Roman law also had provisions applicable to ship collisions, namely the *lex Aquilia*, enacted through advocacy of Aquilius, the tribune of the Plebs, which defined the effects of damage to objects and stipulating liability[13] of the ship culpable of negligence. This and other general principles of liability are certainly relevant to the issue of navigation, just as Roman law greatly influenced the determination of the degree of guilt, the structure of contracts, etc. Nevertheless, the Roman legacy dedicated to shipping was relatively modest. Justinian's Digest regulated the Rhodian Law of Jettison (Lat. *Rhodia de iactu*), the maritime loan (Lat. *foenus nauticum*), the liability of the ship owner for the accepted load (Lat. *receptum nautarum*[14]), and the law of the coastal state (Lat. *naufragium*) (Łopuski, 1996, 71).[15] In the later Byzantine codifications, maritime law was regulated in the *Ecloga*, the codification of Leo III the Isaurian and his son Constantine; also Book LIII of Loe VI's *Basilica* was dedicated to maritime law.[16] Their content modified the provisions of Justinian's code, which seems relatively obvious when

[13] This concept of ship denotes persons who are liable in connection with its operation. Initially, the trend referred to as "ship personification" meant identifying the ship's liability with the ship's owner. However, with the separation of the owner's function from the person actually operating the ship, the concept of "liability of the ship" referred to everyone who takes over responsibility for the operation of the ship, i.e. a carrier who is not the ship's owner.

[14] It concerned the carrier's liability for the cargo accepted on board and was similar to the objective liability based on the principle of risk.

[15] However, one should bear in mind that the basic problem that Roman law posited in connection with the saving of property was the issue of ownership of things thrown to the seashore, and adopted regulations aimed at protecting survivors and their property. See Adamczak (1981), 23.

[16] This book consisted of three parts. The first was a kind of introduction, the second consisted of 19 articles, as many as seven of which concerned the distribution of remuneration between the captain and other crew members, among which the helmsman, the carpenter and the cook were specified. The next eight articles concerned the accommodation of merchants and passengers. The remaining articles discussed the principles of financial settlements related to the carriage of cargo, maritime loan and shares. The third part was the longest and contained provisions for various events that could take place during the sea voyage. It regulated the issues of discipline on board, penalties for assassination or theft on board, goods deposit, loans granted, rescue issues, transactions made during travel, the behaviour of seafarers, and jettisoning. A detailed analysis is carried out by Khalilieh (2006), 10–14. The author also describes the influence of Islamic law on admiralty law. Matysik (1950b), 11 writes about Byzantine achievements in the field of maritime law.

one takes into account the unfavourable circumstances of sailing in that turbulent period, which was replete with wars, disputes and uncertainty.

The Rhodian Sea Law adopted by the Romans also referred to the issue of seamen. Chapters 5 to 7 of the aforementioned codification of maritime law contained provisions concerning discipline on board, established the responsibility of seafarers for participation in fights, but also the liability of the ship (owner) for personal injuries sustained in connection with work on board. The subsequent chapters contained regulations resembling the modern maritime lien institution, which gives seafarers on board the possibility of satisfying claims on account of overdue remuneration from the ship (Couper, 2005, 5 ff.). It was a relatively comprehensive regulation, which can be described as the foundations of admiralty law.

To a limited extent, Roman achievements penetrated into the collections of maritime law established in the Early Middle Ages, most often in local languages, and were drawn upon at the time of great modern European codifications; they did not lead to a significant unification of solutions adopted in Europe (Łopuski, 1996, 73 ff.). Roman maritime law solutions, unlike previous maritime regulations, were not created for the use of small communities around seaports. On the contrary, the geographical expanse of the Roman Empire meant that Roman regulations on shipping were also applied across a large part of Europe. Undoubtedly, they also had an impact on the medieval collections of maritime laws, which would be compiled in Europe from the thirteenth century onwards, although the influence of the Roman law on the continental maritime law was smaller than on civil law.[17] However, the very acquis of Roman law, which is a certain common reference point for European countries by virtue of similarity of the classification of norms, the conceptual framework and mechanisms of interpretation, also affected the shape of maritime law in the continental part of modern Europe. Roman law had a different influence on the Anglo-Saxon maritime law, to which it was incorporated relatively late, in the eighteenth century, through the reception of *legis mercatoriae* into common law. Thus, the significance of Roman law for the development of maritime law was primarily visible in its private dimension. The antique achievement with regard to maritime safety was not elaborated. It is not a coincidence that the most spectacular institution of the ancient maritime law, created by the Greeks and then adopted by the Romans, was the Law of Jettison, applicable in the situation where one already has to deal with a threat at sea caused mostly by the weather and ship overloading. These situations were frequent in antiquity, because the ships tended to carry excessive cargo and there were no effective devices to counter the perils of the sea. As an example of preventive regulations, albeit introduced to a negligible extent, one may mention

[17] The private law part of maritime law shows a definite continuity of certain regulations with solutions known in ancient Greece and Rome, for example in the scope of the contract of affreightment, ship lease agreements, limitation of the carrier's liability for damage or loss of cargo, etc.

a ban on sailing in the winter time, when the ship and crew were most likely to be threatened by terrible weather conditions at sea. Until recently, the view that coastal shipping declined in ancient Greece precisely because of adverse weather conditions that increased the risk of shipwreck off the coast predominated among historians.[18] Recent publications, however, prove that the ban was mainly applied to the fishing fleet, and to a lesser extent to the transport of passengers and cargo (Dugan, 2015, 306). The Romans sanctioned it by introducing a ban on shipping without obtaining the so-called *dimissorium*, or the consent of a competent official to go out to sea (for more details, see Shirop, Linden, 2005; Arnaud, 2016, 142). The calendars concerning the prohibition of shipping in specific seasons, used as a way to prevent marine accidents caused by the sea element were also used in the Middle Ages. Similar prohibitions were in force in medieval maritime law collections, in the Rolls of Oléron, in the maritime regulations of port cities such as Hamburg, Lubeck, in the Hanseatic recesses or in Venetian law.[19]

Little is known about the required qualifications of the crew of ships in antiquity. The analysis of historical sources proves, however, that certain requirements were imposed on them, such as knowledge of the ship's structure, navigation using the stars, the ability to tell signs of weather changes at sea and recognition of changes at sea according to the behaviour of marine animals.[20]

Conclusions

Currently, maritime safety has a much broader scope than in the historical approach described above. Legal regulations do not only govern the safety of the ship, the people and the cargo, but also the safety of the marine environment, which is reflected in the rapid development of legislation on the protection of the

[18] On the other hand, O. Tamuz claims that it was high seas navigation rather than inshore navigation which was practised throughout the year, also in winter. He cites documents proving that ships travelled in the winter time between e.g. the island of Rhodes and the port of Alexandria, and therefore at a considerable distance from the coast. This was due to the lower risk of the ship running aground during a strong storm or poor visibility of the stars. *Cf.* Tamuz (2005), 145 ff. Matysik (1950b), 23 points out that "sailors had known for only a few centuries that it is better to travel far away from land during a storm." However, as indicated above, this is contradicted by the research carried out by O. Tamuz on the prohibition of coastal shipping with the possibility of practicing seafaring in antiquity. Matysik (1950b), 26 also mentions the calendars stating prohibited shipping periods in ancient Greece and Rome, whilst highlighting – as most maritime law historians do – their preventive nature in the field of maritime safety.

[19] Prohibited shipping periods were differently defined in various regulations, but all pertained to periods of bad weather, stormy periods or sea icing (e.g. in the Baltic Sea). Matysik (1950b), 27 observes, however, that in the Middle Ages this prohibition was applied irrespective of the weather conditions, also as an instrument to outrival competition, giving an example of the prohibition on sailing used by the Hansa in the fourteenth century as a way of eliminating Portuguese and English competition.

[20] Lindsay (1874), 34 emphasizes the already emerging awareness of training seafarers, not just disciplining the crew. See also in Polish literature: Matysik (1950a).

marine environment, with the leading International Convention for the Prevention of Pollution from Ships (MARPOL) of 1973 together with the Protocol of 1978, and regulations on the so-called human factor, expressed in the International Safety Management code (ISM code), a part of the Safety of Life Convention 1974 (SOLAS 1974), the International Convention on Standards of Training, Certification and Watchkeeping (STCW convention) and the Maritime Labour Convention (MLC convention).

The evolutionary nature of the development of maritime safety standards presented in a chronological perspective allows one to illustrate their scope. The impact of technological development on the scope of regulations is clearly noticeable. In addition, maritime safety regulations are part of the general history of the development of state and legal concepts. Due to limited shipping, there were generally no preventive norms in the ancient period of history. Available sources show that the then maritime law institutions did not aim to limit the risk resulting from the perils of the sea, and focused on developing rules to spread the risk of sea travel. This proves the already existing awareness of the specificity of maritime law, the source of which is increased risk, particularly severe in the situation of the inability to deal with the perils of the sea. The institutions shaped at that time, such as the Law of Jettison or the maritime loan, concerned issues related to the distribution of risk between the entities involved in a sea voyage, according to the *navigare necesse est* philosophy. This model of regulation may be described as being stateratic, from the Latin *statere*, meaning balance. In this model, the adopted solutions concerning the distribution of risk between the involved entities were not only intended to provide adequate compensation for loss, but also to make all involved entities have an interest in taking actions that increase the chances of success of the sea voyage. Therefore, the search for balance did not refer only to the effects of the events causing the loss, but aimed at mobilizing all the entities involved to make an effort for the success of the enterprise. The principles of risk distribution can also be interpreted as an expression of solidarity and evidence of the existence of a community of sea people.

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Justyna Nawrot

MARITIME SAFETY MODEL ACCORDING TO REGULATIONS IN ANCIENT LAW

Public maritime law dealing with safety issues is mostly recognised as a contemporary branch of maritime law. In contrast to public maritime law, the history of private maritime law referred to as shipping law is very well described in related literature. But also maritime safety arrangements can be found in the ancient as well medieval collections of laws. Article aims to analyse the ancient roots of contemporary legal institutions referring to maritime safety law.

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THE LAWS OF OLERON AS THE RULES GOVERNING MARITIME LABOUR. HAVE WE LEARNED A LESSON FROM THE PAST?

Introduction

The Laws of Oleron,[1] also known as the Judgments of the Sea,[2] are a set of medieval rules created from the maritime consuetude and customs, which contributed considerably to the development of maritime customary law.[3] However, the exact time of formation of those rules is unknown. It is assumed that the original version of the Laws of Oleron was drawn up at the beginning of the twelfth century.[4] In fact, it is well recognized in the maritime literature that merchants

[1] This paper is based on the copy of the *Charter of Oleroun of the Judgments of the Sea* presented in *The Black Book of the Admiralty*, i.e. Twiss (The Black Book of the Admiralty, Vol. III, Rep. 1985), 4–33.

[2] According to Twiss (The Black Book of the Admiralty, Vol. III, Rep. 1985), 4 the oldest known manuscript of "the *Judgment of the Sea* is contained in the *Liber Horn*", with "the exception of that contained in the *Liber Memorandum* from which it seems to have been copied."

[3] According to the *Penny Cyclopaedia* (1840), 426: "The laws, or constitutions, or judgments of Oleron, are capitulary of ancient marine custom written in old French, and bearing the name of Oleron for several centuries, because tradition points to the island so called as the place of their original promulgation. An ancient copy of these laws is to be found in the Black Book of the Admiralty, the original of which is supposed to be in the Bodleian Library; but they are not there called the Laws of Oleron, nor is there any reference in the laws themselves, or in the book which contains them, to their origin or history. They are not unfrequently appended to ancient editions of the 'Coutumier' of Normandy under the title of 'Les Jugemens de la Mer' in Cleirac's edition of 'Uz et Countumes de la Mer' they are given, without any description of the book, or place from whence they are taken, under the name of 'Rolle des Jugemens d'Oleron'. They are generally referred to by French writers on maritime law as 'Jugemens d'Oleron'."

[4] "The early manuscripts of the Rolles of Oleron resolve themselves into two classes, which for convenience may be distinguished as the Gascon and as the Norman or Breton between which are to be observed notable variations in the reading of certain articles", see Twiss (The Black Book of the Admiralty, Vol. I, Rep. 1985), lxiii–lxv.

had a significant influence on the development of the rules in questions. Those medieval merchants were trading along the western coast of France between the French ports and Bruges (*cf.* Kadens, 2015, 268–269), while their main merchandise in the eleventh-twelfth century was most likely wine.

In medieval Europe, the maritime law applicable on the north-east coasts of the Atlantic Ocean, the North Sea and the Baltic Sea was based on the Laws of Oleron (*cf.* Matysik, 1950a, 126; see also: Matysik, 1950b, 141–145; Janik, 1961, 5–20, 90–109; Matysik, 1971, 28–29). Legal norms relating to the terms and conditions of a seafarer contract of employment, which regulated his duties and rights, are found in medieval maritime law collections (*cf.* Frankot, 2007; Pooler, 2015). It may be noted that early maritime law collections did not distinguish commercial maritime law, did not refer to the delimitation of maritime areas as the law of the sea does, nor did it contain specific maritime labour law provisions (*cf.* Trivellato, 2016). The purpose of the norms of customary maritime law of the Middle Ages was to regulate matters related to shipping, particularly issues arising from maritime trade practice.

The Laws of Oleron were introduced in England in the twelfth century by King Richard I (*cf.* Twiss, The Black Book of the Admiralty, Vol. II, Rep. 1985, xlvii–li) and codified in the Black Book of the Admiralty in the fourteenth century (*cf.* Twiss, The Black Book of the Admiralty, Vol. I, Rep. 1985, lvi–lviii). The Laws of Oleron became the maritime law administered by the English admiralty court (*cf.* Runyan, 1975, 97) and were expanded and perfected in the eighteenth century by Lord Mansfield (see Sherman, 1914, 323). The Black Book of the Admiralty disappeared from the Admiralty Registry at the beginning of the nineteenth century. A few handwritten copies of parts of the Black Book of the Admiralty still survive. All known sources were collated and Sir Travers Twiss published as *The Black Book of the Admiralty* in 1871–1876, under Twiss's name as the editor.

As a maritime law collection, the Laws of Oleron were substantially merchant-oriented. The mariners were wage workers and the merchants who entrusted their property to them were aware of the importance of their own duties to the mariners. To protect their own commercial interests, merchants sought to meet the necessary needs of the mariners. This approach is evinced in the content of the Laws of Oleron, which contain, *inter alia*, norms relating to: the rights and obligations of the master and mariners as well as their relationship to the master of the ship; the contract of carriage of goods by sea; general average; pilotage and collision of ships.[5]

Moreover, the Laws of Oleron are characterized by the internal coherency of the text. The order in which the Laws appear very well corresponds to the stages

[5] For the total of 24 rules of the Laws of Oleron, 20 apply to the matters related to the position of the master and the crew (1–3, 5–8, 10–12, 14–22 and 24); the contract of carriage of goods by sea is a subject of 8 rules (3–4, 9–11, 13, 22–23); the general average is regulated in 2 rules (8–9), pilotage is covered in 1 rule (24) and one rule is dedicated to collision of ships (15).

of the sea voyage. The Laws of Oleron begin with the appointment of the master and then cover ship's departure from the port of loading which ought to take place in counsel with the master's companions (the crew). The following laws generally cover certain essential stages during the course of the sea voyage, including the loss of the ship ("it happens sometimes that she is lost") and cargo ("the wines and the other goods") early on in the sea voyage, when the mariners can go ashore at the ports of loading; the laws further specify what happens if the mariners become sick during the sea voyage, resolve in the matters relating to jettison ("she cannot escape without casting overboard goods and wines") and sharing losses incurred to save the ship during storms ("pound by pound amongst the merchants"). Finally, the Laws of Oleron provide for issues arising in the port of unloading at the end of the sea voyage.

Although the doctrine often emphasizes that the Laws of Oleron represent a codification of decisions made in the maritime courts on the small island of Oléron near La Rochelle, and became widely adopted as rules for the settlement of disputes at sea (*cf.* Matysik, 1950a, 125; Runyan, 1975, 96), some authors suggest that the text comprising the first twenty-four laws is "not a compilation of ad hoc judgements rendered over time by some authority, but was compiled for use as a reference for purposes of resolving problems arising in a specific context" (*cf.* Shepard, 2005).[6]

The essential aim of this text is to illustrate the genuine link between the norms contained in the medieval rules that have survived until the modern times, spanning certain legal solutions which applied over the ages. The Laws of Oleron contain rules that are relevant to contemporary maritime labour law. Certainly, they are not a model which is reflected in the Maritime Labour Convention (MLC 2006).[7] Nevertheless, these rules can be an interesting starting point for the discussion about the importance of decent working and living conditions for seafarers on board ships from a perspective of several centuries later.

Rules governing maritime labour

The international shipping rules governing maritime labour for maritime safety and maritime security are upheld through international conventions and codes, which are legally binding instruments.[8] They are a legal source of great significance for the safety of maritime shipping. When analyzing the rules of conduct, it is worth focusing on the working and living conditions on the ship as well as on maritime safety. Decent working and living conditions and safety culture are strictly connected.

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[6] https://www.trans-lex.org/116770 [access: 19.05.2019].

[7] https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/normativeinstrument/wcms_554767.pdf [access: 19.05.2019].

[8] http://www.imo.org/en/About/Conventions/ListOfConventions/Pages/Default.aspx [access: 19.05.2019].

In 2013, the Maritime Labour Convention entered into force. The MLC 2006 aims at creating a single, coherent global instrument (*cf.* Pyć, 2016), consolidating numerous convention achievements developed by the International Labour Organisation (*cf.* McConnell, Devlin, Doumbia-Henry, 2011). The MLC 2006 refers to human rights centered on the idea of dignity promoting decent working conditions. They are expressed in the norms contained therein, in particular those from which it is clear that seafarers should be provided with human working and living conditions on board ships. The MLC 2006 stresses that the global nature of maritime transport implies the need for special protection for seafarers. The rules governing maritime labour are aimed at ensuring both decent working and living conditions on board a ship for all seafarers regardless of their nationality and of the flag of the ships on which they sail, and fairer conditions of competition for shipping companies which are respectful of the rules and therefore often disadvantaged by substandard shipping; also, it seeks to limit social dumping to secure fair competition for ship owners who respect seafarers' rights.

Maritime safety culture requires three elements: personal and collective commitment of all persons on board to the work, common sense and good communication. The mutual trust between the shipowner and the master and crew as well as personnel "on land" is also important. Maritime safety culture has an impact on effective safety management system in practice. This constitutes the substance of management, while management procedures form a functional framework for the Safety Management System (SMS) and the implementation of the primary purpose of the International Management Code for the Safe Operation of Ships and Pollution Prevention (ISM Code),[9] namely maritime safety encompassing the ship, the people and the environment. Participation in the management requires cooperation of many people (*cf.* Lappalainen, 2008, 46–47; Lappalainen, Salmi, 2009, 38). In simplified terms, it can be stated that management is a "team game". Maritime safety culture is a function of team play – management game. This means participation in management, a type of qualitative participation depending on the skills, abilities and commitment of the seafarers – in short it relies on the crew competences.

Over the last few centuries, the shipmaster has been an individual with considerable authority on a ship. But in recent decades, shipping companies are moving away from the hierarchical structure based on master's command and control. The underlying philosophy in the ISM Code supports the development of a safety culture in the shipping companies (*cf.* Anderson, 2015, 58–59). The ISM Code constitutes a system of self-regulation of safe ship operation as well as occupational safety and health on board. The ISM Code requires procedures to ensure: safety and environmental protection policy; safety shipboard operations;

[9] International Management Code for the Safe Operation of Ships and Pollution Prevention – ISM Code 1993, Res.A.741/18; and: Res. MSC.104(73), Res. MSC.179(79), Res. MSC.195(80) Res. MSC.273(85) and MSC.353(92).

identification, assessment and management of risk; reports and analysis of non-conformities, accidents and hazardous occurrences, maintenance of the ship and equipment, documentation, as well as company verification, review and evaluation.

It remains to be considered whether and how the issues of working and living conditions on the ship were provided for in the Laws of Oleron. Then it will be easier to answer the question: have we learned a lesson from the past?

Qualifications for work on a ship

The effectiveness of maritime law standards governing maritime labour can be examined from the standpoint of the methods used by shipping companies operating to achieve the intended commercial venture. For many decades, such considerations have aroused interest in maritime law literature, mainly due to its practical nature. Even after a preliminary analysis, it can be determined that Laws of Oleron naturally respected the rights of a mariner as a professional worker familiar with the maritime customs, who has an important role to play on the ship and without which the merchant would have been unable to pursue his commercial interest effectively. This observation is quite important from the point of view of the MLC 2006, which was developed on the international forum together with the representatives of shipping companies.

The first rule of the Laws of Oleron pertains to a question of fundamental importance for the success of a shipping venture, namely, the appointment of the ship's master. The master was appointed by the shipowner.

> *First a man is made master of a ship. The ship belongs to two or three men. The ship departs from the country to which she belongs, and comes to Bordeaux or to Rochelle, or elsewhere, and is freighted to go to a strange country. The master may not sell the ship unless he has a mandate or procuration from the owners; but, if he has need of money for his expenses, he may put some of the ship's apparel in pledge upon consultation with the ship's company, and this is the judgment in this case* (*Law I*).

The Laws of Oleron allow interpretation, from which it follows that the master should be aware of the seafarer's qualifications, because he was responsible for the damage caused by replacing the dismissed mariner with a less skillful one. Also, a mariner could have reckoned with unpleasant consequences if he left the ship without the master's permission, became intoxicated and started arguing. But if the master had sent a mariner ashore on ship's business and mariner suffered an injury, then he was treated at the expense of the ship.

> *Mariners hire themselves out to their master, and some of them go ashore without leave, and get drunk, and make a row, and there are some of them who are hurt; the master is not bound to have them healed, nor to provide them with anything; on the contrary he may properly put them ashore, and hire others in their place; and if the others cost more than they did, they ought to pay, if the master can find anything of theirs. But if the master sends a mariner on any service of the*

ship by his order, and the mariner wounds himself or is hurt, he is to be healed and maintained at the cost of the ship. And this is the judgment in this case (*Law VI*).

The purpose of the MLC 2006 is to ensure that seafarers are trained or qualified to carry out their duties on board a ship. Regulations in this area are now extensively developed (*cf.* McConnell, Devlin, Doumbia-Henry, 2011). Still, just as in the Laws of Oleron, the shipmaster is appointed and employed by the shipowner. In compliance with the maritime international and domestic law, the shipmaster may order a seafarer to leave the ship and go ashore in the nearest port when it appears that he has been employed on a ship above his qualifications, although he has the required certificates. Moreover, shipowners' safety policy covers all issues related to the maritime safety culture required by the ISM Code. Seafarers shall not work on a ship unless they are trained or certified as competent or otherwise qualified to perform their duties. Presently, shipowners' policy is: no alcohol and no drugs aboard the ship.

Communication and commitment to work on a ship

Effectiveness of action was and is an essential element in maritime shipping, being in evidence on a ship on which a team of mariners works, among which the master usually represents the interests of several entities. In practice, the crew of a particular ship creates a specific pattern of effective action, with characteristic separations exclusively reserved for her. According to the ISM Code the cornerstone of good safety management is commitment from the top (*cf.* Anderson, 2015, 52).

The concept of effective action is encountered both in the medieval Laws of Oleron and in contemporary maritime law, particularly in terms of maritime labour and maritime safety. The ability to act in an effective manner is not static, but is characterized by internal and external dynamism, as well as variability over time. Thus, the assessment of the ability to act in the working conditions on a ship has tended to vary over the centuries.

However, both formerly and now, the crew had to cooperate with one another. The master, as well as the seafarers could not afford to act independently. In medieval maritime law, by way of custom, conduct standards were developed that forged team identity of the ship's crew. The crew acted collectively and had the same goal to achieve. The master's role was to mobilize all the mariners to accomplish the objective, and if any of them decided to leave the ship before the end of the sea voyage, the master had the task to prevent it.

The Laws of Oleron contain rules that directly indicate on what matters the master should consult the crew. One such case, in connection with the departure of the ship on a sea voyage, was to agree a convenient moment with the crew. Before the departure, the mariners had to be consulted to determine if the weather was favorable for sailing. In accordance with the Laws of Oleron, when:

A ship is in a haven and stays to await her time, and the time comes for her departure, the master ought to take counsel with his companions and to say to them: 'Sirs, you have this weather'. There will be some who will say the weather is not good, and some who will say the weather is fine and good. The master is bound to agree with the greater part of his companions. And if he does otherwise, the master is bound to replace the ship and the goods, if they are lost, and this is the judgment in this case (*Law II*).

The legal situation of seafarers was quite clearly defined. The basic duty of the seaman was to work on the ship. The sailors were obliged to save the cargo and the ship. If a seaman failed to save the goods and the remains of the ship, he "lost with the ship", which included the wages. If they fulfilled their duties, it is the master had to provide them with a return to their home port; otherwise, the master would not owe them any obligation. The master could not sell the ship's equipment ("the apparel of the ship") without the shipowners' permission. In this situation, the master should act as a loyal person to the owners of the ship.

If a ship is lost in any land or in any place whatever, the mariners are bound to save the most they can; and if they assist, the master is bound, if he have not the money, to pledge some of the goods which they have saved, and to convey them back to their country; and if they do not assist, he is not bound to furnish them with anything nor to provide them with anything, on the contrary they shall lose their wages, when the ship is lost. And the master has no power to sell the apparel of the ship, if he has not a mandate or procuration from the owners, but he ought to place them in safe deposit, until he knows their wishes. And he ought to act in the most loyal way that he can. And if he acts otherwise, he is bound to make compensation, if he have wherewithal. And this is the judgment in this case (*Law III*).

According to the Laws of Oleron, a prohibition for a mariner to leave the ship without the master's permission was stipulated (under the penalty of paying compensation). The mariners could not go ashore without the permission of the master; if the ship was moored by four lines then the mariners were entitled to go ashore.

A ship departs from a port laden or empty, and arrives in another port; the mariners ought not to go ashore without the leave of the master; for if the ship should be lost from any accident, in such a case they would be bound to make compensation [if they have wherewithal]. But if the ship is in a place where she has been moored with four hawsers, they may properly go ashore] and return in time to their ship. And this is the judgment in this case (*Law V*).

Also, in the case of a jettison the master had to rely on the trustworthiness of the mariners. In a justified need, wines and other goods might be jettisoned overboard; in such an event, the permission of the owners of the goods was required or the master had to swear that it was necessary to save the ship:

A ship loads at Bordeaux, or elsewhere, and it happens that a storm catches the ship at sea, and that she cannot escape without casting overboard goods and wines; the master is bound to say to the merchants: 'Sirs, we cannot escape without casting overboard wines and goods'; the merchants, if there are any, answer as they will, and agree readily to a jettison on the chance, since the reasons of the master are most clear; and if they do not agree, the master ought not to give up

for that reason casting over board as much as he shall see fit, swearing himself and three of his companions upon the Holy Evangelists, when he has arrived in safety on shore, that he did not do it, except in order to save the lives and the ship and the goods and the wines. Those which are cast overboard ought to be appraised at the market price of those which have arrived in safety, and shall be sold and shared pound by pound amongst the merchants; and the master ought to share in the reckoning of his ship or his freight at his choice, to reimburse the losses: the mariners ought to have a ton free, and the rest they ought to share in the jettison, according to what they shall have on board, if they conduct themselves as men on the sea; and if they do not so conduct themselves, they ought not to have any exemption, and the master shall be believed on his oath. And this is the judgment in this case (*Law VIII*).

The master should follow the advice of the majority of the crew. If he did not consult the crew at all or he did not listen to the majority of the crew about weather conditions of the sea voyage, he would be liable. This concerned a situation where the ship had been lost and obviously when the master was able to pay. Thus, the loss of a ship that occured in the absence of a convenient time setting for the commencement of a sea voyage could result in severe consequences for the master. The master was responsible for damages resulting from improper stowage. The master and his crew decided jointly on the way of stowing wine, which is well illustrated in one of the Laws of Oleron:

A ship loads at Bordeaux, or elsewhere, and hoists sail to convey her wines, and departs, and the master and mariners do not fasten as they ought their bulkheads, and bad weather overtakes them on the sea in such manner, that the casks within the ship crush either a tun or a pipe; the ship arrives in safety, and the merchants say that the casks have destroyed their wines; the master says that it is not so; if the master can swear himself and three of his companions, or four of those whom the merchants have chosen, that the wines were not destroyed by the casks, as the merchants stowed their wines above the waterline, they ought to be quit; and if they are not willing to swear they ought to make good to the merchants all their damage, for they are bound to fasten well and surely their bulkheads and their hatches before they depart from the place where they have loaded. And this is the judgment in this case (*Law XI*).

The master "served as judge while at sea" (*cf.* Runyan, 1975, 100). He was responsible for keeping the ship calm and settling disputes, but the authority of the master was not unlimited:

A master hireth his mariners, and he ought to keep them in peace, and be their judge, if there is any one who hurts another, whilst he puts bread and wine on the table; he who shall give the lie to another, ought to pay four pence. And the master, if he gives the lie to any one, ought to pay eight pence; and if any one gives the lie to the master, he ought to pay as much as the master. And if it be so that the master strikes one of his mariners, the mariner ought to abide the first blow, whether it be of the fist or the palm of the hand; and if he strikes him again, the mariner may defend himself. And if a mariner strikes the master first, he ought to lose a hundred shillings or his fist at the choice of the mariner. And this is the judgment in this case (*Law XII*).

The complaint procedure laid down in maritime labor law corresponds in that respect with the Laws of Oleron. In order to ensure that complaints may

be resolved at the lowest possible level, the MLC 2006 provides an appropriate complaint procedure. Taking any action against seafarers in connection with their complaints is prohibited. Seafarers have the right to lodge complaints about the non-provision of decent working and living conditions on a ship. A seafarer can lodge a complaint with the shipmaster (*cf.* Pyć, 2017, 252).

The master was not allowed to strike the mariner under normal conditions, but a mariner struck by the master was required to endure the first blow, be it of fist or palm of the hand. If the master dealt another blow, the mariner had the right to defend himself. The Laws of Oleron do not mention the consequences of a master or a mariner assaulting passengers (*cf.* Runyan, 1975, 100).

According to the Laws of Oleron, the master was subject to several limitations. The master was obliged to ask the crew for advice and accede to the opinion expressed by the majority of the crew; also, he was obliged to rely on the crew to support his statements to the owners (as swearing by mariners) in the event of a collision of a vessel anchored in port with a ship entering the port.

> *A ship is in a roadstead moored and riding at her mooring, and another ship strikes her while she is at rest. The ship is damaged by the blow which the other has given her and there are some wines stove in. And the damage ought to be appraised, and divided by halves between the two ships. And the wines which are in the two ships ought to be halved for the damage between the merchants. The master of the ship, which has struck the other is bound to swear, himself and his mariners, that he did not do it intentionally; and the reason why this judgment is made, is, that it may happen that a vessel would willingly place herself in the way of a better ship, if she were to have all her damage made good from having struck the other ship. But when she knows she ought to share the damage of both by halves, she willingly places herself out of the way. And this is the judgment in this case* (*Law XV*).

If ships were at anchor in a port that was uncovered at low tide, the master could request to move the anchors placed too close to his ship. Anchors that were covered at high tide had to be marked with a buoy.

> *A ship and divers others are in a haven, where there is little water, and one of the ships dries and is too near the other. The master of this ship ought to say to the other mariners: 'Sirs, you should raise your anchor for it is too near us, and may do us damage'; and if they will not raise it, the master for himself with his companions may proceed to raise it and remove it to a distance from them. And if they fail to raise it, and the anchor does then damage, the others must are bound to make compensation thoroughly. And if it should be that they have let go an anchor without a buoy, and it does damage, they are bound to make compensation thoroughly. And if they are in a haven which dries, they are bound to put floats to their anchors, that they may appear above water. This is the judgment in this case* (*Law XVI*).

With respect to communication and commitment to work on a ship, this is currently a particularly important part of the ISM Code. This code clearly exposes common sense as a necessity and a kind of a "board of rescue" in many situations related to the work on a ship. What is missing today, or insufficiently provided in practice, is the appropriate communication on a ship in all conditions. There

is no doubt that the times when the master asked the crew for advice or when the crew had to swear by confirming the events on the ship have passed, but at that time the sailors had it in their minds that the success of the sea voyage might depend on sharing knowledge acquired in maritime practice with all, regardless of the circumstances. Shipping companies (as well as ship managers) and seafarers operate with fundamentally different understandings of the purpose and use of the ISM Code. This contributes to the gaps between its intended purpose and practice (*cf.* Bhattacharya, 2012).

Conditions of employment

The master engaged the mariners through a contractual agreement in mediewal (*cf.* Runyan, 1975, 99). The scope of capacities of the master included: forms of payment and other benefits for the crew. In compliance with the Laws of Oleron, mariners were hired under one of three methods of payment. They were paid asset wage for the voyage,[10] allowed to freight their own cargo in the space allotted to them or granted a share of the profits of the freight by the master (*cf.* Runyan, 1975, 99).

> *A ship arrives to load at Bordeaux or elsewhere. The master is bound to say to his companions: 'Sirs, will you freight your fares, or will you let them at the freight of the ship'. They are bound to reply, which they will do. And if they choose to let them according to the freight of the ship, such freight as the ship shall have they shall have. And if they wish to freight [their fares] for themselves, they ought to freight [them] in such manner that the ship ought not to be delayed. And if it should happen that they find not freight, the master is not to blame. And the master ought to show them their fares and their berths, and each ought to place there the weight of his venture. And if he wishes to place there a tun of water, and it be cast into the sea, it is to be reckoned for wine or other goods pound by pound if the mariners exert themselves reasonably on the sea. And if they freight their fares to merchants the same franchise which the mariners should have shall be allowed to the merchants. And this is the judgment in this case* (*Law XVIII*).

If a mariner wanted to receive his wages in a foreign port and did not have any property on the ship, the master could stop paying him the wages, to ensure that the mariner would complete the sea voyage.

> *A ship arrives to discharge. The mariners wish to have their wages. And there are some who have neither cot nor chest on board; the master may retain of their wages, in order to take the ship back to the place whence he brought it, if they do not give good security to perform the voyage. And this is the judgment in this case* (*Law XIX*).

A sailor had to follow the ship, even when he knew that the ship would not get the freight.

> *The master of a ship hires his mariners at the town whereof the ship is, some of them for the venture, the others for money, it happens that the ship cannot find freight in those parts to come*

[10] Only the payment of a set of wage for sea voyage is known to Roman Law.

in, and it is expedient to go to a further distance, those who are engaged for the venture ought to follow the ship, but to those who are engaged for money the master is bound to increase their wages, view by view and, course by course, by reason that he has engaged them [to go] to a given place. And if they go a shorter distance than that for which the engagement was made, they ought to have all their wages, but they ought to assist in bringing the ship back to the place whence they brought it, if the master wishes it, at the adventure of God. And this is the judgment in this case (*Law XX*).

The following rights of the master were derived from the Laws of Oleron: the right to suspend the payment of mariner's earnings in order to compel him to return by ship; granting a mariner the right to defense against the master blows only the second time; the right to dismiss a seafarer after having excluded him from the table three times:

Contention arises on board of a ship between the master and his mariners. The master ought to take away the napkin from before the mariners three times before he sends them out of the ship. And [if] the mariner offers to make amends according to the award of the mariners who are at the table; and [if] the master is so cruel that he will not do anything and he puts him out of the ship, the mariner may go and follow the ship to her port of discharge, and have all his wages, as if he had come aboard the ship, making amends for his fault according to the award of the mariners. And if it be so, that the master has not another mariner as good on board the ship, and it, is lost through any accident, the master is bound to make good the damage, if he have wherewithal. And this is the judgment in this case (*Law XIV*).

If a merchant did not load the ship and kept her for more than fifteen days beyond the agreed departure date, the merchant was obliged to compensate for the damage caused to the master, as well as the mariners:

A master lets for freight his ship to a merchant, and it is devised between them, and a term is fixed [for loading] and the merchant does not observe this time; on the contrary he keeps the ship and the mariners waiting for fifteen days or more, and sometimes the master loses his time and his expenses from the default of the merchant. The merchant is bound to indemnify the master; and of the indemnification that shall be paid the mariners ought to have one fourth, and the master three fourths, because he provides the expenses. And this is the judgment in this case (*Law XXII*).

The master was required to show the winches and ropes to the merchants for their approval. If a rope broke and the merchants did not approve them, then the master was responsible for the loss. If the ropes were approved, then the merchants bore the loss.

A master of a ship comes in safety to his place of discharge; he ought to show to the merchants the ropes with which he will hoist; and if he sees anything to mend, the master is bound to mend them, for if a tun is lost by fault of the hoisting or of the ropes, the master is bound to make compensation, he and his mariners; and the master ought to share all that he receives for the hoisting, and the hoisting ought to be reckoned in the first place to replace the losses, and the residue ought to be shared amongst then. But if the ropes break without his having shown them to the merchants, he and his mariners will be bound to make good all the damage. But if the merchants

say that the ropes are fair and good, and they break, each ought to share the loss, that is to say, the merchants to whom the wine belongs, so much alone. And this is the judgment in this case (*Law X*).

A person could become a ship's pilot. He was hired to work to move the ship to the place of unloading. The pilot was obliged to ensure that the ship arrived in safety to her berth.

A young man is pilot of a ship, and he is hired to conduct her into the port where she ought to discharge, it may well happen that the port where ships are placed to discharge is a closed port. The master is bound to provide her berth by himself and his crew, and to place buoys that they may appear above water, or to see that her berth is well buoyed, that the merchants may suffer no damage; and if damage results the master is bound to make it good, if they state reasons wherefore the master should be driven from his reasons. And the pilot who has well done his duty when he has brought the ship in safety to her berth, for so far he ought to conduct her, and thenceforth the duty is on the master and his companions. And this is the judgment in this case (*Law XXIV*).

Currently, those are most often shipmasters with many years of experience at sea who choose the profession of a maritime pilot. In order to work as a pilot, the seafarer must obtain the required qualifications and have the appropriate certificate provided for in domestic law and in compliance with international law.

Accommodation and food

The Laws of Oleron also set down specific rules for the treatment of seafarers. Mariners were entitled to one cooked meal a day and wine onboard ship. Mariners from Brittany were entitled to one meal a day and those from Normandy were entitled to two meals. This was due to the fact that mariners from Brittany were entitled to wine, while those from Normandy only had water.

The mariners of the coast of Brittany ought to have only one cooked meal a day, by reason that they have drink going and coming. And those of Normandy ought to have two a day, by reason that their master only supplies them with water in going. But when the ship arrives at the land where the wine grows, the mariners ought to have drink, and the master ought to find it. And this is the judgment in this case (*Law XVII*).

A seaman could take the available food from the ship when the ship was in the port, but he had to come back so that the ship did not suffer a loss as a result of the seafarer's lack of services.

It happens that a ship is at Bordaux or elsewhere; of such cooked food as there shall be in the ship, two mariners may carry with them [ashore] one mess, such as they are cut on board ship. And such bread as there shall be, they ought to have according to what they can eat, and of drink they ought to have none; and they ought to return all quickly, in order that the master lose not the service of the ship, for if the master loses it and there shall be damage, they shall all be bound to indemnify him; or one of the crew hurts himself for want of help, they are bound to contribute to his cure and to make compensation to their companion and the master, and their mess-men. And this is the judgment in this case (*Law XXI*).

Both in the Laws of Oleron and in current regulations, seafarers have the right to accommodation, as well as food and water on board ship. In accordance with the MLC 2006, seafarers on board a ship shall be provided with food and drinking water of appropriate quality, nutritional value and quantity that adequately covers the requirements of the ship and takes into account the differing cultural and religious backgrounds. Food is free of charge during the period of engagement. Seafarers employed as ships' cooks with responsibility for food preparation must be trained and qualified for their position on board a ship.

Medical care on board ship and ashore

Mariners and other maritime employees often work in dangerous conditions on a ship at sea far from home. Therefore, both medieval and modern maritime laws often stipulate special protective measures for those who were injured in their work at sea.

Many legal norms of the current maritime law can be traced back to the Laws of Oleron. As maritime commerce expanded, the need for regulations governing maritime activity and the treatment of employees engaged in maritime activities also increased.

Maritime laws have long described mariners as "wards of admiralty." Thus, mariners as workers require special legal protection due to the higher risk of injury, illness or death they face in their work at sea. According to the Laws of Oleron, shipowners were responsible for the living expenses and medical care of mariners who became ill or were injured in the course of their duties.

This law of "maintenance and cure" is still included in current maritime law, both in the MLC and domestic law. Injured seafarers are entitled to maintenance and treatment until "maximum cure" is reached. They are also entitled to payment of wages they would have received.

If a mariner ("one of the ship's company") should become injured or ill during the course of a voyage, the master must get him not only medical attention onshore, but also provide him with food like onboard the ship and pay him his wages:

> *It happens that sickness attacks one of the ship's company, or two or three, and the sick man can do nothing in a the ship, as he is so ill; the master ought to put him ashore, and seek a lodging for him, and furnish him with tallow or a candle, and supply him with one of the ship's boys to tend him, or hire a woman to nurse him; and he ought to provide him with such food as is used in the ship, that is to say, with as much as he had when he was in health, and nothing more, unless he pleases. And if the sick man wishes to have more delicate food, the master is not bound to find it, unless it be at his expense; and the ship ought not to delay her voyage for him, on the contrary she should proceed on it; and if he should recover, he ought to have his wages for the whole voyage; and if he should die, his wife or his near relatives ought to have them for him. And this is the judgment in this case* (*Law VII*).

To protect the health of seafarers and ensure their prompt access to medical care on board the ship and ashore, including essential dental care, the MLC 2006 provides a number of detailed regulations imposing different duties on the ship. These regulations are not limited to the treatment of sick or injured seafarers but include measures of a preventive character such as health promotion and health education programmes. Ships shall carry a medicine chest, medical equipment and a medical guide, the specifics of which shall be prescribed and subject to regular inspection by the competent authority.

Conclusions

Maritime law has been evolving for centuries. The consuetude and customs that were intimately linked to maritime practice became the foundation for maritime customary law and then international and domestic maritime law, as well as the law of the sea. The Laws of Oleron set down detailed rules governing the mutual relationship of the master and the members of the crew as well as theirs standing with regard to merchants and shipowners, and the person of the pilot. Safety culture has been introduced and studied to ensure safe working environment and to prevent an accident as an important concept to manage risks in various shipping companies.

The Laws of Oleron are an example of customary norms that served to establish patterns of effective action and patterns considered ineffective. This line of reasoning allows one to assume that axiology and common sense, which throughout the ages has permeated the norms of maritime law, is a continuation of past maritime practice in modern times. Traditional command and control structure does pose challenges for seafarers. The seafarers are used to being blamed for onboard incidents and near-misses, which have resulted from poor communication. Therefore, seafarers ought to participate in the management of workplace health and the development of maritime safety culture as stakeholders.

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Dorota Pyć

THE LAWS OF OLERON AS THE RULES GOVERNING MARITIME LABOUR. HAVE WE LEARNED A LESSON FROM THE PAST?

The essence of this paper is to illustrate the genuine link between the norms contained in the medieval Laws of Oleron that have survived to modern times, binding certain legal solutions in the space over the ages. The Laws of Oleron contain norms relating to contemporary maritime labour law. Certainly they are not a model fully reflected in the Maritime Labour Convention (MLC 2006). Nevertheless, these principles can be an interesting starting point for discussions on the importance of decent working conditions, the lives of seafarers on ships and maritime safety culture from a few centuries perspective.

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SOME REMARKS ON BENITO MUSSOLINI'S SPEECH *ROMA ANTICA SUL MARE*

Benito Amilcare Andrea Mussolini (1883–1945) is a well-known person. His private life and political activities have attracted interest of a large number of researchers. Numerous biographies[1] of the leader of the Italian fascist movement have been written and various topics related to that figure are the subject of a vast number of publications[2] that could fill entire libraries. The years of Mussolini's activity in public life, including his role as Italy's prime minister in 1922–1943, have resulted in a large number of political publications and speeches.[3] Of note is the fact that the speeches of the Italian dictator include a lecture titled *Ancient Rome at Sea* (*Roma antica sul mare*). It was given on 5 October 1926 at the inauguration of the Italian University for Foreigners in Perugia (*Regia Università Italiana per Stranieri, Perugia*). This institution had been established in 1925 and specialized in teaching, research, and promotion of the Italian language and culture in all its forms, especially literature, art, and history.[4] The University continues its mission nowadays.

The choice of the subject matter of the speech which Mussolini addressed to people gathered at the *Palazzo dei Priori* in Perugia was not accidental. Making Italy the main power in the Mediterranean Sea was a very important element of the Italian leader's policy. His recollection of the glorious events from distant past was an excellent way to create a vision of restoration of the *Imperium Romanum*.[5]

[1] The list of biographies is provided by Milza (1999), 948–949.
[2] An extensive list of references has been compiled in Nelis (2011), 173–242.
[3] See editions: Piccoli, Ravasio (1934–1939); Susmel, Susmel (1951–1963–1978–1980).
[4] See *Gazzetta Ufficiale del Regno d'Italia*, n. 271/1925: Regio Decreto – Legge 29 ottobre 1925, n. 1965.
[5] See more: Scott (1932); Giardina, Vauchez (2000), 212–296; Nelis (2011); Nelis (2012).

It must be emphasized that in its publications and speeches, the Fascist leader referred to issues associated with the sea on many occasions. Even before he seized power, in an article titled *Navigare necesse!* published on 1 January 1920 in *Il Popolo d'Italia*, he clearly asserted the fundamental importance of the sea to Italy's future. "Instead of a cross, we would like to see an anchor or a sail in the national emblem", stated Mussolini and added: "It is absurd not to dash onto sea lanes because the sea surrounds us on three sides."[6] In the same periodical, in an article titled *Ciò che rimane e ciò che verrà* dated 13 November 1920, Mussolini emphasized that Italians should not become hypnotized by the Adriatic Sea or some of its islands or shores. He recalled that there is another large sea of which the Adriatic Sea is only a humble bay. The larger sea is the Mediterranean Sea which Mussolini believed to be the area for Italy's expansion.[7] The idea to restore the Italian state's past greatness, which included control of the Mediterranean Sea and Rome's leading role in the civilization of Western Europe, was clearly expressed in the speech *Il fascismo e i problemi della politica estera italiana*, delivered by the Fascist leader on 6 February 1921 in Trieste.[8] Symptomatic words were also spoken by Mussolini on 4 October 1922 in Milan (*Dal malinconico tramonto liberale all'aurora fascista della nuova Italia*), where he clearly stated the need to make the Mediterranean Sea "our lake" (*lago nostro*).[9] This was a direct reference to the practice of ancient Romans to refer to the Mediterranean Sea as *mare nostrum* (see Philipp, 1936).

As a result of the so-called March on Rome (*Marcia su Roma*), organized by Mussolini in late October 1922, he was appointed Italy's prime minister by King Victor Emanuel III. In the period of over ten years between Mussolini's ascension to power and his lecture in Perugia, various issues related to Italy's maritime policy were quite frequently included in the Italian leader's statements. When presenting the tenets of his government's new foreign policy (*La nuova politica estera*), on 16 February 1923, he stated firmly: "We must have the courage to say that

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[6] Susmel, Susmel (1954), vol. XIV: *Dalla marcia di Ronchi al secondo Congresso dei Fasci (14 settembre 1919 – 25 maggio 1920)*, 231: "Che l'Italia di domani debba «navigare» va diventando verità acquisita alla coscienza italiana: non la croce vorremmo vedere sullo stemma nazionale ma un'ancora o una vela. È assurdo non gettarsi sulle vie del mare quando il mare ci circonda da tre parti."

[7] Susmel, Susmel (1955), vol. XVI: *Dal Trattato di Rapallo al primo discorso alla Camera (13 novembre 1920 – 21 giugno 1921)*, 6: "(…) gli italiani non devono ipnotizzarsi nell'Adriatico o in alcune isole o sponde dell'Adriatico. C'è anche – se non ci inganniamo – un vasto mare di cui l'Adriatico è un modesto golfo e che si chiama Mediterraneo, nel quale le possibilità vive dell'espansione italiana sono fortissimo."

[8] Susmel, Susmel (1955), vol. XVI, 159: "È destino che il Mediterraneo torni nostro. È destino che Roma torni ad essere la città direttrice della civiltà in tutto l'Occidente d'Europa. Innalziamo la bandiera dell'impero, del nostro imperialismo, che non dev'essere confuso con quello di marcia prussiana o inglese."

[9] Susmel, Susmel (1956), vol. XVIII: *Dalla Conferenza di Cannes alla Marcia su Roma (14 gennaio 1922 – 30 ottobre 1922)*, 439: "(…) proiettando gli italiani come una forza unica verso i compiti mondiali facendo del Mediterraneo il lago nostro alleandoci cioè con quelli che nel Mediterraneo vivono ed espellendo coloro che del Mediterraneo sono i parassiti." See also Mack Smith (1976), 16; Milza (1999), 424.

Italy must not be nailed forever to one sea, even if it is the Adriatic Sea. Besides the Adriatic Sea there is also the Mediterranean Sea and other seas that may be of interest to us."[10] These words were confirmed by Mussolini's speech *Al popolo di Firenze*, given at the *Palazzo Vecchio* in Florence on 19 June of the same year, in which Mussolini said: "We want the sea not to be a stricture that limits our ability to live and to develop, but rather a road to our necessary global expansion."[11] The Italian prime minister did not limit his activity to verbal declarations but also took steps to implement specific designs of his government's maritime policy. As an example, one could cite development of the shipbuilding industry, both for the merchant marine and for the navy (Krzywiec, 1935).

Mussolini was also aware of the importance of Italy's maritime commerce. In the speech *Al popolo di Catania*, which he gave on 11 May 1924 from the balcony of the *Palazzo Municipale*, he put very strong emphasis on the need to restore Italian's love for the sea. It must be noted that the Italian prime minister quoted some famous words: *vivere non necesse, sed navigare necesse est*.[12] According to the Greek writer Plutarch (*Plutarchus*), those words had been spoken by Pompey the Great (*Gnaeus Pompeius Magnus)* in 56 BC when he was in charge of Rome's commercial shipping. He sailed to Sicily, Sardinia, and Africa to fetch grain. Before he sailed back with the grain, a storm started and the shipmasters were hesitant to depart. Then he boarded a ship and demanded that the anchor be lifted screaming: "Sailing is necessary, living is not necessary!"[13] The issue of maritime commerce was also discussed by Mussolini on 5 October 1924. In the speech he gave within the walls of *Università Bocconi* in Milan during the inauguration of the *Congresso nazionale dei dottori in scienze economiche e commerciali*, he recalled that it was the sea – as life experience indicated – that could bring happiness and wealth to Italians.[14] In his speech *Noi siamo mediterranei*, given on 8 April 1926 on board the ship *Cavour* anchored in the vicinity of Fiumicino, he firmly stated: "We are bound to the Mediterranean Sea and our destiny has always been and will always be linked to the sea."[15]

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[10] Susmel, Susmel (1956), vol. XIX: *Dalla Marcia su Roma al viaggio negli Abruzzi (31 ottobre 1922 – 22 agosto 1923)*, 146: "Bisogna avere il coraggio di dire che l'Italia non può eternamente rimanere inchiodata in un solo mare, sia pur esso il mare Adriatico. Oltre il mare Adriatico c'è il Mediterraneo, e ci sono altri mari che possono interessarci."

[11] Susmel, Susmel (1956), vol. XIX, 278: "(…) vogliamo che il mare non sia una cintura contro la nostra vitalità, ma invece la strada per la nostra necessaria espansione nel mondo."

[12] Susmel, Susmel (1956), vol. XX: *Dal viaggio negli Abruzzi al delitto Matteotti (23 agosto 1923 – 13 giugno 1924)*, 269: "O popolo di Catania marinara! Dobbiamo tornare ad amare il mare, a sentire la ebbrezza del mare, poichè *vivere non necesse, sed navigare necesse est*."

[13] Plut. *Vit. Pomp.* 50, 1.

[14] Susmel, Susmel (1956), vol. XXI: *Dal delitto Matteotti all'attentato Zaniboni (14 giugno 1924 – 4 novembre 1925)*, 101: "(…) se è vero che noi siamo circondati dal mare e che tutti i nostri problemi di rifornimenti dipendono in gran parte dal mare, e dal mare, come già ci venne la vita, potrà anche venirci la fortuna e la prosperità."

[15] Susmel, Susmel (1957), vol. XXII: *Dall'attentato Zaniboni al discorso dell'Ascensione (5 novembre 1925 –*

One can clearly see that the broadly defined sea-related issues were a very important element of Mussolini's political plans. Mussolini's speech *Roma antica sul mare* (Susmel, Susmel, 1957, vol. XXII, 213–227),[16] given in 1926, must not be analyzed only in historical terms. This is because it was a part of the Fascist *romanità* myth and constituted a continuation of explicit articulation of Italy's strategic objectives in sea-related matters addressed to the Italian society and to the entire world.

In his speech, the Italian dictator focused on the maritime history of ancient Rome, starting from the period of the Roman Kings and ending in the third century after Christ. The author focused most of all on a description of the numerous sea battles fought by Romans, the peace treaties that Rome signed with its neighbors, and the organization and development of the Roman naval fleet. The contents of the lecture included details concerning various social and legal matters, as well as references to Roman public law. Mussolini started his speech by asking the following fundamental questions: Was the ancient Rome also famous at sea? Was Rome also a maritime power? Was the Roman Empire also a maritime empire? The answers to all those questions were affirmative. Mussolini added that without controlling the sea, Rome would not have become an empire and would not have been able to remain an empire because it had to subjugate numerous nations across the sea and was able to reach many conquered areas much quicker by sea. Another question was: Did Rome conduct maritime commerce before the Punic Wars? The answer that *Il Duce* gave to that question was also affirmative.

After a short introduction, the Italian leader described Rome's maritime history in the period of the Roman Kings. Mussolini informed the audience that the Mediterranean Sea was controlled both militarily and commercially by Etruscans, Greeks, Syracusans, and most of all Carthaginians. Rome, as Mussolini said, "did not give any vital signs at sea" (Susmel, Susmel, 1956, vol. XXII, 214). He made a reference to the publication by the historian Ettore Pais to list the main reasons why Romans attached greater importance to land than to sea (Pais, 1913–1920).

He spent a significant amount of time discussing the First Punic War (264–241 BC) He remarked that before the war, Rome's position had changed as it gained a "wider breathing space at sea." This happened because Rome conquered cities that already conducted maritime commerce and had a fleet and ship crews. The leader of Fascist Italy provided many details associated with Rome's actions intended to defend its coast. He mentioned that Rome established numerous colonies that performed military functions. He also spoke about establishment of

26 maggio 1927), 112: "Noi siamo mediterranei ed il nostro destino, senza copiare alcuno, è stato e sarà sempre sul mare. Per la gloriosa Marina italiana: Eia! Eia! Alalà!"

[16] Mussolini's speech was first published in *Il Popolo d'Italia* (6 ottobre 1926, n. 238, p. 1–2), and then in the form of a separate book, which then saw multiple reprints before the start of World War II, e.g.: Milano 1926; Palermo 1926; Roma 1926; Spoleto 1926; Mantova 1926, 1927, 1929.

the *duumviri navales*[17] and appointment of four quaestors (*quaestores classici*) just before the war with Carthage.[18] Mussolini concluded that all those steps constituted implementation of the Senate's plan that included Rome's independence at sea, breakup of the maritime alliance with Taranto, closing the Adriatic Sea to ships sailing from Epirus, and the elimination of Carthaginian dominance. In his speech, Mussolini made a reference to the opinion of Theodor Mommsen, an outstanding researcher of antiquity and winner of the Nobel Prize in Literature in 1902, whose monumental work *Römische Geschichte*, was a source of information for the Italian leader.[19]

Il Duce also discussed the relations between Rome and Carthage. When discussing the first treaty between Rome and Carthage, concluded as early as 509 BC, Mussolini referred to a long text from a work by the Greek historian Polybius.[20] In Mussolini's opinion, it was indicative of the fact that Romans had a limited sphere of activities at sea but, on the other hand, it showed that the powerful Carthage had to reckon even then with Rome. By mentioning the account of the Roman historian Livy (*Titus Livius*),[21] he also discussed another treaty between Rome and Carthage, concluded in 348 BC, which regulated maritime trade and sailing. At the end of his speech, he mentioned the treaty dating back to 306 BC, which imposed strict limitations on Rome's sailing and prohibited Rome from conducting trade in Africa and Sardinia.[22]

Researchers studying Roman law would find it interesting that the Italian prime minister's comments related to the immediate cause of the First Punic War. When discussing the situation during the siege of Messana and the expectation of Mamertines to receive help from Rome, he informed that the relevant decision was delegated by the Roman Senate to the Centuriate Assembly (*comitia centuriata*), who decided to send relief to Messana, which marked the start of a regular war between Rome and Carthage.

Mussolini discussed the course of important sea battles (Mylae, Eknomos) and familiarized the audience with the way combat was conducted, the number of ships, and the losses suffered by the sides in the conflict. He also emphasized the merits of the Roman commanders. When summarizing the results of the First Punic War, he clearly stated that "war proves Rome's power also at sea" (Susmel, Susmel, 1956, vol. XXII, 223). *Il Duce* criticized T. Mommsen who, in his opinion,

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[17] Instituted in 311 BC, they took care of the needs of the fleet and commanded a patrol force for the defence of the coast, see Berger (1953), 446 (s.v. *Duoviri navales*).

[18] Instituted in 267 BC, they held positions in administration of the Roman navy; for more details see: Wesener (1963), 818–819; Harris (1976), 92.

[19] Mommsen (1874), 413–417. It is puzzling that Mussolini listed three known seats of the *quaestores classici*: Ostia, Brindisi, and Rimini. Mommsen clearly indicated Ostia, Cales in Campania, and Rimini, and added that the fourth seat was unknown – Mommsen (1874), 416.

[20] Polyb. 3.22.

[21] Livy, *Per.* 7.27.2.

[22] Polyb. 3.24; Livy, *Per*. 9.43.26.

reduced the merits of Rome and presented the way that Rome conducted naval war in a negative light. It must be mentioned that the German historian blamed Rome mostly for its failure to adopt a clear strategy, lack of appropriate fleet and ship crews, incompetence of the commanders, and their frequent changes. He also stated that the factors that contributed to Rome's eventual victory were the favor of the gods, the energy of its citizens and, most importantly, the errors made by the enemy (Mommsen, 1874, 534–537). It should be emphasized, however, that in addition to words of great admiration for Rome's achievements, Mussolini was able to remark on the conflict's negative consequences for Rome, namely the loss of 700 ships, reduction of its population by nearly 1/6, and the depreciation of the Roman currency.

The Italian dictator spent a little less time discussing the Second Punic War (218–201 BC) e talked with delight about Rome's victory and the terms of the Tunis peace (201 BC) imposed on Carthage, which he listed carefully. Later in his speech, he emphasized the fact that after Carthage's loss of power, the Mediterranean Sea became a "Roman lake" (*lago romano*). Also, the Italian prime minister said that: "Rome's maritime history has no more of such glorious pages" (Susmel, Susmel, 1956, vol. XXII, 226). However, Mussolini considered the fight of Pompey the Great against pirates to be a very important event. It is worth noting that in 67 BC, as a result of the initiative of the plebeian tribune Aulus Gabinius, a law was adopted (*lex Gabinia de uno imperatore contra praedones constituendo*, also sometimes titled *lex Gabinia de bello piratico*) to regulate actions intended to eliminate pirates from the Mediterranean Sea. The commander of the campaign was Pompey the Great, who was given extensive powers (see more Tarwacka, 2009, 43–55). *Il Duce* emphasized that the victorious fight against pirates was completed in less than three months thanks to the excellent position of the Roman fleet.[23] Also, he took note of the famous battle of Actium (31 BC) which had a great impact on the history of the Roman state.

The maritime history of Rome in the time of the Empire could not, in the opinion of the Italian leader, boast great deeds. Without giving any specific details, he mentioned several events, including the expedition of Germanicus and his victory over the Teutones, the construction of the Ostia port during the reign of Emperor Claudius, and the latter's introduction of laws regulating grain trade, construction of the Civitavecchia port, and expansion of the Ancona port during the rule of Trajan, as well as the naval victories of Severus and Claudius II.

Mussolini's words ending the speech in Perugia were very symptomatic: "Thus, it can be concluded, that Rome was also powerful at sea and that this power was the result of long sacrifices, steadfast perseverance, and firm will. Those values were important yesterday and will be important tomorrow and always." It is clear that those words were an arc spanning the glorious part of

[23] Plut. *Vit. Pomp.* 26.3–4 and 28.1–2.

Rome and the vision of a glorious future of Italy (Rancati, 1939). *Il Duce*'s speech, which was over one hour long, was received by the audience with enthusiasm. Many persons congratulated him and expressed their admiration of his genius and profound thinking (Susmel, Susmel, 1956, vol. XXII, 227). Among them, there was the Italian historian of antiquity and senator E. Pais who, as A. Giardina suspected, helped Mussolini prepare the lecture (Giardina, Vauchez, 2000, 249–250). The Fascist leader often cited his works: Pais (1913–1920); Pais (1915). Moreover, as Mussolini mentioned at the start of his speech, he also used the following works[24]: G. Luzzato, *Storia del commercio*, vol. I: *Dall'antichità al Rinascimento*, Florence 1914; F. Corazzini, *Osservazioni sopra una nuova storia generale della marina militare*, Catania 1892; T. Frank, *Storia economica di Roma dalle origini alla fine della repubblica*, transl. by B. Lavagnini, Florence 1924; G. Ferrero, C. Barbagallo, *Roma antica*, vol. I–III, Florence 1921–1922; G. De Sanctis, *Storia dei Romani*, vol. III: *L'età delle guerre puniche*, vol. I–II, Turin 1916–1917; A. Köster, *Das antike Seewesen*, Berlin 1923; A.V. Vecchi, *Storia generale della marina militare*, vol. I–II, Florence 1892; L. Homo, *L'Italie primitive et les débuts de l'impérialisme romain*, Paris 1925; T. Mommsen, *Storia di Roma antica*, new Italian translation based on the latest German edition by L. Di San Giusto, edited by E. Pais, vol. I–III, Turin 1925. A majority of them are works written in the Italian language, but some had been written in French and German. Mussolini knew French well[25] but his German was much worse.[26] It is noteworthy that, as the speech indicates, Mussolini did not use the original Mommsen's work in German, but instead used the Italian translation.[27]

The Italian leader's lecture is important first of all to people who study Mussolini's political activity. It can also be of interest to historians of antiquity and researchers studying Roman law. The content of the speech is largely filled with historical substance, which is by no means surprising. The author used professional publications on various matters, which are often cited. It may also be noted that *Il Duce* did not limit his speech to merely acquainting the audience with the maritime history of ancient Rome, but also expressed his own opinions about the events. He also expressed opinions that contradicted the opinions of authors of some works. Specialists who study the laws of ancient Rome have identified several parts of the speech *Roma antica sul mare* where legal matters are discussed. The Italian dictator did not quote legal sources, such as the Digest (*Digesta*) or the Code of Justinian (*Codex Iustinianus*), but he did cite ancient readers who dis-

[24] Publications with Mussolini's speech contain only the names of the authors and the titles of their works (often incomplete). However, they do not contain information about the place and the year of publication of the works. This data has been added by the author of this article.

[25] He even worked as a teacher of that language at a private school in Oneglia, see Fermi (1961), 61; Borucki (1995), 19.

[26] He learned those languages during his stay in Switzerland when he was a young man, see Monelli (1968), 35.

[27] It was probably T. Mommsen, *Storia di Roma antica*, new Italian translation based on the latest German edition by L. Di San Giusto, edited by E. Pais, E. Pais, vol. I–III, Turin 1925.

cussed legal matters in their works. When discussing the treaties between Rome and Carthage, Mussolini quoted a large paragraph from the works of Polybius and availed himself of information from the works of Livy. However, publications containing the speech in question do not contain information on where the contents of the works of the aforementioned writers can be found. Researchers studying Roman law will certainly take note of information concerning the establishment of the *duumviri navales* and the *quaestores classici*. However, the author of the speech did not explain what the tasks of those officials were. He focused a little more on the Centuriate Assembly (*comitia centuriata*) and the campaign against pirates led by Pompey the Great. The Italian prime minister also discussed the important matter of the distribution of grain in Rome (*frumentationes*). He mentioned the relevant measures taken by Gaius Gracchus and the changes made by Julius Caesar. *Il Duce* also provided details regarding the number of persons entitled to grain in different periods, in accordance with the data contained in scientific publications (Humbert, 1896).

Mussolini's lecture also had a propaganda aspect. The leader of the Italian Fascists intended to restore the past glory of the *Empire*. On various occasions, he eagerly mentioned the prominent role of Rome throughout the history of the world (Scott, 1932, 464). He also emphasized the great importance of Roman law.[28] In Mussolini's opinion: "without the sheets of Rome's history, the entire world history would be awfully mutilated and a large part of the contemporary world would be incomprehensible."[29] In her book on the dictator, Laura Fermi stated that: "He dreamt of an Italy to whom it was 'fated' that the Mediterranean Sea 'our lake' and its inclosing shores, should return; and of a Rome that would again impart 'its civilization, its great juridical civilization, as solid as its monuments, to the entire world'" (Fermi, 1961, 217–218). Reference to the memory of the naval power of the ancient Rome went along with all actions taken by the leader of Fascist Italy, whose main objective was restoration of the past glory of the Roman Empire. It is worth mentioning that the imperial propaganda made a fairly substantial impact on the architecture of Rome and other Italian cities (Painter, 2007; Żyromski, 2009 – especially Part IV: *The fascist Rome*, 182–212).[30] The myth of *romanità* was also manifested in the adoption of multiple symbols and rites, official celebration of the Birth of Rome (*Natale di Roma*) on 21 April, and bimillenial

[28] Susmel, Susmel (1954), vol. XV: *Dal secondo Congresso dei Fasci al Trattato di Rapallo (26 maggio 1920 – 12 novembre 1920)*, 217: "Roma è il nome che riempie tutta la storia per venti secoli. Roma dà il segnale della civiltà universale; Roma che traccia strade, segna confini e che dà al mondo le leggi eterne dell'immutabile suo diritto."

[29] Susmel, Susmel (1958), vol. XXV: *Dal dodicesimo anniversario della fondazione dei Fasci al Patto a quarto (24 marzo 1931 – 7 giugno 1933)*, 85: "Basta pensare che senza le pagine della storia di Roma, tutta la storia universale sarebbe terribilmente mutilata e gran parte del mondo contemporaneo sarebbe incomprensibile."

[30] Works in Polish include also: Szydłowski (1935); Żyromski (2004); Burno (2011); Burno (2016), with literature cited therein.

anniversaries of birth of famous figures such as Virgil, Horace, and Augustus (see more Nelis, 2011, 86–120). Many Italian researchers studying Roman law were involved in the propagation of this myth (Wołodkiewicz, 1996, 262–263). Practices intended to shape certain attitudes were not limited to government policy but were also present in various areas of public life of the ordinary citizens. In my opinion, the words of the French writer and journalist René Benjamin are worthy of note, as he gave the following account of his meeting with the Italian dictator: "Looking at Mussolini, I saw the Roman law, the Romans' conquests, I saw the heavy but wise architecture from the most beautiful era of Rome. I saw the greatness that would never stop inspiring admiration. It was reborn in Mussolini" (Benjamin, 1939, 171).

The successive years of *Il Duce*'s public activity were a continuation of his great power ambitions. As Denis Mack Smith noted: "already in the mid-1920s, contingency plans were prepared for a possible occupation of Ethiopia, and by 1928 the revival of imperialism and militarism was stated with pride to be virtually an accomplished fact" (Mack Smith, 1976, 16). The leader of the Italian Fascists made statements about maritime policy on many occasions. In the speech *Sintesi del regime*, which he gave on 18 March 1934 in Rome, he emphasized that the entire Italy is located near the sea and its historical objectives are Asia and Africa. It was there that he saw the main points that must kindle Italians' interest and the will to act.[31] He justified the planned conquest of Africa by the need to ensure appropriate living conditions to the Italian people. He considered this to be completely natural and compared it to the conquests of the ancient Rome (Borucki, 1995, 109). After the Italian forces occupied Ethiopia,[32] in the evening of 9 May 1936 in Rome, Mussolini announced the creation of a new Fascist empire.[33] His statements on matters related to the sea were clearly materialistic. In his speech of 1 November 1936 in Milan, he stated: "If for others the Mediterranean Sea is the road, for Italians it is the life."[34] In the foreword to the January 1937 issue of the periodical *Rivista Maritima*, he once more emphasized the fact that "Italy is an island surrounded by the sea and the sea can be a free way of life or a chain of slavery."[35] Later, on 26 March 1939, in Rome, he firmly emphasized: "Geographically, historically, politically, and militarily, the Mediterranean Sea is a living space

[31] Susmel, Susmel (1958), vol. XXVI: *Dal Patto di Quattro all'inaugurazione della Provincia di Littoria (8 giugno 1933 – 18 dicembre 1934)*, 190: "Tutta l'Italia è sul mare" and 191: "Gli obiettivi storici dell'Italia hanno due nomi: Asia ed Africa. Sud ed Oriente sono i punti cardinali che devono suscitare l'interesse e la volontà degli italiani."

[32] The circumstances and the course of the war in Ethiopia are discussed by Mack Smith (1976), 59–81.

[33] Susmel, Susmel (1959), vol. XXVII: *Dall'inaugurazione della Provincia di Littoria alla proclamazione dell'Impero (19 dicembre 1934 – 9 maggio 1936)*, 268–269. See also Milza (1999), 678–681.

[34] Susmel, Susmel (1959), vol. XXVIII: *Dalla proclamazione dell'Impero al viaggio in Germania (10 maggio 1936 – 30 settembre 1937)*, 71: "Se per gli altri il Mediterraneo è una strada, per noi Italiani è la vita."

[35] Susmel, Susmel (1959), vol. XXVIII, 96: "(…) l'Italia è un'isola circondata dal mare e che il mare – quel determinato mare – può essere una via libera di vita o una catena di schiavitù."

for Italy and when we say the Mediterranean Sea, we naturally include also the bay called the Adriatic Sea in which the interests of Italy are supreme";[36] not much later, in his speech *Al popolo di Cosenza* on 30 March 1939, he added: "Italy does not intend to remain a prisoner in the Mediterranean Sea."[37]

An analysis of Mussolini's political activity leads to the conclusion that he considered questions of maritime policy to be immensely important for the future of Italy. The glorious sheets of ancient Rome's maritime history were used by *Il Duce* in the fascist historical policy that was based on a combination of the imperial past with the vision of a new Italy. In the publication *La dottrina del Fascismo*, Mussolini clearly emphasized that Fascism was a historical concept. He also pointed to the great importance of tradition in the memories, language, customs, and norms of social life.[38] He considered tradition to be one of the greatest spiritual strengths of nations that was a continuous and uninterrupted creation of their soul. He emphasized: "A state is not only the present, but also the past and, most of all, the future."[39] It was in this spirit that his famous speech *Roma antica sul mare* was given. Glorification of the achievements of ancient Romans in naval operations which ensured their control of the Mediterranean Sea basin was to constitute a solid foundation for the construction of a new Italian state. That state was to have the status of a maritime empire. This was to be achieved by way of an armed conflict. This is because the doctrine of Fascism did not assume the possibility or usefulness of everlasting peace whilst rejecting pacifism. The consequences of Mussolini's policies became evident during World War II.

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[36] Susmel, Susmel (1959), vol. XXIX: *Dal viaggio in Germania all'intervento dell'Italia nella seconda guerra mondiale (1 ottobre 1937 – 10 giugno 1940)*, 252: "(…) geograficamente, storicamente, politicamente, militarmente il Mediterraneo è uno spazio vitale (*la moltitudine grida: «È nostro!»*) per l'Italia e, quando diciamo Mediterraneo, vi includiamo naturalmente anche quel golfo che si chiama Adriatico e nel quale gli interessi dell'Italia sono preminenti."

[37] Susmel, Susmel (1959), vol. XXIX, 255: "(…) l'Italia non intende affatto di rimanere prigioniera nel Mediterraneo."

[38] Susmel, Susmel (1961), vol. XXXIV: *Il mio diario di guerra (1915–1917); La dottrina del Fascismo (1932); Vita di Arnaldo (1932); Parlo con Bruno (1941); Pensieri Pontini e Sardi (1943); Storia di un anno (1944, Il tempo di Bastone e della Carota)*, 118: "Il fascismo è una concezione storica… Donde il gran valore della tradizione nelle memorie, nella lingua, nei costumi, nelle norme del vivere sociale."

[39] Susmel, Susmel (1961), vol. XXXIV, 129: "Lo Stato non è soltanto presente, ma è anche passato e soprattutto future."

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SOME REMARKS ON BENITO MUSSOLINI'S SPEECH *ROMA ANTICA SUL MARE*

The purpose of this article is to analyse Benito Mussolini's speech titled *Roma antica sul mare* given on 5 October 1926 in Perugia. The Fascist leader referred on many occasions to issues associated with the sea. Making Italy the main power on the Mediterranean Sea was a very important element of the Italian leader's policy. His recollection of glorious events from distant past was an excellent way to create a vision of the restoration of the Roman Empire.

PRAWO WSPÓŁCZESNE
I TRADYCJA ROMANISTYCZNA

MODERN LEGAL ISSUES
AND ROMAN LEGAL TRADITION

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ODPOWIEDZIALNOŚĆ PAŃSTW ZA SZKODY WYRZĄDZONE W ŚRODOWISKU MORSKIM W MIĘDZYNARODOWYM PRAWIE MORZA

Istota odpowiedzialności w prawie międzynarodowym

Odpowiedzialność podmiotów prawa międzynarodowego za naruszenie prawa jest jedną z nielicznych dziedzin prawa międzynarodowego, które nie zostały dotąd skodyfikowane (Czapliński, 2009, 155)[1]. Odpowiedzialność państwa jest fundamentalną zasadą prawa międzynarodowego, która wynika z natury międzynarodowego systemu prawnego oraz z doktryny suwerenności państwowej i równości państw. Odpowiedzialność za naruszenie prawa wynika z naruszenia jakiegokolwiek zobowiązania nałożonego przez prawo międzynarodowe. Taka odpowiedzialność w prawie międzynarodowym znana jest jako odpowiedzialność za naruszenie prawa (*responsibility*). W projekcie Komisji Prawa Międzynarodowego Organizacji Narodów Zjednoczonych rozdzielono odpowiedzialność na delikty międzynarodowoprawne i odpowiedzialność za działania niezabronione przez prawo międzynarodowe. Pierwszą określa się jako *state responsibility*, a drugą jako *state liability.* Odpowiedzialność międzynarodowa ma charakter zbliżony do odpowiedzialności cywilnej na gruncie prawa wewnętrznego[2].

[1] Prace prowadzone pod egidą ONZ zostały zwieńczone przyjęciem przez ZO NZ rezolucji 56/83 z 12.12.2001 r. zawierającej ostateczne brzmienie artykułów o odpowiedzialności międzynarodowej państw za naruszenia prawa międzynarodowego. Por. Zbaraszewska (2007).

[2] Odpowiedzialność cywilna w szerszym znaczeniu polega na powstaniu negatywnych skutków prawnych dla podmiotu, którego zachowanie podlega ocenie, bądź też niepowstanie zamierzonych skutków prawnych. W węższym znaczeniu pojęcie odpowiedzialności cywilnej jest wiązane z odpowiedzialnością odszkodowawczą, realizowaną poprzez roszczenie o naprawienie szkody w ramach tzw. reżimu deliktowego lub kontraktowego. Podstawową funkcją tak rozumianej odpowiedzialności jest ochrona interesów poszkodowanego poprzez kompensację. Por. Safjan (2000), 563.

Zasada odpowiedzialności państwa jest uznawana w prawie międzynarodowym, w ramach którego państwo odpowiada za naruszenie zobowiązań międzynarodowych. Znalazła ona swoje potwierdzenie w orzeczeniu z 1927 r. Stałego Trybunału Sprawiedliwości Międzynarodowej, który stwierdził, że jest zasadą prawa międzynarodowego, iż naruszenie zobowiązania powoduje obowiązek zadośćuczynienia w odpowiedniej formie. W orzeczeniu z 1928 r. Trybunał dodał: „jest zasadą prawa międzynarodowego, a nawet zasadą prawa w ogóle, że każde naruszenie zobowiązania pociąga za sobą obowiązek zadośćuczynienia". W tym samym orzeczeniu określono wskazówki co do wysokości i charakteru zadośćuczynienia: „Główną zasadą zawartą w pojęciu bezprawnego działania – zasadą, która jak się wydaje, jest uznana w międzynarodowej praktyce, a w szczególności w decyzjach trybunałów arbitrażowych – jest to, że zadośćuczynienie musi, w zakresie w jakim jest to możliwe, zniweczyć wszystkie konsekwencje bezprawnego działania i przywrócić sytuację, która prawdopodobnie istniałaby, gdyby działanie nie zostało wykonane" (zob. Browlie, 1998, 461).

Dla kwalifikacji odpowiedzialności międzynarodowej państwa z tytułu naruszenia prawa niezbędne jest powstanie deliktu międzynarodowego. Delikt międzynarodowy ma miejsce wówczas, gdy jego powstanie jest przypisane państwu na podstawie prawa międzynarodowego i powoduje naruszenie zobowiązania międzynarodowego.

Za działanie państwa z punktu widzenia prawa międzynarodowego uważa się zachowanie każdego organu państwowego mającego taki status w rozumieniu prawa wewnętrznego danego państwa, jeżeli tylko działa on w takim właśnie charakterze. Prawo międzynarodowe nie interesuje się podziałem kompetencji między poszczególnymi organami państwa, ale wykonaniem obowiązków wynikających z umowy międzynarodowej.

Dla ustalenia zasad odpowiedzialności za szkody wyrządzone w środowisku powszechnie uważany jest „Trail Smelter Case" (zob. „American Journal of International Law" 33, 1939, 182; por. Ciechanowicz, 1989, 11–30, 67–71; Czapliński, 2003; Wałkowski, 2018, 302). Kazus ten rozpatrywany był przez trybunał arbitrażowy w 1938 r. w sporze pomiędzy Stanami Zjednoczonymi a Kanadą. Chodziło tu o skargę amerykańskich farmerów i mieszkańców przygranicznego miasta Northport, którzy byli zatruwani codziennie dwutlenkiem siarki pochodzącym z kanadyjskiej huty Trail. W orzeczeniu wydanym w tej sprawie Trybunał sformułował zasadę nazwaną później zasadą „dobrego sąsiedztwa". Wynika z niej, że żadne państwo nie ma prawa używać lub zezwalać na używanie swego terytorium w sposób powodujący szkody na terytorium innego państwa, albo we własności osób tam zamieszkujących, zwłaszcza gdy szkody te są poważne, a ponadto oczywiste i udowodnione.

Za trwałe osiągnięcia prawa międzynarodowego w ochronie środowiska morskiego uznać należy wzrastającą ilość umów międzynarodowych w tym

przedmiocie (zob. np. Bar, Jendrośka, 2004, 13–20)[3]. Umowa międzynarodowa ciągle pozostaje instrumentem najskuteczniej wiążącym państwa również w sferze ochrony środowiska. Duży wpływ na treść zawieranych umów wywierają uchwały organizacji międzynarodowych i deklaracje konferencji światowych, np. Organizacji Narodów Zjednoczonych, Programu Narodów Zjednoczonych do spraw Ochrony Środowiska – UNEP, czy Deklaracja sztokholmska z 1972 r., Deklaracja z Rio de Janeiro z 1992 r. Bywa też, że w tekstach umów zamieszczono odesłanie do przepisów prawa międzynarodowego publicznego dotyczących międzynarodowej odpowiedzialności państwa. Tak jest np. w Protokole w sprawie odpowiedzialności cywilnej i odszkodowania za szkody wynikłe z transgranicznych skutków awarii przemysłowych na wodach transgranicznych (Bar, Jendrośka, 2004, 271).

Zagadnienia ochrony środowiska morskiego przed zanieczyszczeniem weszły na stałe do prawa międzynarodowego obok tak nowych i istotnych jak terroryzm czy użycie siły (zob. Bruhnee, Toope, 2010, rozdz. 4, 126–219). Konwencja Narodów Zjednoczonych o prawie morza z 1982 r. – UNCLOS (Dz. U. z 2002 r. Nr 59, poz. 543) jest typową umową międzynarodową, w której ogniskuje się cały dotychczasowy dorobek prawa międzynarodowego w tej materii. Jest to umowa wielostronna kodyfikująca reguły użytkowania i ochrony morza. Państwa zgodnie z Kartą Narodów Zjednoczonych i zasadami prawa międzynarodowego mają suwerenne prawo do eksploatacji własnych zasobów zgodnie z ich własną polityką ochrony środowiska i rozwoju oraz ponoszą odpowiedzialność za zagwarantowanie, aby działalność lub kontrola w obrębie ich własnej jurysdykcji nie powodowały szkód w środowisku innych państw lub obszarów wykraczających poza granice ich własnej jurysdykcji.

Charakter prawny zasad prawa międzynarodowego bywa niekiedy kwestionowany, co wynika ze znacznego stopnia ich nieokreśloności, wymagającego uzupełnienia przez pewne normy bardziej szczegółowe. Zasada dobrego sąsiedztwa poprzez poszczególne sądy międzynarodowe odnoszona była do zasad szczegółowych, charakterystycznych dla dziedziny – międzynarodowego prawa środowiska, międzynarodowego prawa użytkowania zasobów wodnych czy międzynarodowego prawa morza.

Rok 1968 uznaje się powszechnie za datę narodzin wyodrębnionej grupy zagadnień ochrony środowiska w prawie międzynarodowym. Dopiero jednak po roku 1992, czyli po Konferencji Narodów Zjednoczonych „Środowisko i rozwój" w Rio de Janeiro można mówić o sprawach ochrony środowiska, w tym o ochronie mórz jako wspólnym dziedzictwie ludzkości. Wyrażono to w szeregu dokumentach z 1992 r.: Deklaracji z Rio w sprawie środowiska i rozwoju (27 zasad), Deklaracji o lasach oraz Globalnym Programie Działania – Agenda 21. Do problemów wymagających rozwiązania została wówczas zaliczona w szczegól-

[3] MEA – Multilateral Environmental Agreements.

ności ochrona mórz przed zanieczyszczeniem (zob. Paczuski, 2008, 43; Bąkowski, 2018, *passim*)[4]. Zagadnieniu odpowiedzialności nie poświęcono specjalnej uwagi. Pośrednio wynika z niego, że na każdym państwie spoczywa obowiązek troski o środowisko potwierdzający tym samym zasadę suwerenności państw i międzynarodowej współpracy w tym zakresie.

W tym miejscu należy przytoczyć konstatację E.K. Czech (2008, 33), że odpowiedzialność prawnomiędzynarodowa w ochronie środowiska i jej rola była tematem licznych wypowiedzi nauki prawa. Zagrożenie jej poniesieniem nie zawsze powoduje natychmiastową mobilizację działań mających na celu wywiązanie się przez państwa ze zobowiązań międzynarodowych. Jednak w dłuższej perspektywie czasowej, często przy wprowadzaniu dalszych obowiązków w zakresie ochrony środowiska na poziomie Unii Europejskiej, pożądane efekty zostają zazwyczaj osiągnięte poprzez przyjęcie koniecznych rozwiązań prawnych, np. Ramowej Dyrektywy Wodnej czy Strategii Morskiej UE.

Międzynarodowe prawo morza

Międzynarodowa odpowiedzialność państw za szkody wynikłe w środowisku morskim powstaje przede wszystkim z niewykonania zobowiązań mających swoje źródło w umowach wielostronnych, jak i regionalnym charakterze. Przedmiot regulacji – środowisko morskie jest złożony, ponieważ dzieli się ono na strefy podlegające różnej jurysdykcji, w odniesieniu do których funkcjonują międzynarodowe bądź krajowe normy ochronne. To zróżnicowanie, pomimo oczywistości tezy o jedności środowiska morskiego, wywiera znaczny wpływ na charakter i zakres regulacji. Poza tym daje się zauważyć różnorodność zanieczyszczeń środowiska morskiego, np. ze źródeł lądowych, ze źródeł rozproszonych lub punktowych, według rodzajów polutantów, rodzajów działalności ludzkiej powodującej zanieczyszczenia. Tak więc należy wyraźnie stwierdzić, że ochrona środowiska morskiego jako zagadnienie prawne ma charakter kompleksowy i wymaga odpowiednio zharmonizowanych rozwiązań dotyczących kilku podstawowych gałęzi prawa: międzynarodowego publicznego, administracyjnego, cywilnego, karnego. Pisząc niniejszy artykuł o odpowiedzialności państw za szkody wyrządzone w środowisku morskim, przedmiotem rozważań uczyniłam normy dotyczące tego zagadnienia zawarte w prawie międzynarodowym publicznym, określane jako międzynarodowe prawo morza.

Określenie „międzynarodowe prawo morza" jest przykładem fragmentacji prawa międzynarodowego publicznego, procesu, który objął wiele działów tego prawa, takich jak np. międzynarodowe prawo środowiska, międzynarodowe prawo praw człowieka, międzynarodowe prawo wojenne, międzynarodowe

[4] Ustawa z dnia 21 marca 1991 r. o obszarach morskich Rzeczypospolitej Polskiej i administracji morskiej (tekst jedn.: Dz. U. z 2018 r., poz. 2214) w art. 2 określa obszary morskie RP. Zob. też Schultz-Zehden, Matczak (eds.) (2012), 023.

prawo zasobów wodnych (zob. Menkes, 2012; Cała-Wacinkiewicz, 2017). Proces ten związany jest z rozwojem prawa międzynarodowego i przebiega w odpowiedzi na wyzwania wewnętrzne i zewnętrzne, powstają nowe obszary regulacji, chociaż zasady i instytucje są ciągle te same, typowe dla prawa międzynarodowego publicznego. Ilustruje to doświadczenie z prawem kosmicznym.

Fragmentacja stawia pod znakiem zapytania charakter prawa międzynarodowego, jako systemu, a nie zbioru norm, jest więc traktowana jako zagrożenie dla aksjologicznej jedności prawa międzynarodowego. Konsekwencją fragmentacji prawa międzynarodowego jest przedmiotowy podział na quasi-gałęzie wewnątrz samego prawa międzynarodowego, jak podane wyżej przykłady.

Międzynarodowe prawo morza zajmuje się regulacją stref morskich i kompetencjami państw w tych strefach, a także jurysdykcją państw na obszarach morskich oraz regulacją statusu prawnego obszarów wyłączonych spod jurysdykcji państw. Międzynarodowe prawo morza należy odróżnić od prawa morskiego, które jako część prawa wewnętrznego reguluje kwestie dotyczące administracji strefami morskimi pod jurysdykcją państwa, portami, redami, połowami w wyłącznej strefie ekonomicznej, warunkami rejestracji statków, zatrudnianiem marynarzy itd. Prawo morza pozostaje w dużej mierze prawem zwyczajowym. Pierwsza próba umownego uregulowania międzynarodowego prawa morza w czterech Konwencjach genewskich z 1958 r. – I KG w sprawie morza terytorialnego i strefy przyległej; II KG w sprawie mórz pełnych (mórz otwartych); III KG w sprawie rybołówstwa i konserwacji zasobów biologicznych mórz pełnych (otwartych); IV KG w sprawie szelfu kontynentalnego – uważana była za krok milowy w skatalogowaniu obowiązków i praw państw na obszarach morskich podlegających jurysdykcji międzynarodowej. W 1982 r. pod auspicjami Narodów Zjednoczonych została przygotowana Konwencja o prawie morza (UNCLOS), która skodyfikowała istniejące normy zwyczajowe, ale również wprowadziła nowe rozwiązania w zakresie wyłącznej strefy ekonomicznej, ochrony środowiska morskiego, dna mórz i oceanów. Obecnie stronami UNCLOS pozostaje 155 państw, w tym Polska (Dz. U. z 2002 r. Nr 59, poz. 543).

Międzynarodowe prawo morza jest również dziedziną, w której ogromne znaczenie odgrywa zasada słuszności (*equity*). Zasada ta wyraża się w zastosowaniu aktu sprawiedliwości do konkretnego stanu faktycznego. Odwoływanie do niej występuje w rozstrzyganych przez sądownictwo międzynarodowe w sporach, związanych np. z rozgraniczeniem wód szelfu kontynentalnego. Zasada słuszności została sformułowana w wyroku Międzynarodowego Trybunału Sprawiedliwości z 1982 r. dotyczącym szelfu kontynentalnego Tunezji i Libii oraz wyroku z 1985 r. w sprawie szelfu Libii i Malty.

Regulacja uprawnień władczych państw na obszarach morskich opiera się na założeniu, że Ocean Światowy podzielony jest na strefy, a w każdej strefie uprawnienia państw są konstruowane odmiennie. Obszary morskie, pod względem prawnym, można podzielić na:

1. Obszary wchodzące w skład terytorium państwa:
   – morskie wody wewnętrzne,
   – morze terytorialne,
   gdzie obowiązuje prawo krajowe, a więc regulacje wewnętrzne dotyczące kompensacji szkód w środowisku morskim.
2. Obszary znajdujące się poza terytorium państwa, na których państwo może wykonywać ograniczoną jurysdykcję, a więc określone prawa suwerenne. Są to:
   – strefa przyległa,
   – wyłączna strefa ekonomiczna,
   – szelf kontynentalny.
3. Obszary znajdujące się poza terytorium państwa, niepodlegające jego jurysdykcji:
   – morze otwarte,
   – dno mórz i oceanów,
   gdzie obowiązuje prawo międzynarodowe publiczne i mamy do czynienia z odpowiedzialnością państw za szkody wyrządzone w środowisku morskim.

Źródła i podstawy odpowiedzialności państwa wynikają z konwencji międzynarodowych o zasięgu powszechnym, np. o prawie morza, jak i konwencji regionalnych, np. Konwencji helsińskiej o ochronie środowiska Morza Bałtyckiego z 1992 r.

Zasady ogólne w Konwencji o prawie morza związane z ochroną środowiska

W Konwencji o prawie morza zawarte są zasady odnoszące się do zachowania i ochrony i użytkowania środowiska morskiego (zob. szerzej Łukaszuk, 2006; Zbaraszewska, 2008; Tanaka, 2015; Ciechanowicz-McLean, Bielawska-Srock, 2017), które należy postrzegać w szerszym kontekście jej wielu przesłań generalnych, określanych w preambule. Deklaruje się tam m.in. pokojowe korzystanie z mórz i oceanów, sprawiedliwe i efektywne korzystanie z ich zasobów, badanie, ochronę i zachowanie środowiska morskiego. Przesłania te i zasady zostały rozwinięte w przepisach Konwencji, które traktują ochronę środowiska morskiego jako *ius cogens*.

Zasada ochrony środowiska przed zanieczyszczeniami antropogenicznymi jest obowiązkiem państw i innych podmiotów, w tym organizacji międzynarodowych międzyrządowych. Za ważną uznaje się zasadę niedopuszczalności wyrządzania szkody środowisku morskiemu innych państw przez państwo nadbrzeżne, działające w akwenach podlegających jego jurysdykcji oraz zasadę niedopuszczalności zanieczyszczania wód morza pełnego. Konwencja o prawie morza dotyczy wszystkich obszarów morskich, przy czym: wyeksponowano źródła zanieczyszczenia lądowego; rozszerzono szczególne prawa w zakresie działań

ochronnych państwa nadbrzeżnego (art. 21), zaakcentowano odpowiednio zagadnienia technologii w kontekście ochrony i zachowania środowiska morskiego (art. 196 ust. 1, art. 202 i art. 203).

Część XII Konwencji o prawie morza zawiera przepisy dotyczące ochrony środowiska, z których wynikają cztery następujące zasady:

– Zasada ogólna ochrony środowiska (art. 192);
– Zasada współpracy państw w tym zakresie (art. 194 w zw. z art. 207 ust. 4), w której dużą rangę nadano współpracy regionalnej. Na państwa nałożono obowiązek: notyfikacji o grożącej szkodzie ekologicznej (art. 198), stworzenia systemu informacji o jakości środowiska i jego zagrożeniu, ustalenia ogólnie obowiązujących norm określających maksymalny poziom dopuszczalnego zanieczyszczenia mórz, udzielania pomocy państwom rozwijającym się w postaci funduszy, pomocy fachowej, korzystania ze służb specjalistycznych;
– Zasada „samoobrony", tj. prawa podejmowania niezbędnych środków zapobiegających (art. 207–212);
– Zasada odpowiedzialności państw za zanieczyszczanie środowiska morskiego (rozdz. 9), tj. jest za nieprzestrzeganie przepisów ochronnych przewidziana jest odpowiedzialność karna, pieniężna (art. 230). Odpowiedzialność ta została oparta na przesłankach obiektywnych (art. 235 § 2). Przepisy rozdziału 9 czynią państwa odpowiedzialnymi za wykonanie swoich zobowiązań międzynarodowych dotyczących ochrony i zachowania środowiska morskiego zgodnie z prawem międzynarodowym. Konwencja nie określa jednak bliżej szczegółowych zasad tej odpowiedzialności. Ze względów praktycznych dobrze więc, że Komisja Prawa Międzynarodowego ONZ opracowała projekt artykułów o odpowiedzialności państw, który został przyjęty w czasie sesji Komisji w 2001 r.

Generalnie z instytucji odpowiedzialności państwa wynika ogólny obowiązek odszkodowania, również w odniesieniu do szkód spowodowanych zaniedbaniem ochrony środowiska, potwierdzony orzeczeniem w sprawie huty Trail Smelter. Utrzymuje się, że wyrównanie szkód w środowisku dotyczy wyłącznie szkód majątkowych. Trudno bowiem domagać się odszkodowania za szkodę moralną poniesioną w formie naruszenia suwerenności tylko wskutek faktu przemieszczania się przez granice substancji zanieczyszczających. Istniejące orzecznictwo zdaje się to potwierdzać. Wyrównanie szkody majątkowej może zatem nastąpić w dwojaki sposób: albo przez przywrócenie stanu, jaki istniał przed jej wyrządzeniem – *restitutio in integrum*, albo przez zapłatę sumy pieniężnej odpowiadającej wysokości szkody – odszkodowania.

Odszkodowanie, ta materialno-majątkowa strona odpowiedzialności, ma w praktyce największe znaczenie, gdyż *restitutio in integrum* w szkodach w środowisku morskim jest z reguły niemożliwe do wykonania lub pociąga za sobą nadmierne koszty i trudności. Niebezpieczne są katastrofy tankowców na morzu, gdzie wiele ton ropy zanieczyszcza wody morskie i okoliczne brzegi. Dalsza ak-

cja zapobiegawcza pociąga za sobą ogromne koszty, głównie przez użycie dużej ilości detergentów i wznoszenie zapór przed dostaniem się ropy do portów, ujść rzek i usuwanie zanieczyszczeń w sposób mechaniczny. Statki ubezpieczone są od odpowiedzialności cywilnej na znacznie mniejszą kwotę niż wysokość zaistniałych szkód. Wypadki te pokazują, jak wielkie mogą być rozmiary szkód na morzu, i torują drogę do obiektywnej odpowiedzialności za szkody w środowisku morskim oraz uzasadniają funkcjonowanie instytucji funduszy odszkodowawczych.

Pojęcie szkody wyrządzonej w środowisku morskim

Prawo międzynarodowe reguluje zagadnienia odpowiedzialności za szkody w środowisku w ramach trzech obszarów tematycznych: zapobiegania szkodom w środowisku (*prevention*); reagowania w przypadku wystąpienia takiej szkody (*response*) i w końcu odpowiedzialności za szkodę (*reparation*, *compensation*). Przedmiotem analizy w niniejszym artykule jest ostatnie zagadnienie.

Ustalenie szkody spowodowanej przez zanieczyszczenie i jej rozmiarów jest w wielu wypadkach bardzo trudne ze względu na brak odpowiednich ustaleń nauk ścisłych w dziedzinie wpływu, zwłaszcza długofalowego, substancji zanieczyszczających na wiele gatunków morskich, a także na równowagę ekologiczną środowiska morskiego. Ponadto, szkodliwe skutki zanieczyszczenia morza są często niewymierne i niemożliwe do wyceny w pieniądzu. Dotyczą one nie tylko konkretnych spraw i osób, lecz często także całej społeczności lub dopiero przyszłych pokoleń.

Ustalenie szkód spowodowanych przez zanieczyszczenie i ich rozmiarów jest w większości wypadków, jak wspomniano wyżej, trudne z uwagi na niemierzalność długofalowego wpływu, substancji zanieczyszczających na wiele gatunków morskich, różnorodność biologiczną, a także z uwagi na równowagę ekologiczną ekosystemu morskiego. W konsekwencji tego szkodliwe skutki zanieczyszczenia morza są często niewymierne i niemożliwe do wyceny w pieniądzu. Ideałem byłoby, gdyby została ustalona np. jedna międzynarodowa skala ekonomicznej wyceny zasobów żywych morza. Dotychczasowe propozycje zmierzały do ustalenia opłaty od tony ropy, która wskutek wypadku podczas eksploatacji zasobów mineralnych mogłaby się przedostać do morza. Były też inicjatywy opracowania systemu klasyfikacji typów wybrzeży pod kątem ich podatności na szkody spowodowane przez wyciek ropy.

Pojęcie szkody wyrządzonej środowisku morskiemu jest rozległe, podobnie jak szkody ekologicznej, jednak zaledwie kilka lub kilkanaście procent tych szkód uznawanych jest przez prawo za szkodę. Szkody te często mają charakter katastrofalny, są szkodami poważnymi czy szkodami wielkimi.

W doktrynie i orzecznictwie panuje zgodność co do tego, aby wyodrębnić dwa rodzaje szkód: szkody rzeczywiste – *damnum emergens* i utracone korzyści

– *lucrum cessans*. Podstawą uznawania utraconych korzyści jest istnienie związku przyczynowego takiego, by utracone korzyści można było przypisać normalnemu biegowi wypadku po zaistnieniu czynu wywołującego szkodę. Różne są metody ustalania szkód z tytułu *lucrum cessans*. W przypadku przedsięwzięć i zakładów funkcjonujących wiele lat podstawą ustalenia kompensacji jest wartość wypracowanych tam zysków w ciągu ostatnich kilku lat. Dotyczy to również statków dokonujących regularnych połowów czy upraw dających coroczne plony. Trudności w obliczeniu przyszłych zysków występują wtedy, gdy mamy do czynienia z przedsięwzięciem jednostkowym, z wypadkami szkód znacznych i katastrofalnych. Analogie do istniejących przedsięwzięć, dających stałe regularne zyski są tu nie do zastosowania.

Problemem jest, czy ich wartość oceniać należy w momencie powstania szkody, w momencie wyrokowania, czy w momencie usuwania szkody. Przyjmuje się jednak, że najbardziej sprawiedliwie można ocenić szkodę w momencie wyrokowania.

Zasadę pełnego odszkodowania, w myśl której wysokość odszkodowania powinna odpowiadać wartości strat niepokrytych przez restytucję w naturze, trudno przestrzegać w odpowiedzialności za szkody katastrofalne czy nawet znaczne. W takich przypadkach istnieje konieczność kwotowego ograniczenia wszelkiej odpowiedzialności za tego typu szkody, gdyż nie wszystkie państwa są zdolne pokryć finansowo pełną wartość szkody, gdyby zaciążył na nich obowiązek odszkodowania. Dlatego też stworzono fundusze odszkodowawcze. Dla przykładu w projekcie nowego kodeksu morskiego[5] w Polsce, który implementuje „morskie" umowy międzynarodowe, ratyfikowane przez Polskę, w tytule IX „Odpowiedzialność za szkody spowodowane zanieczyszczeniem morza" proponuje się utrzymanie istniejących funduszy: Międzynarodowego Funduszu Odszkodowań za Szkody Spowodowane Zanieczyszczeniem Olejami oraz Międzynarodowego Dodatkowego Funduszu Odszkodowań za Szkody Spowodowane Zanieczyszczeniem Olejami. W art. 374 przez szkodę wyrządzoną zanieczyszczeniem rozumie się szkodę wyrządzoną działaniem substancji zanieczyszczających, jak również celowym użyciem środków zapobiegawczych zastosowanych po zdarzeniu powodującym zanieczyszczenie. Naprawienie szkody wyrządzonej zanieczyszczeniem obejmuje straty poniesione przez poszkodowanego oraz korzyści, które mógłby osiągnąć, gdyby nie nastąpiło zanieczyszczenie środowiska. Naprawienie szkody obejmuje również zwrot kosztu środków zapobiegawczych oraz niezbędnych wydatków i nakładów, które zostały lub będą poniesione w celu przywrócenia środowiska do stanu sprzed zanieczyszczenia.

Fundusz ten wprowadzony w 1971 r. wypłaca odszkodowanie wówczas, gdy właściciel statku odpowiedzialny na podstawie Konwencji z 1969 r. o odpowiedzialności cywilnej za szkody spowodowane zanieczyszczeniem olejami z 1969 r.

[5] Tekst [w:] *Prawo Morskie* 25 (2018).

(CLC z 1969 r. – Dz. U. z 1976 r. Nr 32, poz. 184) oraz Protokołu z 27 listopada 1992 r. w sprawie zmiany Międzynarodowej konwencji o odpowiedzialności cywilnej za szkody spowodowane zanieczyszczeniem olejami, sporządzonej w Brukseli w dniu 29 listopada 1969 r. (CLC z 1992 r. – Dz. U. z 2001 r. Nr 136, poz. 1526), jest finansowo niezdolny do wypłacenia w całości swoich zobowiązań i jakiekolwiek zabezpieczenie finansowe nie pokrywa i nie jest wystarczające dla zaspokojenia roszczeń odszkodowawczych z tytułu szkód spowodowanych zanieczyszczeniami olejami. Istnienie takiego funduszu jest w istocie stworzeniem systemu gwarancji zabezpieczenia wierzytelności z tytułu wyrządzenia szkody lub wywołania stanu zagrożenia szkodą. Rozwiązanie takie ma duże znaczenie w kompensowaniu szkód spowodowanych przez niezidentyfikowane obiekty morskie i tzw. zanieczyszczenia transgraniczne.

Podsumowanie

Reasumując, należy stwierdzić, że w wypadku sporów międzynarodowych dotyczących szkód wyrządzonych w środowisku morskim, jeżeli nie istnieją normy konwencyjne, można się odwołać do zasady odpowiedzialności państw w prawie międzynarodowym. Z tej zasady wynikają inne zasady, m.in. takie, że należy unikać pokrycia tej samej szkody dwukrotnie, tzn. że odszkodowanie nie może być źródłem niesłusznego wzbogacenia, oraz że odszkodowanie powinno być wypłacone w walucie państwa dochodzącego roszczenia.

Kwestia, czy te pewne dawno ustalone ogólne zasady odszkodowawcze, wzorowane najczęściej na ustawodawstwie cywilnym, mogą być stosowane w całej rozciągłości do szkód wywołanych zanieczyszczeniami w środowisku morskim, dawno już została przesądzona na tak. Zyskuje ona na znaczeniu w sytuacjach, gdy nie mamy do czynienia z odszkodowaniem limitowanym umową, ustalonym *ex ante* na wypadek zaistnienia określonych szkód, gdzie z góry przyjmuje się określoną sumę pieniężną tytułem odszkodowania. Odwoływanie się w tej materii do zasad słuszności i sprawiedliwości to za mało, gdyż zawierają one element swobodnego uznania.

Są zwolennicy twierdzenia, że wielka różnorodność szkód w środowisku, ich rozmiary i charakter, a także niezbadane do końca przez naukę skutki dla ludzkości każą uregulować te zagadnienia kompleksowo i jednolicie w skali międzynarodowej, zwłaszcza w odniesieniu do morza. W związku z tym od wielu lat proponuje się tu zastosowanie *actio popularis*, czyli występowania z roszczeniem odszkodowawczym przez państwo w imieniu społeczności międzynarodowej jako całości bez potrzeby wykazania, że został naruszony konkretny interes strony wszczynającej spór. Jest to jednak sprawa kontrowersyjna i zasługująca na rozważenie. Obowiązek ochrony środowiska można uznać już obecnie za obowiązek *erga omnes* na równi z normami zakazującymi niewolnictwa, ludobójstwa, agresji. Obowiązek ten egzekwowany jest przez wszystkie państwa wobec

wszystkich państw z tego powodu, że skutki naruszenia tego obowiązku mogą być groźne dla całej ludzkości, dla obecnych i przyszłych pokoleń. Z drugiej strony przydatność *actio popularis* podawana jest w wątpliwość w miarę gromadzenia coraz większej liczby dowodów naukowych na jedność ekosystemu ziemskiego, a zatem na zagrożenie żywotnych interesów każdego państwa przez szkodliwą dla środowiska działalność nawet w bardzo oddalonych zakątkach globu. Tak czy inaczej zastosowanie *actio popularis* jest problematyczne ze względu na brak odpowiedniej normy traktatowej.

W mojej ocenie odpowiedzialność międzynarodowa państw za szkody wyrządzone środowisku w prawie morza w praktyce nie funkcjonuje właściwie, ponieważ morza są teraz bardziej zanieczyszczone niż kiedykolwiek wcześniej. Oto dwa przykłady. Pierwszy dotyczy Morza Bałtyckiego, które jest obecnie porównywane do zupy lub kisielu z powodu olbrzymiej ilości zanieczyszczeń i eutrofizacji. Jest to niepokojące, dlatego że morze to znajduje się „pod ochroną" Konwencji o prawie morza z 1982 r. i Konwencji helsińskich o ochronie środowiska Morza Bałtyckiego z 1974 r. i z 1992 r. Drugi przykład dotyczy zanieczyszczeń mórz i oceanów wszechobecnym plastikiem, który znajduje się na morzu pełnym, morzach terytorialnych i dnie mórz, jest też obecny w faunie i florze żyjącej w tym środowisku. Powstaje pytanie, jak mogło dojść do tak dużej skali zanieczyszczeń w czasie, kiedy mamy tak rozbudowaną globalną legislację ochronną w prawie międzynarodowym.

Odpowiedzi należy szukać w braku sankcji w tym prawie oraz braku skodyfikowanej instytucji prawnomiędzynarodowej odpowiedzialności państw, nad którą prace trwają od osiemdziesięciu lat. W świetle tych konstatacji ciągle przydatne są uniwersalne instytucje prawa rzymskiego w zakresie kompensacji szkód.

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Janina Ciechanowicz-McLean

RESPONSIBILITY OF STATES FOR DAMAGE CAUSED TO THE MARINE ENVIRONMENT IN INTERNATIONAL LAW OF THE SEA

The States' responsibility is a fundamental institution of international law. The International Law Commission – ILC expressed that in the Articles on Responsibility of States for International Wrongful Acts. The principles and rules governing States are more clear and certain because they are set out in the United Nations Convention on the Law of the Sea – UNCLOS. UNCLOS and the Articles of ILC provide mechanisms to hold States responsible if they fail to fulfil their obligations to prevent, reduce and control pollutions of the marine environment. The dispute settlement procedures in UNCLOS provide remedies for an effective action that are not available in most fields of transboundary pollution.

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RHODIAN LAW AS A PROTOTYPE OF THE CLAIM FOR DAMAGE SUFFERED IN ANOTHER PERSON'S INTEREST IN POLISH CIVIL LAW

Introduction

Roman law contains numerous universal, supranational and timeless elements, which have largely contributed to its global reach (Sójka-Zielińska, 2010, 35–36). Therefore, the reception of solutions from Roman law is not surprising. It turns out, however, that Romans also recoded well-functioning legal institutions. The intensity of Greek influence on Rome before mid-fifth century BC is extremely clear in religion, arts and crafts and trade. This influence in many fields was indeed intense, but it would be dangerous to infer that there was also an influence on Roman law (Watson, 1993, 27). With regard to maritime law, the subject of reception was the Rhodian law on jettison, which was subsequently transplanted into other legal orders[1], including Polish law, and became a prototype for the Polish regulation stipulating the possibility of demanding compensation for loss suffered in someone else's interest. In this paper, I will discuss how the Rhodian Law become a part of Roman law. I present origin of common average and compare the regulations of *lex Rhodia de iactu* in Roman law with the Polish construction of loss suffered in another person's interest. I do so to demonstrate that Rhodian law is a prototype of claim for damage suffered in another person's interest in Polish civil law – regulation, which is hardly ever applied in practice, which should constitute the significant form of the legal protection inducing for undertaking the mutual civil concern.

[1] The rules of Lex Rhodia also influenced the content of the regulation in ABGB, Roman-Dutch Law.

Reception of the lex Rhodia rules into Roman Law

In ancient times, the domain of maritime law – with some exceptions – was ruled by customary law of the sea. But that era ended when Romans adopted the maritime law of Rhodes. This fact is very forcibly evinced in the rescript of emperor Augustus, contained in Book XIV, Title 2, Section 9 of the Digest of Justinian. The text is in Greek and was included in the Digest from the particular act known as *lex Rhodia* (Dareste, 1905, 1–29.), written probably around the middle of the second century A.D. by the Roman jurist L. Volusius Maecianus.[2] The text he drafted was incorporated into the Digest with the following wording:

> D. 14.2.9. *Id est: Petitio Eudaemonis Nicomedensis ad imperatorem Antoninum: Domine imperator Antonine, cum naufragium fecissemus in Italia [immo in Icaria], direpti sumus a publicis [immo a publicanis], qui in Cycladibus insulis habitant. Antoninus dicit Eudaemoni. Ego orbis terrarum dominus sum, lex autem maris, lege Rhodia de re nautica res iudicetur, quatenus nulla lex ex nostris ei contraria est. Idem etiam divus Augustus iudicavit.* – "In this fragment Eudaemon Nicomedia informed Emperor Augustus that having suffered a shipwreck in Icaria they have been plundered by the public service officials [tax collectors] who reside in the Cyclades. Emperor Antoninus answer to Eudaemon that he is the master of the world, but custom is the master of the sea. Thus, the issue should be judged according to the maritime law of the Rhodians in matters where no laws of our states to the contrary. The same has been confirmed by Augustus."

A number of representatives of the doctrine, such as Dimitri C. Gofas (1995, 30), argue that around the middle of the second century AD there existed a body of rules called the *lex Rhodia*. They maintain that the name "Rhodian" came to be associated with a body of customary rules which had already existed for centuries, and which had been gradually developing around the Eastern Mediterranean seaboard at least since the period of Phoenician domination (Dauvillier, 1959, 53–56).

There is also evidence that during the fifth century BC, Demosthenes and other Athenian orators began to mention a body of rules they referred to as "commercial laws"; which by the middle of the fourth century BC seem to have gained Panhellenic character Gofas (1995, 30). In the third and second centuries BC, this body of maritime customs under the name of Rhodian law were internationally acknowledged (*ius gentium*) and became known to the Romans when, after the Carthaginian Wars and during the evolution of Roman commercial and maritime activities, they started visiting the island of Rhodos. The reason for those visits was probably the desire among Roman jurists to study at the famous Rhodian

[2] Lucius Volusius Maecianus was an important jurist of the classical period of Roman law. He held a number of public positions as the head of the office and *libellis*, *praefectus vehiculorum*, *praefectus annonae* and *praefectus* of Egypt. Taught law to Marcus Aurelius, and enjoyed *ius publice respondendi ex auctoritate principis*. His main works include *Quaestiones de fideicommissis* (16 books) and, in the field of criminal law and procedure, *De iudiciis publicis* (14 books). *Cf.* Litewski (2000), 145.

school of rhetoric.[3] As a result, during the pre-classical period of Roman law the Rhodian law came to be incorporated into the Roman legal system, and it is very probable that it was implied in all contracts for the carriage of goods by sea (Zimmermann, 1996, 408). The issue of reception of the rules from Rhodian law into Roman law has been a subject of scientific debate. Most probably, the transfer of the rules regulating goods cast overboard did not consist in an introduction of dedicated statutes into Roman legislation, but rather in the adoption of an appropriate legal principle which had been functioning earlier within *ius gentium* (Zalewski, 2016, 176; footnote 7 and literature cited there).

As for *de lege Rhodia de iactu* in Justinian's Digest, it has to be noted that apart from the main subject of this title, i.e. *iactus* (jettison and contribution), certain fragments do not actually pertain to *iactus*. One passage is concerned with the rights and obligations of the shipper under the agreement which he had concluded with a freighter, in relation to the carriage of freight; another fragment addresses questions connected with shipwreck and the potential claims of the fiscal agents (D. 14.2.10) (The Digest of Justinian, 1998, 421).

The origins of general average

Carriage of goods by sea is an enterprise joining many separate and diverse interests into a "common venture". Such are the responsibilities and the rights arising from the venture that all parties – carriers, owners, mortgagers, crew, charterers, shippers and consignees – share the risks, losses and benefits which may ensue (Sowiński, 1935, 205–206). It is probable that this maritime custom developed spontaneously and independently in different parts of the world at a time when distance precluded any contact between them or reciprocal influence. Its origins can hardly be precisely determined, but many historians believe that it had been in existence and widely applied in the wider maritime community for centuries (Bolanča, Amižić, Pezelj, 2017, 2). The first written trace of general average was *lex Rhodia de iactu*, which stipulated that if merchandise was thrown overboard in order to lighten a ship, that which was given for all should be replaced by the contribution of all.[4] The only recognized form of general average sacrifice was the jettison of cargo (mostly in an endeavour to increase the buoyancy of the damaged ship and prevent her sinking). General average derived from ancient Greek law and was afterwards further developed in Roman and Byzantine law (*Nomos Rhodion Nautikos*, from the seventh – ninth century), in which general

[3] Such conclusion can be drawn following an analysis of texts by classical jurists, who referred to the Rhodian law in their writings. For example, Cic. *Off.* 3.23 refers to a solution connected with jettison which he borrowed from Hecaton of Rhodes. What is more, one chapter of the postclassical collection of *Pauli Sententiae* is entitled *ad legem Rhodiam* (Paulus, *Sent.* 2.7).

[4] D. 14.2.1: *Lege Rhodia cavetur, ut, si levandae navis gratia iactus mercium factus est, omnium contributione sarciatur quod pro omnibus datum est.*

average included losses caused by *casus fortuitus*, *vis maior*, attacks of pirates and collision of ships (Bolanča, Amižić, Pezelj, 2017, 2).

The contributions were based on the idea of a community of risk and stemmed from the principle of *aequitas*.[5] This principle was closely connected with the idea of *periculum maris*, which means that the risk at sea is common to all those who take part in a maritime venture[6], so that any damage or loss incurred for the common good must be met by common contributions (Gofas, 1995, 34).

Lex Rhodia de iactu and damage suffered in another person's interest in Polish civil law – purpose and function of the regulation

Showing the origins and implementation of the principle of general average as well as earlier reception of the Rhodian law rules into Roman law was necessary in order to demonstrate analogies between Polish regulations concerning damage suffered in another person's interest and those set forth in the Rhodian law, which Roman law later embraced. Analysis of Art. 438 of the Polish Civil Code of 1964 (further as PCC) and other rules that apply to the issue in question, compared with the Roman regulations included mainly in Justinian's Digest will allow to show that the Rhodian law, is in fact a prototype of the Polish regulation contained in Art. 438 PCC.

Introduction to Book 14 of the Digest contains the most basic and concise definition – ascribed to Paulus – of the legal arrangement which is central to the entire *Lege Rhodie de Iactu*:

> D. 14.2.1. *Paulus libro secundo sententiarum: Lege Rhodia cavetur, ut si levandae navis gratia iactus mercium factus est, omnium contributione sarciatur quod pro omnibus datum est.* – "The *lex Rhodia* provides that if jettison of merchandise has been carried out in order to lighten the ship, everyone must contribute to compensate for what has been given up for the sake of all."

This text is often compared to the corresponding passage in Paulus, *Sent.* 2.7.1:

> Levandae navis gratia iactus cum mercium factus est omnium intributione sarciatur quod pro omnibus iactum est.

The above excerpts suggest that jettison calls for compensation on the part of those who did not suffer from it, provided that they have actually benefited from it. Aubert recognizes this institution as an early form of cargo insurance (Aubert, 2007).

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[5] D. 14.2.2 pr.: (…) *aequissimum enim est commune detrimentum fieri eorum, qui propter amissas res aliorum consecuti sunt, ut merces suas salvas haberent*.

[6] *Communis periculi* in Roman law was a binding element for all owners of goods imported aboard a vessel and the legal basis for the enforcement of mutual claims. Por. D. 14.2.3: *Cum arbor aut aliud navis instrumentum removendi communis periculi causa deiectum est, contributio debetur*.

Here, one should also cite a fragment from Papinianus, found in Book XIX of the *Responsa*:

> D. 14.2.3. *Papinianus libro nono decimo responsorum: Cum arbor aut aliud navis instrumentum removendi communis periculi causa deiectum est, contributio debetur.* – "Where a mast, or any other part of the equipment of a ship is thrown overboard for the purpose of removing a danger common to all, contribution is required."

As in the earlier D. 14.2.2.1, Papinianus specifies that *contributio* may derive from discarding the riggings of a ship (*arbor aut aliud navis instrumentum*), if it is done in the order to remove a common danger (*removendi communis periculi causa*).

Both above fragments are crucial given the main subject of this article. They show that there were two ways in which this institution was elaborated by the jurists in the Digest of Justinian. Apart from that, they evince generalization of risk-sharing rules that were anchored in the concept of common danger and rules of joint liability in maritime law.

To obtain a full picture of the similarity between the Polish and the Roman provision, one needs to quote the text of Art. 438 PCC: "Anyone who, in order to avert damage threatening another person or in order to avert a common danger, compulsorily or even voluntarily suffers financial damage may demand remedy of the losses suffered in the appropriate proportion from the persons who benefited therefrom."[7]

First, one notices that common danger is the primary element which connects all cited fragments. Second, a possibility of redress is given to the unfortunate owner of lost goods, because his property was sacrificed in order to save the property of others. He incurred a loss for the common benefit so he may demand compensation from all persons who have benefited, at a ratio appropriate to the loss suffered.

On the one hand, through the regulation contained in Art. 438, the Polish legislator wanted to protect social trust, and on the other hand wished to protect the interests of the person who sacrifices their property to eliminate the damage or danger that threatens other people. The validity of Art. 438 with respect to equity is also emphasized in the rulings of the Polish Supreme Court,[8] which examined that behavior within the framework of the situation expressed in Art. 438 of the PCC; it has been compared in the jurisprudence to a type of civic care and activity whose development should be fostered, including through legal protection.[9]

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[7] This provision refers in its wording to the previously applicable Art. 122 Polish Code of Obligations of 1933: "Anyone who, in order to reverse the threat of the second damage or common danger, voluntarily or even forcibly suffered material damage, may demand from those who benefited from it, pay in the appropriate proportion of the loss suffered."

[8] Judicial decision of the Polish Supreme Court of January 14th, 2015, II CSK 248/14, Bulletin of the Polish Supreme Court 2015, No. 3.

[9] Judicial decision of the Polish Supreme Court of May 28th, 1997, III CKN 82/97, Case Law of the Polish Supreme Court. Civil Chamber 1997, No. 11, item 178.

The principle of *aequitas*, similarly as in the Roman law, is causing enforcing the regulation included in Art. 438 of the PCC. However, it isn't changing the fact that Art. 438 is being regarded by the Polish doctrine and the jurisprudence as self-contained base of the liability for loss, which is independent from the fault, the risk or the rightness principle's (Kasprzyk, 1989, 22).

The Rhodian and the Polish regulation – comparative analysis

For a more detailed picture of the resemblance between the Rhodian law and the Polish regulation one needs to analyze the crucial elements which enabled or enable them to apply. For this reason, discussions introduced in this section will include such issues as: character of threatening danger, aim of behaving of the aggrieved party, the bereavement of the aggrieved party and the benefit on the side obliged as well as compensation for loss.

Source of the threatening danger

According to the first requirement stipulated in the Rhodian law (Osuchowski, 1951, 47), danger must threaten the ship and the cargo directly. From the Roman legal perspective, it meant that danger cannot have been caused by any person interested in the ship or the cargo. If any owner of cargo jettisoned the cargo without a reason in the shape of danger, they bore responsibility for the *damnum iniuria datum* and could be sued under *lex Aquilia*, *actio in factum* or *actio doli*.

In Polish law, there was a question whether compensation is also granted when the same person was exposed to the threat of salvage. Generally, common danger should not be invoked by a person who claims damages but other views have been expressed in the doctrine as well:

– when an action brought by a person who claimed damages was unlawful, the compensation was not granted,
– only if the person who claimed damages was guilty of the action, even though the action was not unlawful, compensation was not granted,
– both cases were assessed in the light of Art. 5 PCC, which provides for the abuse of subjective rights (Machnikowski, Śmieja, 2018, 802–803).

Aim of behaving of the aggrieved party

Given the issue under consideration, another requisite which may be compared here is the action which must be taken in order to prevent general average. Before discussing the cause of the complaint, the complaint itself should be examined more closely. In the Roman legal regime, carriage by sea was usually undertaken by way of *locatio conductio operis contract* (Lenel, 1889, 1038: *Pauli ad edictum libri XXXIV*; *cf.* Płodzień, 2011, 73). This contract bound the *magister navis* to transport the customer's goods to the port of destination. Under the contract he was

not, of course, supposed to throw them overboard. If he did so, he was therefore liable to his customer under *actio locati*. If, however, it was inequitable to let the loss lie with the person whose goods had been sacrificed, it would have been equally inequitable to see the *magister navis* lose out. He was therefore able to proceed against the other customers whose goods had been saved. For this purpose, he could avail himself of the *actio conducti* or he could induce the other consignors to make their payment by withholding their goods (*ius retentionis*) (Zimmermann, 1996, 408). In the end, the loss was to be split equally between all participants of this communal enterprise, and the action was adjusted accordingly.[10]

This brief description demonstrates the rules which governed pursuit of complaint in the case of *iactus* in order to withhold general average (*communio*), which imposed the obligation of contribution. Now, one should also review the circumstances provided in Roman sources, which constitute a case of general average and thus a purpose to act. Justinian's Digest enumerates the following:

- severe and unexpected storm at the sea has befallen the ship, creating the danger of sinking,[11]
- this unexpected circumstance made some extraordinary measures necessary in order to save the ship from sinking and the cargo from being lost, and it was not only jettison but also the severing of a mast or of the rigging of the ship, with the consent of the passengers[12] or transshipment of a part of the cargo into the ship's boats in order to lessen the burden on the ship,[13]
- goods jettisoned have been effectively lost,
- the jettison has effectively resulted in the ship being saved (Gofas, 1995, 34; Płodzień, 2011, 74).

Fulfilling mentioned above premises enabled the aggrieved party to lay a claim for the compensation for loss. Nevertheless the subject of such claim was different in the Roman law than in the Polish law. Previously cited D. 14.2.3 suggests that Romans took into consideration only material damage but in Polish law it is possible to investigate personal injury as well.[14] According to Art. 438 PCC, action taken by the victim is intended not only to prevent the danger to others but also to the victim. The action must be taken to eliminate the threat of injury, or "with a view to obviating shared danger" as Art. 438 puts it. Absence of the purpose

[10] See Zimmermann (1996), 408: "The first locator could sue the magister navis for the value of his property that had been jettisoned, minus his own share of the loss; the magister navis, in turn, would sue the other locatores for their pro rata contribution."

[11] D. 14.2.2 (*tempestate gravi orta*); D. 14.2.6 (*Navis adversa tempestate depressa*); D. 14.2.2 pr. (*Laborante nave*).

[12] D. 14.2.2.1 (*voluntate vectorum*); D. 14.2.3 (*Cum arbor aut aliud navis instrumentum removendi communis periculi causa deiectum est, contributio debetur*).

[13] D.14.2.2.4 pr.

[14] The Polish legislator meant not only damage to property, but also non-material damage (threat of harm to someone) as well as damage in such goods, as the right to the image or the right to the name. See Kubas (1979), 93.

of action means that the compensation should not be awarded. Apart from the above, the Polish legislator defined other additional requirements that allow one to claim compensation for the loss sustained in someone else's interest as:

– occurrence of the danger of suffering harm by another person or common danger,
– voluntary or compulsory prejudice on the part of the person acting in someone's interest,
– benefit gained by the persons in whose interest this action has been taken,
– existence of a causal relationship between the victim's actions and the emergence of the aforesaid benefits (Machnikowski, Śmieja, 2018, 803).

The above warrants provide one common conclusion, namely that the action taken by the aggrieved party would have to have been adequate to the situation and involved prior deliberation. But this matter was perceived similarly in Roman and in Polish law. Sacrificial activity as a requirement for compensation seems indispensable, but one needs to consider that even confronted with minor danger people are often unable to make clear-headed assessments of facts. Still, it must be taken into consideration that concept of general average, which presupposed the obligation of contribution was adopted into both legal systems, first into Roman, and then from Roman into Polish law. Also, it needs to be stressed that in either framework the introduction of such a solution was dictated by equitable reasons.

The Roman sources do not provide information about a formal declaration of the need to jettison the cargo. For this reason, there is a divergence of views on this subject between commentators of Roman legal texts. Influenced by medieval maritime laws, earlier authors were convinced that persons traveling aboard a ship held counsel before casting any goods into the sea. As there is no clear evidence in the Roman sources about a dispute before the *iactus*, it is to be assumed that the decision was made by the *magister navis* (Płodzień, 2011, 77).

In the Polish regulation, incurring loss to protect others from harm or to prevent common average is always, if only partly, dictated by the intention of achieving such a result. Therefore, if the measures taken to remove the threat of injury were unreasonable (and even pointless), and had the desired effect only by a happy coincidence, compensation should not be awarded (Machnikowski, Śmieja, 2018, 804).

Bereavement of the aggrieved party

As for the next requirement, we must bear in mind that effective loss of the jettisoned goods and sacrifice of particular property had to exist while the aggrieved party have made the complaint for the compensation. It means that in Polish law, just as in Roman law, there is a principle that material damage must be compensated in full, and the value of the saved cargo must be included in the

calculation of the compensation; otherwise, unlawful enrichment would ensue (Sowiński, 1935, 206).

Roman sources clearly indicate that only the owner who has lost his goods,[15] or the one whose goods were damaged[16] during jettison may demand joint compensation for losses suffered as a result of the jettison with the complaint *actio locati* or *actio conducti* against the manager of the ship. Thus, if the lost goods have been recovered in some way, the owners of the jettisoned property lose the right to compensation and, if they have already received it, they must return it to the grantors. should the lost goods have been recovered (Płodzień, 2011, 82).

From the standpoint of Polish law, the action of the aggrieved party must involve their loss of property in order to counter the threat of damage, where the loss further entails His loss the benefit of those from whom compensation is claimed. What is more, a relation within the meaning of the *conditio sine qua non* theory must occur between loss and benefit (Machnikowski, Śmieja, 2018, 805).

Benefit of the obliged party

Finally, one needs to mention the successful outcome of sacrificing property. Again, the provision in Art. 438 PCC is very close to what Romans took from Greeks. The principle formulated at the outset states that an obligation to compensate for the damage which has occurred arises only when the ship is rescued (*salva nave*) with the rest of the cargo remaining on it. In the Roman source, i.e. D. 14.2.2 pr., the gloss of Accursius also conveys that the person whose goods have been sacrificed should be able to proceed directly (*via recta*) against the other persons deriving a benefit therefrom, for their pro rata contribution. Thus, one would be able to avoid the somewhat cumbersome detour via the conductor.[17]

In Polish law, a claim under Art. 438 PCC can only be directed against those who have benefited directly. This claim can be also made when the aggrieved party has sacrificed certain property, even exclusively, to save their own goods, as long as other people have also benefited from it. As already observed, causation has to exist between the loss and the benefit (Borysiak, 2019, 8).

Compensation for loss

The last element to be analyzed here is the redress of damage. It should be emphasized that this element can only be taken into consideration if the jettison has effectively resulted in the ship being saved (Gofas, 1995, 34). According to the Roman sources (D. 14.2.1) the damage incurred as a result of jettison has to be covered by all persons interested in the ship and the cargo (*omnium contribu-*

[15] D.14.2.1 (*datum est*).

[16] D. 14.2.4: (…) *nam sciut ei qui perdiderit subvenitur, ita et ei subveniri oportet, qui deteriores propier iactum res habere coeperit*.

[17] Thus, the *Lex Rhodia* moved into close proximity of the *negotiorum gestio*. Zimmermann (1996), 410.

tione sarciatur quod pro omnibus datum est). Moreover, it may be concluded from D. 14.2.2.2 that owners of the saved cargo have to compensate for the damage proportionally to its value, not weight. We can also find source where Paulus also obliges the injured parties to jointly compensate for the damage.[18] The last person who according to the sources has to participate in compensation is the ship owner (*dominus navis*). Their participation is proportional to the total value of the ship.[19]

In Polish civil law, the person whose property suffered loss can demand compensation from those who obtained benefit. When actions aimed at preventing the damage have benefited several people at the same time, the aggrieved party may demand compensation from each of them in a "commensurate relationship", and therefore in a proportion in which the amounts of these benefits remain to each other (Borysiak, 2019, 11). Hence, there is no need to resort to joint and several liability, because the claimant has a separate claim against every beneficiary (Kubas, 1979, 91).

When examining the redress of damage resulting from common danger, we need to consider contribution of the group whose goods have been saved from common average in Roman law, and determine precisely what this damage means in Polish law. So all objects saved from common average are required to contribute according to the value they would fetch when sold (Gofas, 1995, 34). Goods saved but damaged were estimated with their damage and being taken into consideration with less the cost of the damage.[20] According to Paulus, whose view is expressed in D. 14.2.2.2, lost objects should be estimated according to the price of their purchase, without taking into account the possible profit from their sale.

Art. 438 PCC leaves no doubt that under this regulation only material damages can be compensated for. It means that a person who tries to eliminate danger cannot raise claims with respect to personal harm. It clearly follows from the article that while compensation for the loss incurred (*damnum emergens*) is claimed, it should be recognized that the claim does not cover one's lost profits (*lucrum cessans*) (Antoszek, 2019, 6). The amount of compensation is predicated on the amount of the loss suffered by the claimant, and the extent of benefit asserted by the person(s) from whom the claim is being sought. Generally, the aggrieved party should obtain total compensation for the loss even if that loss was small in relation to the benefits as well as in the case of common average.

Here, it becomes evident yet again that the Polish regulation has his roots in the *lex Rhodia de iactu*, subsequently transplanted into Roman law where the rule

[18] D.14.2.2.4: (…) *Portio autem pro aestimatione rerum quae salvae sunt et earum quae amissae sunt praestari solet.*

[19] D.14.2.2.2.

[20] D.14.2.4.2.

of *omnium contribution sarciatur* was – as in Poland – applied in accordance with the principles of equity.[21]

Conclusions

The general aim of this article has been to show that the Rhodian law is a prototype of claim for damage suffered in another person's interests in Polish law. *Lex Rhodia de iactu* was adopted and successfully employed in Roman law. That is why I demonstrate how Polish regulations concerning the claim for damage suffered in another person's interests work by comparing principles of the Roman *iactus* and the application of Art. 438 PCC. The analysis has been carried out in the light of underlying rules and principles, to elucidate their functioning in Roman and Polish law. Consequently, one can see that the requirements posited in both institutions are very similar and the general structure has remained unchanged. The respective Roman as well as Polish regulations derived from the Rhodian law operate in the circumstances of common average. What is more, fairness (*aequitas*) was the chief reason why the *lex Rhodia* was integrated into Roman law, and the same can be said about Art. 438 in Polish civil law. Morevoer, Art. 438 PCC is treated as a sui generis and unique regulation. Due to the fact that common average is characteristic for shipping, and is rarely encountered in the circumstances regulated by the Polish Civil Code, Art. 438 is hardly ever applied in practice. Also, the infrequent practical use of this institution may be attributed to the fact that the hypothesis of Art. 438 intersects with the hypotheses in e.g. Art. 757, Art. 142, Art. 423, Art. 424, causing possible of convergence of claims. It occurs quite often in practice, but the choice of the type of claim lies ultimately with the aggrieved party. It should also be considered that pursuant to Art. 438 only losses can be claimed (*damnum emergens*) while lost profits remain unsettled, hence in case of overlapping standards it is expedient to use such a claim that allows full compensation. What is more, the existence of Art. 438 PCC does not preclude tort claims which can be brought by the aggrieved party against persons responsible for an event which led to a threat of harm or caused a common danger. The rights of the former under Art. 438 – if they have been impoverished due to the action of a third party – include the possibility of resorting to claims for unjust enrichment against persons who have benefited thereby, as determined by the Polish Supreme Court.

In summary, it has to be observed that Art. 438 PCC is a legislator's encouragement to the third parties to intervene for the good of others, which is construed as a desirable preventive behavior. From this reason, broad interpretation enables the regulation of Art. 438 to be considered as quasi-preventive. Preventive remedy measures are not a worthless sophistication in law; their existence is a real

[21] Sentence of Polish Supreme Court from 14.01.2015, II CSK 248/14, Bulletin of Polish Supreme Court 2015, No. 3.

necessity in today's society. In the contemporary world, decisions taken by an individual (their rational choices) influence the lives of others in an unprecedented manner. Many human actions today can have far-reaching effects, affecting the life or health of many others, as well as the environment and our planet as a whole, and even future generations.

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Beata J. Kowalczyk

RHODIAN LAW AS A PROTOTYPE OF THE CLAIM FOR DAMAGE SUFFERED IN ANOTHER PERSON'S INTEREST IN POLISH CIVIL LAW

The doctrine of Rhodian law of jettison has a long history in Roman law and has been inherited by numerous legal systems of today. During the pre-classical period of Roman law, Rhodian law was incorporated in the Roman legal system, and probably it was implied in all contracts of carrying goods by sea. Rhodian law was also a prototype of a claim for damage suffered in another person's interests in Polish civil law. The Author presents the origin of general average, the reasons of the introduction of this regulation, as well as its function in Roman law and Polish civil law. The article explores the premises of the regulation and provides its comparative analysis. Art. 438 of the Polish Civil Code of 1964 is rarely used in practice due to many competing actions that can be taken by suffered persons. From the point of view of the purpose of this regulation, the most important is to encourage third parties to intervene in the interests of others, which is desirable preventive behavior that can be recognized as a quasi- preventive remedy and is necessary in today's society.

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UNIVERSALITY OF THE RHODIAN MARITIME LAW FROM THE STANDPOINT OF NEOEVOLUTIONISM[1]

There is no dispute that the many solutions developed in Roman law, and especially in the Western European Roman tradition following the codification of Justinian the Great, have been a source of inspiration as well as tried and tested reference points for the contemporary legal deliberation, in the very least providing arguments in favour of increased flexibility of the law in the future; some, one the other hand, remain a monument of timeless values.[2]

The same is frequently said about the Rhodian law concerning jettison, i.e. throwing goods overboard in order to lighten and consequently save the vessel, described and detailed in the opinions of Roman jurists, which have been preserved mostly in Justinian's Digest from 533 AD, under the title *De lege Rhodia de iactu* (D. 14.2).[3]

The Rhodian custom or more precisely the Rhodian principle, based on equity which requires joint contribution to offset damage, is considered to be a primary source of knowledge of the terms of jettison and other risks associated with navi-

[1] I am grateful for the critical remarks on the preliminary draft of the paper, presented at *International Seminar "Roman maritime law" November 18–19th, 2017, Gdańsk*, and its more elaborated version at *IX. Rechtshistorikertag im Ostseeraum/9th Conference in Legal History in the Baltic Sea Area 16–20 May 2018 in Tallinn/Reval and Tartu/Dorpat, Estonia – "Recht und Wirtschaft in Stadt und Land Law and Economics in Urban and Rural Environment."* – especially Professors Albrecht Cordes (Goethe-Universität, Frankfurt am Main) and Anton Rudokwas (Saint Petersburg State University).

[2] On the modern discussions about the place of Romanistics in legal studies see e.g. Zimmermann (2015), esp. 466–470; Dajczak (2018).

[3] For details see Wagner (1997); Aubert (2007), with previous studies. In Polish scholars, see still partly valid Płodzień (1961) and in short: Benincasa (2011), 91–98 (see also previous studies concerning *Lex Rhodia de iactu*, compiled *ibidem* in note 14 on page 18). About *Digesta Iustiniani* in general *cf.* only from recent studies Honoré (2010); Lovato (2013).

gation. The rules are supposed to have originated at least around 1000–800 BC and, as early as the fourth century BC, they were applied in the Mediterranean, also supplanting the customary *ius naufragii*, which allowed the inhabitants to seize all that washed ashore from the wreck of a ship along its coast (*cf.* Purpura, 2002).[4] It was then adopted and elaborated by the Romans since the late Roman Republic, when slave trade and food supply for Rome – apart from luxury goods – became vital for the Roman state, becoming an integral part of the contractual relations between the parties to a contract of carriage by sea (see e.g. Benincasa, 2011, 35–47, with previous studies). One of the crucial issues in this regard was the transportation of *annona* for the inhabitants of Rome, conducted by private shipowners and controlled by the state, a practice which lasted until the Vandal occupation of North Africa in 442 and then after 500 AD, possibly as late as the Arab conquest of North Africa in the end of the seventh century (in the East, the supply for Constantinople continued from 332 until the collapse of the Roman rule in Egypt in 642 AD) (for details see Sirks, 1991, esp. 161–168, 191–239).

The Rhodian principle was so easily adopted by the Romans because it "was a sort of common *lex mercatoria maritima* for the states bordering on the Mediterranean Sea" (Zimmermann, 1996, 407–408). They acknowledged it as a part of the natural law, which they readily recognized as a vital component of the *ius gentium*,[5] while its implementation is an illustration of the limited reception of foreign rules in Roman private law.[6] It happened, as Reinhard Zimmerman aptly observed, because "the idea of the community of risk and emanating from the principle of *aequitas*, late Republican jurisprudence received the lex Rhodia into Roman Law, not by way of legal surgery, but in a most natural or homeopathic manner" (Zimmermann, 1996, 408). According to Roman law, the practical application of the principle known as *Lex Rhodia de iactu* was ensued exclusively in the framework of the *locatio conductio* (*operis*), the contract of good faith of Roman law,[7] where the *vector* was the *locator* and the *magister navis,* who saved "the vessel from foundering by throwing goods overboard and thus lightening the ship", was the *conductor* (Zimmermann, 1996, 407). The former was entitled to sue the latter for the value of his property that had been jettisoned but minus his own share in the loss, while the *magister navis* in turn would sue cargo owners for their pro rata contribution. *Lex Rhodia de iactu* also applied in cases where a part of the cargo was used to ransom a ship from pirates, who despite the efforts of the Ro-

[4] Gomes (2014) provides an outline of historical development of the concept of limitation of liability in maritime transportation until the modern times. See also Nawrot (2019) [in this volume], quoting *inter alii* the instructive sketch of Gaca (2016).

[5] The meaning of *ius gentium* and its relation to nature and natural law is discussed in detail in: Kaser (1993). Also, listen to the lecture by Humfress (2017).

[6] Disputes concerning the origin and the place of *lex Rhodia de iactu* in Roman law has recently been summarized by Chevreau (2005), esp. notes 7–8. See also Sánchez-Moreno Ellar (2013); Söğüt (2017), esp. note 10.

[7] Concerning *bona fides* in Roman law see in detail: Dajczak (1997); Dajczak (1998); Dajczak (1999).

mans were a real threat to naval transport, especially in late antiquity (*cf.* e.g. de Souza, 1999, 228–240; Gruenewald, 2004; Drinkwater, 2015; Caldwell, 2015).

The Rhodian Code of Jettison influenced maritime law since the Middle Ages, via the Byzantine version preserved in *Basilica*, a collection of laws published by the emperor Leo VI in the late ninth century AD, though particular contribution should be attributed to the *Nomos Rhodion Nautikos*, probably dating in the same period.[8] However, the latter described mutual relations between the parties as part of the contract of *societas* (*koinonia*), adding some specific details concerning the jettison while, as already noted, Roman law relied on the contract *locatio conductio* in this regard.[9] Thanks to the text of Justinian's codification and, even more prominently, due to Roman customary law,[10] the Roman variant – the Byzantine understanding of *lex Rhodia* aside – inspired the development of maritime and commercial practices in the Mediterranean. It manifested first in the Italian and Croatian cities from eleventh century onwards, and then re-emerged in the famous Catalonian *Llibre del Consolat del Mar* from the fourteenth century, which enjoyed the same status as the Rhodian law had done in its day.[11] The rules of the Rhodian Code of Jettison were brought by the Crusaders – thanks to the Maritime Assizes of the Kingdom of Jerusalem and especially the French *Rôles d'Oléron* (1160) – to the Anglo-Norman world as well.[12] The compilation known as the *Black Book of the Admiralty*, possibly from the early fourteenth century quoted the *Rôles d'Oléron* in the beginning, which means that the rules concerning jettison in English maritime law partially followed ancient traditions in this regard (on the other hand, the Court of Admiralty was the most powerful English judicial institution using the rules of Roman law in its practice).[13] The rules governing average rooted in the Mediterranean traditions inspired to some degree the customary law concerning jettison in the Baltic Sea; since the fourteenth century, the Laws of Visby were particularly important in that area, including Gdańsk.[14] The issue of the seventeenth-century national maritime codes in Sweden (1667),[15] France (1681) and Denmark (1683) (see in details Gaca, 1992) was the next step in the development of maritime law; the most important of the enactments was

[8] See about some aspects of maritime law in Basilica Kofanov (2014).

[9] See details Andrés Santos (2019) [in this volume]. See also about the manuscripts of *Nomos Rhodion Nautikos* e.g. Burgmann (2009).

[10] As correctly noticed Berman (1983), 340.

[11] See in general e.g. Purpura (2013). About *Llibre del Consolat del Mar* see Chiner Gimeno – Galiana Chacón (2003); Klimaszewska (2011), 32–37. For the Polish reader available is edition of Libera (1957). Concerning Croatian examples see details in: Đukić (2016).

[12] *Cf.* Klimaszewska (2011), 26–32, with previous studies. *Cf.* also Böhm (2019) [in this volume].

[13] *Cf.* the edition of Twiss (1871). See Marzec (2004) concerning the Court of Admiralty.

[14] *Cf.* from recent studies Frankot (2007); Frankot (2012), esp. 27–42, 81–109. See also in general Zimmermann (1996), 411–412. From Polish authors still valid are remarks of Matysik (1958), 44–46; Matysik (1960). Maciejewski (2000) discussed other sources of maritime law in medieval Gdańsk.

[15] About the legal enactments in Sweden in the early modern times see: Kotkas (2014), esp. 151–152.

Jean-Baptiste Colbert's *Ordonnance de la Marine*.[16] The substantive law embodied in the ordnance was very closely emulated in the French *Code de Commerce*, whose adoption in 1807 meant that maritime law in France and the countries influenced by this code – as well as separately by the German enactments, including the cardinal and still applicable *Handelsgesetzbuch* of 1897 – was thereafter considered as a branch of commercial law, at the expense of importance previously attached to custom and usage.[17] However, the international nature of naval transportation caused it to be recognized as a supranational issue, resulting in the introduction of the important York Antwerp Rules of 1890 concerning general average – last updated in 2004 – whose spirit recalls the Rhodian legal antecessor.[18] At the same time, the Roman understanding of the Rhodian principle of jettison inspired the doctrine concerning the compensation for any damage incurred in joint interest or in other people's interest. The concept was developed gradually since the discovery of Justinian's Digest in Italy and the establishment of the medieval school of glossators in the eleventh century; it may still be encountered in a number of present-day civil codes.[19]

* * *

Roman Law, which itself depends on previous concepts regarding jettison, played the main role in civilian legal tradition, but the problem of how to handle the issue was solved independently in similar way by later customary law as well.

Consequently, looking for a direct inspiration of the Roman *lex Rhodia de iactu* seems therefore to be a case of cognitive bias, i.e. an error in thinking in which the context and the framing of information influence individual judgment and decision-making.[20] An intuitive, common understanding of the principles of general

[16] General overview of early modern regulations till 1681 is given by Gormley (1961). *Cf.* also Allaire (2015) about the development of French maritime law between 1500–1800. See also Warlamont (1955) for the possible inspirations of the *Ordonnance de la Marine* of 1681.

[17] For details see Klimaszewska (2011), esp. 200–215, concerning the importance of the *Code de Commerce* of 1807. About further history of commercial law in Europe see e.g. Flume (2014). Poland possesses its own *Maritime Code Act* from 2001 (Journal of Laws No. 138, item 1545, with further amendments; concerning the general average see Articles 250–256), which replaced the former enactment of 1961. The history of maritime law in Poland is however much more complex. See e.g. Młynarczyk (2012).

[18] *Cf.* Cornah (2004). For the outline of later development see Kruit (2017), 25–31. *Cf.* also https://www.britannica.com/topic/maritime-law#ref39237 [access: 15.03.2019].

[19] The foremost of those is the Austrian *Allgemeines Bürgerliches Gesetzbuch* of 1811, still remaining in force. Besides Austria, the enactment is also the basic civil code of Liechtenstein, while its influence persisted in other successor states of Austria-Hungary (along with the Polish Civil Code of 1964); the concept is also shared by Roman-Dutch Law. See Zalewski (2016); Zalewski (2019) [in this volume] and briefly Zimmermann (1996), 409–411. On the discover of *Digesta Iustiniani* and the school of glossators see e.g. Lange (1997); Brundage (2008), esp. 219–282; Ascheri (2013), esp. 105–242 and briefly Meuller (1990); Dondorp, Schrange (2007); Pennington (2007). According to Schiavone (2012) it was only then that the modern concept of law was born.

[20] *Cf.* https://www.interaction-design.org/literature/topics/cognitive-biases [access: 15.03.2019]. On the understanding of cognitive biases from an evolutionary perspective see e.g. Haselton, Nettle,

average existed in many legal sources since antiquity but opinions varied widely regarding the details of the procedure and the events covered by its provisions, therefore the scope of the law of jettison tended to vary over time (see correctly Ferrándiz, 2017). It must also be underlined that only since the Middle Ages has general average been approached as a separate subject, independent from contracts for the carriage of goods by sea and maritime insurance law. It was not the case with *Lex Rhodia de iactu* which, as underlined above, was understood by the Romans within the framework of the contract *locatio conductio* (*operis*). Apart from the historical examples discussed above, one cannot forget the Muslim concept of jettison, which also exerted considerably influence on maritime legal traditions: even the English *average* (from Latin *avaria/averia*) is derived in fact from Arabic *awar* (a defect, or anything defective or damaged, including partially spoiled merchandise).[21]

It seems therefore a little obsolete to assert today that "Rhodian principle has been the corner-stone upon which have rested through all the centuries, and still rest, the dealings of men of the sea with the innumerable cases of mishap which arise upon the sea" (Benedict, 1909, 241). These words may be treated as an example of invoking tradition (*argumentum ad antiquitatem*), which might be fallacious as such,[22] or even an example of authority bias, the tendency to attribute greater accuracy to the opinion of an authority figure.[23] On the other hand, the truth is that Rhodian principle represented time-tested wisdom and reflected sophisticated adaptation to the environment of maritime trade.

Therefore it seems to be an example of a principle of ancient origin which was so 'natural' that it continues to exists – although in a somewhat modified form – even today. What is more, an analysis of the various historic regimes concerning jettison shows that despite many differences all of them share a similar concept: if the income was common, so should be the loss, while the expenditure and sacrifices for the common safety of the parties interested in the maritime venture were to be borne and made by (some of) the parties who had benefited therefrom (Kruit, 2015, esp. 192 and 202). This means that fairness is at their core, regardless

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Andrews (2005); Haselton, Nettle, Murray (2015). Cognitive bias has led to many simplifications in modern Romanistics. *Cf.* Dajczak (2013), esp. 11, quoting Kahnemann (2012). Despite simplifications, the 'antique (also Roman) themes' continue to be exploited – albeit in quite a different vein – in modern political discourses too. See e.g. Morley (2009), esp. 141–163 and Mac Sweeney [*et al.*] (2019).

[21] *Cf.* https://en.wikipedia.org/wiki/List_of_English_words_of_Arabic_origin_(A-B) (s.v. *average*) [access: 15.03.2019]. In greeater detail see Khalilieh (1998), 87–105; Khalilieh (2006), esp. 150–194. *Cf.* also Paine (2015), 198–228.

[22] *Argumentum ad antiquitatem* – an argument in which a proposition is deemed correct on the basis that it is correlated with some past or present tradition. About its advantages and limitations cf. e.g. Harpine (1993).

[23] For details see e.g. Blass (1999). *Moral Foundation Theory* goes as far as claiming that the authority/subversion is one of pillars of human morality: it was shaped by our long primate history of hierarchical social interactions and underlies virtues of leadership and followership, including deference to legitimate authority and respect for traditions. *Cf.* studies quoted *supra* and remarks in note 33.

of the fact that it cannot always be conclusively stated whether the diffusion of the ancient Rhodian principle took place in reality or whether the different laws were the effect of parallel development.

The rules concerning jettison which developed in the past and still feature in modern legal enactments and international rules, perfectly correspond in this regard with human nature as described by modern evolutionary studies: it is underlined that it comprises a universal and innate concept of justice, which challenges the idea of seeing the people as autonomous individuals, free to make their own decisions.[24]

One of the leading approaches in modern evolutionary studies, namely evolutionary psychology, seeks to account for human actions from the standpoint of biological and cultural evolution (or more precisely positing their co-evolution within the *Dual inheritance theory*); it advances the research, or is a component part of sociobiology.[25] Evolutionary psychologists presume that much of human behaviour is the output of psychological adaptations that evolved to solve recurrent problems in human ancestral environments and therefore they may be viewed in the context of the forces of natural selection.[26] Their studies, combined with the findings of other evolutionary researchers, suggest therefore to a possible biological basis of many social norms that penalize (or reward) behaviour which benefits individuals, i.e. moral and legal norms too.[27] To put it briefly but aptly, "Contemporary humans inherit primitive predispositions to react positively to being treated fairly and negatively to being treated unfairly, to pass judgment on those who treat others fairly or unfairly, and to feel obliged to pay back others" (Krebs, 2008, 243).[28]

The discoveries of evolutionary psychologists and the data collected by researchers representing other branches of psychology led Jonathan Haidt,[29] an American researcher who combines evolutionary studies with social psychol-

[24] 'Free will' is well known concept promoted in Western philosophy. For details see O'Connor, Franklin (2019), with further literature. This approach avoids one of the basic issues correctly underlined by Shusterman (2006), p. 4: "Philosophers have emphasized rationality and language as the distinguishing essence of human kind, but human embodiment seems at least as universal and essential a condition of humanity."

[25] The term "sociobiology" originated at least as early as the 1940s but the concept did not gain major recognition until the publication of Wilson (1975), esp. 547–575 concerning its possible application to humans. On *Dual Inheritance Theory* in detail see: Henrich, McElreath (2007).

[26] On evolutionary psychology in detail see e.g. Barkow, Cosmides, Tooby (1992); Buss (2005); Dunbar, Barret (2007); Buss (2012); Buss (2015). On different branches of sociobiology see Alcock (2001), 8–21.

[27] For summaries concerning both issues see: Jones (2005); Krebs (2005); Jones (2015); Kurzban, DeScioli (2015). Also, on the use of evolutionary psychology in the study of modern social issues: Barkow (2006); Craig Roberts (2011). Among Polish scholars *cf.* also Załuski (2009).

[28] On the vision of 'human nature' in the light of evolutionary psychology see detailed discussion in Pinker (2002), with further literature.

[29] However, the evolutionary approach seems to be the leading one in modern psychology. *Cf.* Budzicz (2018).

ogy, to a more complex idea concerning the roots of morality among humans (*cf.* Haidt, 2012, esp. 111–218). According to Haidt, as representatives of the species *Homo sapiens* we share six innate moral foundations, upon which cultures have developed their various moralities just as there are five innate taste receptors on the tongue, which human cultures have used to create many different cuisines.[30] The six building blocks are care/harm, fairness/cheating, liberty/oppression, loyalty/betrayal, authority/subversion, and sanctity/degradation. *Moral Foundations Theory*, which Haidt co-developed with Craig Joseph and Jesse Graham (see Graham [*et al.*], 2012),[31] promoted the idea that fairness/cheating foundation, related to the evolutionary process of reciprocal altruism,[32] generates ideas of justice, rights, and autonomy, not just the need of equality but rather the expectation of justice in social dimensions.[33]

Humans are in fact hardwired with a sense of morality, together with the basic sense of justice and what is more, we certainly share that last trait with chimpanzees, representatives of *Pan*, humans' closest living relative.[34] It means that human at least the last common ancestor of chimpanzees and humans, who lived ca 6–7 million years ago, was probably also sensitive with regard to justice.[35] Consequently, it is nothing surprising that an intuitive, common understanding of just/unjust, which constitutes the basis of the concept of general average whose

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[30] The phenomenon of culture, defined as a process which involves social transmittance of a novel behavior, both among peers and between generations is possibly not an exclusive human domain and this behaviour is shared by many members of the animal kingdom (Primates; *Cetacea* - whales, dolphins, and porpoises; rats; birds, fishes). See https://en.wikipedia.org/wiki/Animal_culture [access: 15.03.2019]. *Cf.* also the comparison between the cultures of humans and chimpanzees: Boesch (2012).

[31] *Cf.* also http://www.moralfoundations.org/ [access: 15.03.2019].

[32] Trivers (1971) developed the original theory of reciprocal altruism, proposed by Hamilton (1964) who based it on 'kin selection' theory to explain the altruistic behaviours among unrelated organisms. See e.g. Hames (2015) about the value of both approaches for evolutionary psychology. According to a debatable view, group selection might have been equally important to kin selection among humans, because models based on the dominant significance of kinship do not account for all the aspects of human behaviour. *Cf.* Nowak, Tarnita, Wilson (2010) but *contra* Pinker (2015).

[33] Boehm (1999) came forward with a comprehensive vision of why a more egalitarian social organisation emerged and persisted among the traditional societies before the Neolithic revolution (whereby the social organisation was based on reverse dominance hierarchy where the pyramid of power is turned upside down, with a politically united rank and file decisively dominating the alpha-male types). The concept was developed in Boehm (2012), esp. 75–87. The hierarchical ordering of social structures is thus more characteristic of human societies; however, all human societies, large or small, wealthy or poor, industrialized or subsistence based, have at least status hierarchies. For details see Vugt, Tybur (2015). As a result political flexibility of our species is formidable: we can be quite egalitarian but we can be quite despotic as well.

[34] *Cf.* Mendes, Steinbeis (2018), with previous studies. See also Bloom (2013), concerning the innate sense of justice among human children.

[35] To date, there no consensus has been achieved as to whether it should include the genus *Pan* (i.e. common chimpanzees and bonobos) into the *Hominini*. On the modern discussion concerning the relation between evolution of humans and chimps see overview in: Muller, Wrangham, Pilbeam (2017). *Cf.* also preliminary remarks concerning the place of humans among primates from the standpoint of modern palaeontology: Begun (2016), 1–26.

development owed to some extent to the Rhodian principle concerning the jettison played some role, caused the latter to be appreciated in the past and today.

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As previously noted, modern legal national enactments and international rules concerning general average are only in part an effect of social engineering on the part of lawmakers. Quite contrary, they are mainly the upshot of social experience and long-lasting legal tradition. However, this is not the only reason why historically developed provisions concerning jettison are still valid today. As it was deduced, it happens also because they are founded on fairness, which corresponds with the paradigm of universality of human nature which, shaped in the course of the evolution of the *Homo sapiens*, incorporates an innate sense of justice.

The discussed example shows therefore that law studies, also those focusing on legal history, such as Roman law studies, can utilize some of the findings of modern evolutionary studies – especially those made by evolutionary psychologists – to their advantage (see Wiewiorowski, 2015, 19–21, 292, with further literature). The approach enables one to arrive at a more profound understanding why certain principles of law which have historical origins, including many principles of Roman law, are still recalled in legal practice or even exist in a modified form in modern law.[36] Studies carried out in such a fashion may demonstrate the actual, not declarative universality of historical experience afforded by the Roman law and legal tradition in general. Among other things, they permit one to establish the boundaries, already verified in the past, which delimit the scope of solutions chosen by the traditionally construed legislator and other entities which exert an influence on the shape of solutions in legal systems in various areas of social life. As the research of evolutionary studies indicates, these boundaries are universal and provide a basis for the system of values to which people adhere, despite the utterly different social realities of the contemporary and antique world, and despite the gradual and inevitable severing of the bonds between the contemporary legal institutions and their historical antecessors, occasioned by the turbulent cultural transformations. They are associated with biological, evolved components of human nature which register relatively minor change over time. Taking historical experience into consideration would thus be partly supported by the evidence provided by natural and social sciences, and therefore would be of paramount significance for legal studies. This approach would help to promote the idea of unity of knowledge – a consilience that attempts to bridge the culture gap between the sciences and the humanities promoted recently by biologist Edward

[36] *Cf.* Wiewiorowski (2018), where the perspective of evolutionary psychology are applied to different issues of the Roman law studies, focusing specifically on legal maxims (note 13 list previous papers in similar vein are quoted).

O. Wilson, which the dilemmas of the modern world acutely require (*cf.* Wilson, 1998; see also studies collected in: Slingerland, Collard, 2012; Carroll, McAdams, Wilson, 2016).

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Jacek Wiewiorowski

UNIVERSALITY OF THE RHODIAN MARITIME LAW FROM THE STANDPOINT OF NEOEVOLUTIONISM

The article is devoted to the Rhodian maritime law (i.e. *lex Rhodia de iactu* [Rhodian law about jettison]), which is considered to be a primary source of knowledge about the terms of jettison and other risks associated with navigation in maritime law. First, the Author presents general information concerning the issue and the impact of law in legal history. Then, he draws on the findings of sciences with regard to the roots of the sense of justice among humans and points out their correspondences with solutions adopted in Rhodian law about jettison. In conclusion, the Author advocates the need to resort to the achievements of evolutionary psychology in studies devoted to Roman law and modern legal studies as well. In his opinion, this would serve to verify and support the thesis that certain solutions developed by Roman law are universal as well as to promote the idea of returning to the unity of knowledge (consilience).

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OD RZYMSKIEGO PRAWA MORSKIEGO DO POLSKIEGO PRAWA ZOBOWIĄZAŃ. KILKA UWAG NA TEMAT HISTORYCZNEJ GENEZY ART. 438 K.C.

Jednym z najciekawszych zagadnień prawa obligacyjnego jest obowiązek naprawienia szkody powstałej w cudzym lub wspólnym interesie. Z uwagi na niewielką doniosłość praktyczną instytucja ta pozostaje jednak na marginesie dociekań polskiej cywilistyki[1]. Tymczasem zagadnienie to jest szczególnie atrakcyjne dla historyka prawa, bowiem omawiana instytucja przeszła na przestrzeni dziejów zaskakującą ewolucję: od antycznego rzymskiego prawa morskiego do współczesnych kodeksów cywilnych. Rodziła przy tym ożywione dyskusje. Podczas gdy jedni podkreślali jej ścisły związek z zasadą słuszności, inni doszukiwali się problemów praktycznych w jej zastosowaniu. Stanowiła ona nieustający problem dla prawodawców i przedstawicieli nauki, którzy do dziś nie mogą poradzić sobie z jej odpowiednim umiejscowieniem w systematyce prawa zobowiązań.

Zagadnienie naprawienia szkody (w istocie straty – *damnum emergens*) powstałej w cudzym lub we wspólnym interesie zostało uregulowane przez polskiego prawodawcę w art. 438 ustawy z dnia 23 kwietnia 1964 r. – Kodeks cywilny (tekst jedn.: Dz. U. z 2019 r., poz. 1145; dalej: k.c.). Zgodnie ze wskazanym przepisem: „Kto w celu odwrócenia grożącej drugiemu szkody albo w celu odwrócenia wspólnego niebezpieczeństwa przymusowo lub nawet dobrowolnie poniósł szkodę majątkową, może żądać naprawienia poniesionych strat w odpowiednim stosunku od osób, które z tego odniosły korzyść".

Historycznym poprzednikiem cytowanej regulacji był art. 122 rozporządzenia Prezydenta Rzeczypospolitej z dnia 27 października 1933 r. – Kodeks zobowiązań (Dz. U. z 1933 r. Nr 82, poz. 598; dalej: k.z.). Jakkolwiek brzmienie art. 122 k.z. oraz

[1] Jedynym opracowaniem, które poświęcone jest wyłącznie temu zagadnieniu, pozostaje obszerny artykuł z lat siedemdziesiątych XX w.: Kubas (1979).

obecnie obowiązującego art. 438 k.c. jest zbliżone[2], to ich umiejscowienie w systematyce kodeksowej prawa obligacyjnego pozostaje odmienne. Twórcy przedwojennego kodeksu zobowiązań zakwalifikowali bowiem odpowiedzialność za naprawienie szkody poniesionej w cudzym lub we wspólnym interesie, jako zobowiązanie „z innych źródeł" (dział II k.z.), a konkretnie jako jeden ze stanów podpadających pod „prowadzenie cudzych spraw bez zlecenia" (art. 115 i nn. k.z.). Z kolei w systematyce obecnie obowiązującego kodeksu cywilnego tytułowy przepis mieści się w tytule dotyczącym czynów niedozwolonych (art. 415–449 k.c.). Oczywiście, ani treść przedmiotowej regulacji, ani też tradycja historyczna nie pozwalają na zaaprobowanie zarówno klasyfikacji przedwojennej[3], jak i współczesnej[4]. Jak bowiem słusznie wskazuje M. Kaliński, odpowiedzialność za szkodę poniesioną w cudzym lub we wspólnym interesie stanowi reżim autonomiczny (Kaliński, 2018, 21).

Kłopoty z umiejscowieniem omawianej regulacji w przedwojennej systematyce kodeksowej pojawiły się zresztą już na etapie prac przygotowawczych nad kodeksem zobowiązań. R. Longchamps de Bérier podkreślał mianowicie, że ze względu na to, iż stan faktyczny objęty ostatecznie treścią art. 122 k.z. „zbliża się więcej do prowadzenia cudzej sprawy bez zlecenia, niż do niesłusznego zbogacenia, umieszczono ten artykuł na końcu rozdziału o prowadzeniu cudzych spraw bez zlecenia w przypuszczeniu, że jego odrębna natura prawna nie będzie zapoznana" (cyt. za: Korzonek, Rosennlüth, 1936, 296–297). Wzorem dla polskiej regulacji był § 1043 austriackiego Allgemeines Bürgerliches Gesetzbuch z 1811 r. (dalej: ABGB)[5], który jako jedyny z kodeksów cywilnych państw zaborczych re-

[2] Art. 122 k.z. stanowił: „Kto, w celu odwrócenia grożącej drugiemu szkody albo w celu odwrócenia wspólnego niebezpieczeństwa, przymusowo lub nawet dobrowolnie poniósł szkodę majątkową, ten może żądać od osób, które z tego odniosły korzyść, powetowania w odpowiednim stosunku doznanej straty".

[3] Już wówczas wskazywano, że osoba występująca z roszczeniem na podstawie art. 122 k.z. może być także „osobą interesowaną", a zatem „nie jest konieczne działanie w cudzym imieniu" – Korzonek, Rosennlüth (1936), 295. Por. także uwagi współczesnych przedstawicieli nauki: Gudowski, Bieniek (2018), uwaga 5.

[4] Problem ten został dostrzeżony w judykaturze Sądu Najwyższego, który w wyroku z dnia 14 stycznia 2015 r., II CSK 248/14, LEX nr 1645258, odnosząc się do art. 438 k.c., stwierdził: „Powyższy przepis, pomimo że znalazł się wśród przepisów dotyczących czynów niedozwolonych, nie przystaje do tej kategorii stosunków zobowiązaniowych w ścisłym tego słowa znaczeniu. Nie poddaje się on kwalifikacji pod kątem którejkolwiek z zasad odpowiedzialności, występujących w obrębie czynów niedozwolonych". Czachórski (1983), 210 wskazał, że: „Sama kwalifikacja obowiązku naprawienia szkody jest tutaj sporna. Jakkolwiek bowiem przepis art. 438 k.c. jest zamieszczony w rozdziale o czynach niedozwolonych, równie dobrze mógłby się znajdować np. w rozdziale o prowadzeniu cudzych spraw bez zlecenia". Machnikowski, Śmieja (2018), 802 piszą wprost o tym, że umiejscowienie omawianej instytucji wśród przepisów dotyczących czynów niedozwolonych „było do pewnego stopnia dziełem przypadku", podyktowanym „trudnościami ze znalezieniem dla niego innego miejsca".

[5] Przepis ten stanowi: „Hat jemand in einem Nothfalle, um einen größern Schaden von sich und Andern abzuwenden, sein Eigenthum aufgeopfert; so müssen ihn Alle, welche daraus Vortheil zogen, verhältnißmäßig entschädigen. Die ausführlichere Anwendung dieser Vorschrift auf Seegefahren ist ein Gegenstand der Seegesetze". Nie miał swojego odpowiednika w Kodeksie zachodniogalicyjskim z 1797 r.

gulował to zagadnienie (Peiper, 1934), 155; Korzonek, Rosennlüth, 1936, 297). Był on zapewne inspiracją także dla zbliżonej regulacji w czeskim prawie cywilnym (zob. Dostalík, Poláček, 2017).

Przyczyną, dla której umieszczenie problematyki odpowiedzialności za szkodę poniesioną w cudzym lub wspólnym interesie w systematyce prawa zobowiązań rodzi tak duże trudności, jest niewątpliwie fakt, że regulacja ta znajduje swoją pragenezę w antycznych prawach morskich, a konkretnie w regulacji określanej jako *lex Rhodia de iactu* (zob. Zimmermann, 1996, 409–411; Zalewski, 2016; na temat *lex Rhodia* w antycznym prawie rzymskim zob. np. Kreller, 1921; Osuchowski, 1950; Osuchowski, 1951; De Robertis, 1953; Wieacker, 1953; Wiliński, 1960; Płodzień, 1961; Atkinson, 1974; Thomas, 1974; Purpura, 2002; Chevreau, 2005; Schanbacher, 2006). W istocie jednak – wbrew nazwie, jaką niekiedy posługiwała się rzymska jurysprudencja[6], a którą następnie przyjęto jako jeden z tytułów księgi czternastej justyniańskich Digestów[7] – należałoby mówić nie tyle o rodyjskiej „ustawie" (*lex*), co o „zasadzie" rodyjskiej[8]. Dotyczyła ona rozkładu ryzyka związanego z przymusowym zrzutem do morza znajdujących się na statku towarów w celu jego odciążenia, a tym samym dla uniknięcia niebezpieczeństwa zatonięcia (Płodzień, 1961, 24).

Jest to zagadnienie niezmiernie ciekawe, bowiem monarchia Habsburgów austriackich – w przeciwieństwie do kolonialnego imperium ich hiszpańskich kuzynów – nigdy nie uchodziła za szczególną potęgę morską. Nadmienić też warto, że w 1811 r. w ogóle nie posiadała dostępu do morza[9]. Mogłoby to sugerować, że jakkolwiek austriacka, a później również polska, regulacja przypomina konstrukcyjnie zasadę rodyjską, to brak jest między nimi bezpośredniego związku historycznego, zarówno z uwagi na różny zakres zastosowania (w przypadku zasady rodyjskiej – ograniczony jedynie do szkód powstałych w związku z żeglugą), jak i przepaść czasową, liczącą blisko 1300 lat między powstaniem Digestów oraz ABGB. W takim wypadku za uzasadnione mogłoby uchodzić jedynie dopatrywanie się w zasadzie rodyjskiej pierwowzoru dla instytucji „wspólnej awarii", uregulowanej obecnie w art. 250 i nn. ustawy z dnia 18 września 2001 r. – Kodeks morski (tekst jedn.: Dz. U. z 2018 r., poz. 2175) (zob. Płodzień, 1961, 7)[10].

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[6] D. 14.2.1: *Paulus libro secundo sententiarum: Lege Rhodia cavetur, ut si levandae navis gratia iactus mercium factus est, omnium contributione sarciatur quod pro omnibus datum est.*

[7] D. 14.2: *De lege Rhodia de iactu*. Określenia *lex Rhodia* używa również św. Izydor z Sewilli – Isidorus *Etym.* 5.17: *De legibus rhodiis. Rhodiae leges navalium conmerciorum sunt, ab insula Rhodo cognominatae, in qua antiquitus mercatorum usus fuit.*

[8] Szerzej na ten temat zob. Chevreau (2005). Określeniem „zasada" konsekwentnie posługuje się także Płodzień (1961), 58 i nn.

[9] Cesarstwo austriackie straciło dostęp do morza śródziemnego w związku z zawarciem z Napoleonem pokoju w Schönbrunnie z 1809 r. – zob. Bazylow (1981), 143. Na brak potencjału morskiego Austrii zwraca uwagę także Zimmermann (1996), 411.

[10] Autor ten, pomimo że spod jego pióra wyszła jedyna polskojęzyczna monografia na temat *lex Rhodia*, nie dostrzegł związku między art. 122 k.z. a zasadą rodyjską. Historyczną genezą „wspólnej awarii" (w prawie niemieckim jako *grosse Haverei*) zajmował się Heck (1889).

Oczywiście punktem wyjścia dla omówienia historycznego rozwoju zasady rodyjskiej musi być przedstawienie jej treści. Zachowane w Digestach wypowiedzi Paulusa oraz Papiniana świadczą o tym, że w zasadzie rodyjskiej można dostrzec dwa elementy podstawowe, które muszą zaistnieć, by można było mówić o odpowiedzialności odszkodowawczej: [a] istnienie wspólnego niebezpieczeństwa oraz [b] powstanie szkody w wyniku działania, którego celem oraz rzeczywistym skutkiem jest zniwelowanie tego niebezpieczeństwa[11]. W zasadzie wszelkie dalsze wymogi wskazywane w literaturze przedmiotu odnoszą się do dwóch wskazanych powyżej przesłanek podstawowych, służąc do ich sprecyzowania[12].

Dopiero w tym miejscu pojawia się problem umiejscowienia zasady rodyjskiej w systemie rzymskiego prawa zobowiązań i dalszych tego konsekwencji. Chodzi tu przede wszystkim o podstawę i sposób dochodzenia roszczenia o naprawienie szkody, powstałej wskutek działania we wspólnym interesie, czy też – jak wskazywano w starszej literaturze – „działania ofiarnego" (zob. Płodzień, 1961, 71–77). Jest to dokładnie ten sam problem, przed którym stanęli twórcy kodyfikacji nowożytnych, z pewnymi jednak zastrzeżeniami. Zadanie rzymskich jurystów było bowiem łatwiejsze o tyle, że zasada rodyjska dotyczyła jedynie szkody powstałej na skutek zrzutu towarów lub części statku do morza. Zakres jej zastosowania był zatem przedmiotowo zawężony w stosunku do regulacji zawartej w ABGB i we współczesnym polskim prawie cywilnym. Z drugiej jednak strony prawo rzymskie opierało się na systemie skarg (*actiones*) (por. Czech-Jezierska, 2017, 428–429), a zatem należało precyzyjnie określić, która skarga służyć będzie do dochodzenia roszczenia w przypadku stanu faktycznego podpadającego pod zasadę rodyjską.

Paulus w komentarzu do edyktu pretorskiego wskazuje, że poszkodowany powinien posłużyć się skargami z kontraktu najmu (*locatio-conductio*)[13]:

> D. 14.2.2 pr.: (…) *Si laborante nave iactus factus est, amissarum mercium domini, si merces vehendas locaverant, ex locato cum magistro navis agere debent: is deinde cum reliquis, quorum merces salvae sunt, ex conducto, ut detrimentum pro portione communicetur, agere potest. Servius quidem respondit ex locato agere cum magistro navis debere, ut ceterorum vectorum merces retineat, donec portionem damni praestent. Immo etsi „non" retineat merces magister, ultro ex locato habiturus est actionem cum vectoribus: quid enim si vectores sint, qui nullas sarcinas habeant? Plane commodius est, si sint, retinere eas. At si non totam navem conduxerit, ex conducto aget, sicut vectores, qui loca in navem conduxerunt: aequissimum enim est commune*

[11] D. 14.2.1: (…) *Lege Rhodia cavetur, ut si levandae navis gratia iactus mercium factus est, omnium contributione sarciatur quod pro omnibus datum est.* D. 14.2.3: (…) *Cum arbor aut aliud navis instrumentum removendi communis periculi causa deiectum est, contributio debetur.*

[12] Zob. Płodzień (1961), 69–70 oraz przyp. 43 wraz z przytoczoną przez autora literaturą. W szczególności dotyczy to wymogu definitywnej utraty lub uszkodzenia towarów – zob. D. 14.2.8: (…) *Qui levandae navis gratia res aliquas proiciunt, non hanc mentem habent, ut eas pro derelicto habeant, quippe si invenerint eas, ablaturos et, si suspicati fuerint, in quem locum eiectae sunt, requisituros: ut perinde sint, ac si quis onere pressus in viam rem abiecerit mox cum aliis reversurus, ut eandem auferret.* W przeciwnym razie trudno byłoby mówić o szkodzie, będącej uszczerbkiem majątkowym.

[13] Płodzień (1961), 99 wskazuje, że jest to różnica również w stosunku do konstrukcji wspólnej awarii.

detrimentum fieri eorum, qui propter amissas res aliorum consecuti sunt, ut merces suas salvas haberent.

W najprostszym układzie, przy wykonywaniu usługi transportowej w oparciu o kontrakt najmu dzieła (*locatio conductio operis faciendi*) (Aubert, 2007, 161)[14], właściciel utraconego towaru skarżył *ex locato* kapitana statku (*magister navis*) o naprawienie szkody. Ten z kolei mógł posłużyć się *actio conducti* w celu realizacji swojego roszczenia zwrotnego do właścicieli innych towarów, które ocalały wraz z całym statkiem. Opierając się na opinii Serwiusza Sulpicjusza Rufusa, do której odnosi się w cytowanym fragmencie Paulus, można sformułować przypuszczenie, że pierwotnie konsekwencje obciążające kapitana statku były węższe, bowiem poszkodowany właściciel mógł żądać jedynie zatrzymania uratowanych towarów, dopóki szkoda nie zostanie naprawiona.

Nieco odmienna sytuacja następowała w przypadku pasażerów, którzy nie przewozili żadnych towarów. Wówczas pomiędzy nimi a kapitanem istniał stosunek najmu rzeczy (*locatio-conductio rei*), gdzie to kapitanowi jako wynajmującemu (*locator*) będzie przysługiwała *actio locati* przeciwko pasażerom (*conductores*). Podobnie będzie, gdy właściciel towarów wyrzuconych wynajął cały statek. Wówczas również podstawą roszczenia będzie kontrakt najmu rzeczy, gdzie wynajmującym (*locator*) jest kapitan, zaś najemcą (*conductor*) poszkodowany. Wtedy zatem również nastąpi swoiste „odwrócenie skarg", w którym właściciel utraconych lub uszkodzonych towarów będzie pozywał kapitana *ex conducto.*

Odejście od rzymskiej konstrukcji dochodzenia roszczeń na podstawie skarg przysługujących w różnych odmianach kontraktu najmu nastąpiło już w bizantyjskich Bazylikach, gdzie oparto się przypuszczalnie na znanej w greckim prawie zwyczajowym wspólnocie, powstającej w przypadku zagrożenia dotyczącego określonej grupy osób (Płodzień, 1961, 102–103; Chevreau, 2005, 75). Co ciekawe, stało się tak pomimo tego, że przedmiotowa regulacja wciąż nie wychodziła poza sferę stosunków związanych z żeglugą transportową. Wynika to zapewne z praktycznych niedogodności związanych z konstrukcją rzymską, gdzie *magister navis* przyjmuje funkcję pewnego rodzaju pośrednika, w rozliczeniach między poszczególnymi właścicielami towarów oraz pasażerami (por. Tafaro, 2008, 16; Dostalík, Poláček, 2017, 8)[15].

Problem ustalenia adekwatnej podstawy prawnej, a tym samym doprecyzowania charakteru wzajemnych roszczeń, musiał oczywiście zintensyfikować się wraz z uogólnieniem samej zasady rodyjskiej. Nastąpiło to w XI–XIII stuleciu, wtedy bowiem działała włoska szkoła glosatorów, której zawdzięczamy wypro-

[14] W literaturze podkreśla się, że oparcie reguł realizacji roszczeń wynikających z zasady rodyjskiej na różnych rodzajach najmu było możliwe z uwagi na to, że był to kontrakt *bonae fidei* – zob. Wagner (1997), 363; Dostalík, Poláček (2017), 8. Chevreau (2005), 75 podkreśla, że zastosowanie skarg z najmu świadczy o braku recepcji formalnej „ustawy rodyjskiej".

[15] Odnośnie do poglądów dotyczących roli kapitana statku wyrażanych w starszej literaturze zob. Płodzień (1961), 103.

wadzenie konstrukcji odpowiedzialności ze szkodę poniesioną we wspólnym interesie poza wąski krąg prawa morskiego (zob. Zimmermann, 1996, 409; Lokin, Brandsma, Jansen, 2003, 260; Zalewski, 2016, 180–181). Podstawowym źródłem w tym zakresie pozostaje *Glossa Ordinaria* (*Glossa Magna*) (cyt. według wydania: Accursius, 1627), w której znajduje się następująca uwaga do fragmentu z komentarza do edyktu autorstwa Paulusa:

> Gl. *Aequissimum* ad 14.2.2 pr.: *Et not. quod si quid pro communi utilitate, vel alterius damni patior, quod mihi est restitutio facienda, ut hic et supr. l.j. et supra quod met. caus. l. metum.§.sed licet et infra pro soc. l. cum duobus.§.quidam. et infra de verbor. signif. l. impense. et infra de impens. l. quod dicitur. Sed contra infra ead. l. § seq. Sol. ibi non pro communi utilitate, nec sua vel aliorum voluntate fuit factum, autem sic.*

Autor glosy wskazuje, że w każdej sytuacji, gdy ktoś doznał szkody dla korzyści innej osoby, bądź nawet dla korzyści wspólnej, winna być mu ona naprawiona (*quid pro communi utilitate, vel alterius damni patior, quod mihi est restitutio facienda*). Odwołuje się przy tym do innych instytucji prawa rzymskiego, opierających się na podobnej zasadzie. Glosator odsyła m.in. do fragmentu komentarza Ulpiana do edyktu pretorskiego, gdzie jurysta ten rozważa zagadnienie roszczenia odszkodowawczego, jakie przysługuje jednemu wspólnikowi przeciwko drugiemu, z powodu uszczerbku majątkowego poniesionego na skutek rabunku, mającego miejsce podczas podróży odbywanej we wspólnym interesie[16]. W tym przypadku, podobnie jak przy zastosowaniu ustawy rodyjskiej, środkiem procesowym służącym do dochodzenia odszkodowania była odpowiednia skarga kontraktowa, a zatem *actio pro socio.*

Pomiędzy procesowym zastosowaniem zasady rodyjskiej, opierającym się na skargach z kontraktu *locatio-conductio*, a wykorzystaniem *actio pro socio* we wzajemnych rozliczeniach między wspólnikami, o którym mowa we wskazanym przez glosatora fragmencie pism Ulpiana, zachodzi jednak istotna różnica. W pierwszym przypadku konieczne było kierowanie przez poszkodowanego powództwa do kapitana statku, który z kolei mógł pozywać pozostałych właścicieli towarów o zwrot przypadających na nich kwot. Rozliczenie pomiędzy wspólnikami było siłą rzeczy prostsze, bowiem brakowało w nim osoby pośredniczącej, jaką w przypadku obowiązku naprawienia szkody powstałej na skutek zrzutu morskiego był *magister navis.* Być może to zainspirowało Accursiusa do zaproponowania uproszczonej procedury dochodzenia należności:

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[16] D. 17.2.52.4: (…) *Quidam sagariam negotiationem coierunt: alter ex his ad merces comparandas profectus in latrones incidit suamque pecuniam perdidit, servi eius vulnerati sunt resque proprias perdidit. Dicit Iulianus damnum esse commune ideoque actione pro socio damni partem dimidiam adgnoscere debere tam pecuniae quam rerum ceterarum, quas secum non tulisset socius nisi ad merces communi nomine comparandas proficisceretur. Sed et si quid in medicos impensum est, pro parte socium agnoscere debere rectissime Iulianus probat. Proinde et si naufragio quid periit, cum non alias merces quam navi solerent advehi, damnum ambo sentient: nam sicuti lucrum, ita damnum quoque commune esse oportet, quod non culpa socii contingit.*

Gl. *Agere potest* ad D. 14.2.2 pr.: *Scilicet magister. Sed videtur quod non possit agi, ut infr. de preascrip. ver. l. qui servandarum. in princ quae est contra. Sed dic non potest agi (ut ibi dicit) actione legis Aquiliae contra proiicientem, vel simili: sed de aequitate ratione contributionis tenetur, ut hic vector magistro: et magister damnum passo: melius tamen esset ut via recta ageret damnum passus sublato circuitu: ut supra de condict. inde. l. dominus testamento. et hoc admitto, si magister agere nolit, vel reinere: ut supra de eo per quem fact. est. l. fin. in princip. potest etiam agi act. negot. gest. quia utiliter gessit: ut supra de neg. gest. l. sed an ultro. § j. Accurs.*

Proponując bezpośrednie dochodzenie odszkodowania (*via recta*) przez poszkodowanego, Accursius wychodzi niejako naprzeciw propozycji ogólnego zastosowania zasady, że szkody poniesione we wspólnym interesie powinny być naprawione przez ich beneficjentów (Zimmermann, 1996, 410). Zastosowanie rzymskiej konstrukcji, o której mowa w komentarzu Paulusa do edyktu, jest tu oczywiście zupełnie nieprzydatne, a to z uwagi na brak osoby, która byłaby odpowiednikiem kapitana statku. Accursius – podobnie jak wcześniej rzymscy juryści – stanął przed problemem podstawy prawnej roszczenia przysługującemu poszkodowanemu. Dochodzi w tym względzie do wniosków podobnych do tych, które niezależnie od niego wysnuła polska przedwojenna cywilistyka, a zatem, że najwłaściwsza byłaby w takiej sytuacji skarga z prowadzenia cudzych spraw bez zlecenia (*actio negotiorum gestio*) (Lokin, Brandsma, Jansen, 2003, 261). Propozycję tę oparł Accursius na komentarzu Ulpiana do edyktu pretorskiego[17].

O ile jednak sama koncepcja rozszerzenia zastosowania zasady rodyjskiej na sytuacje poniesienia szkody we wspólnym interesie w okolicznościach innych niż związanych z transportem towarów drogą morską została zaakceptowana przez przedstawicieli szkoły komentatorów[18], a później uznana – zwłaszcza przez prawników z państewek Rzeszy – za *communis opinio*[19], o tyle sporna była dopuszczalność stosowania w takim przypadku *actio negotiorum gestio.* Dość po-

[17] D. 3.5.9 pr.: (…) *Sed an ultro mihi tribuitur actio sumptuum quos feci? Et puto competere, nisi specialiter id actum est, ut neuter adversus alterum habeat actionem.*

[18] Zob. Bartolus de Saxoferrato (1523), com. ad D. 14.2.2 pr.: *Iste ver. equisiimum enim etc. facit ad q. .qń domus alicuius destriutur a vicinis: ne ignis ulterius transeat debeat ei emendari a vicinis: quia pro communi utilitate factum est in argumentum induco non determino*; Baldus de Ubaldis (1577), com. ad D. 14.2.2 pr.: *Igne orto in aliqua contrata, si domus alicuius destruitur a vicinis ne ignis terius extendatur, fieri potest iure. Milites, qui tempore guerrae porpter defensionem vadunt ad bellum, si ibi perdunt equum, sibi per commune debet emendari*; Pistoris (1596), Cons. XVI, 9: *Unde et insert ibi gl. quod damnum, quod quis patitur pro communi utilitate, debeat ei ex publico sarciri. Imò et Bart. ibi inducit illum textum in argumentum, quod quando domus alicuius destruitur â vicinis, ne ignis ulterius transeat, debeat ei emndari a vicinis, quia pro communi utilitate factum est*. Zob. także: Zimmermann (1996), 409–-410; Lokin, Brandsma, Jansen (2003), 261; Zalewski (2016), 182.

[19] Lauterbach (1707), lib. XIV, tit. 2, 14: *Denique communis et aequissima est opinio, si urgente incendio domus aliqua diruta sit, caeterarum conservandarum causa, id damnum, in subsidium, contributione farciendum esse a vicinis, ad quos verisimiliter ignis potuit pervenire* (…). Leyser (1776), sp. CLX, II: *Contributionem fieri ob jactum ab omnibus, aequum erat, quia jactu non facto periculum imminebat aequale omnibus navi vectis, tam salvis, quam jactis. At non ita ex orto incendio aequalis ad omnem viciniam spectat damni metus, sed ad proximos maximus minor at remotiores. Ut proinde rectius dicatur, vel a nullo refici tale damnum oportere, si ad depositas aedes jam ignis pertigerit; vel si necdum eo pervenerit incendium, ab eo solo, qui dejecit.*

wiedzieć, że znany francuski prawnik i humanista Cuiacius (Jacques Cujas, 1522–1590), komentując propozycję Accursiusa, określił go mianem „nieprzydatnego" (a nawet „głupiego" – *ineptus*) i cechującego się niezrozumieniem praw[20]. Autor ten wskazywał, że z uwagi na brak zlecenia nie może być wykorzystana tutaj *actio mandati*; wykluczona jest także *actio de dolo*, ponieważ do zrzutu nie doszło na skutek działania w złym zamiarze, a celem osób dokonujących zrzutu nie było spowodowanie szkody, tylko ratowanie statku; czy w końcu niedopuszczalne jest użycie *actio negotiorum gestio*, bowiem z pewnością beneficjenci całego zdarzenia, którzy towary swoje uratowali, nie działali w interesie poszkodowanego, a co najwyżej w interesie wspólnym, na ogół jednak w interesie własnym, co zupełnie wyklucza zastosowanie konstrukcji *negotiorum gestio* (Cuiacius, 1758, 531). Ostatecznie Cuiacius stwierdził, że w takiej sytuacji w ogóle nie ma możliwości bezpośredniego dochodzenia szkody i zachować należy konstrukcję zaproponowaną przez rzymskich jurystów, opartą na *actio locati* i *actio conducti*[21].

Przyjęcie koncepcji Cuiaciusa poprowadziłoby rzecz jasna do ponownego ograniczenia zasady rodyjskiej wyłącznie do szkód powstałych na skutek zrzutu morskiego. Europejska nauka prawa poszła jednak w przeciwną stronę, pomimo pojawiających się niekiedy głosów krytycznych[22]. Niemniej jednak nie pozostały one bez echa, bowiem doskonale zorientowany w twórczości XVI-wiecznego prawnika Robert Joseph Pothier (1699–1772) rozpatrywał problematykę *lex Rhodia* jedynie w perspektywie zagadnień związanych ze zrzutem morskim, pomijając milczeniem koncepcję średniowiecznych glosatorów (zob. Pothier, 1821, 16–33). Rzecz jasna podstawą dochodzenia roszczeń, na którą wskazuje Pothier, był kontrakt najmu (Pothier, 1821, 29–33). Wpływ twórczości Cuiaciusa oraz Pothiera na treść Kodeksu Napoleona z 1804 r. tłumaczy, dlaczego w tym akcie prawnym nie znajdujemy odpowiednika § 1043 ABGB[23].

Pogląd glosatorów o istnieniu ogólnej zasady dotyczącej obowiązku naprawienia szkody poniesionej w cudzym lub wspólnym interesie został natomiast

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[20] Cuiacius (1758), 530–531: *Et inepte igitur Accursius, qui et cetera omnia legis non intellexit, dat dominis jactarum mercium adversus reliquos actio nem negotiorum gestorum, quia nec ipsi ultra projacerunt merces suas, ut alias servarent, sed de communi Consilio et decreto omnium, u test in legis Rhodiae novellae cap. nono.*

[21] Cuiacius (1758), 531: *Verum quamvis domini amissarum mercium nullam actionem habeant adversus ceateros vectores, ex obligatione tamen locati, et conducti habent actionem adversus magistrum navis.*

[22] Najlepszym przykładem może być tutaj stanowisko, jakie prezentował holenderski prawnik J. Voet (1647–1713), który odrzucił koncepcję glosatorów o rozszerzeniu zastosowania zasady rodyjskiej na przypadki inne niż związane z żeglugą morską, podnosząc przede wszystkim zarzut praktycznych trudności z ustaleniem kręgu beneficjentów zdarzenia skutkującego szkodą. Voet odnosił się przy tym do znanego z komentarzy Baldusa de Ubaldis przykładu obowiązku kompensacji szkody powstałej na skutek zburzenia domu, by zapobiec rozprzestrzenianiu się pożaru – zob. Voet (1698), XIV, tit. II, 18: *Contributionem fieri ob jactum ab omnibus, aequum erat, quia jactu non facto periculum imminebat aequale omnibus navi vectis, tam salvis, quam jactis. At non ita ex orto incendio aequalis ad omnem viciniam spectat damni metus, sed ad proximos maximus minor at remotiores. Ut proinde rectius dicatur, vel a nullo refici tale damnum oportere, si ad depositas aedes jam ignis pertigerit; vel si necdum eo pervenerit incendium, ab eo solo, qui dejecit.*

[23] Na temat wpływu Pothiera na treść Kodeksu Napoleona zob. Koranyi (1955), 385; Sójka-Zielińska (2008), 27.

zaakceptowany przez Modestinusa Pistoris (1516–1565)[24], który odrzucił jednak możliwość zastosowania w takim przypadku *actio negotiorum gestio.* Prawnik ten zaproponował wykorzystanie nieznanej wcześniej *actio generalis*, (…) *quae ex varijs figuris causarum oritur* (Pistoris, 1596, Cons. XVI 19). Wynikało to z przeświadczenia Modestinusa, że roszczenie o naprawienie szkody poniesionej w cudzym lub wspólnym interesie opiera się na zasadzie słuszności, a zatem musi istnieć możliwość jego dochodzenia, pomimo braku odpowiedniej ku temu skargi znanej antycznemu prawu rzymskiemu (por. Lokin, Brandsma, Jansen, 2003, 261). W tym okresie pojawiły się także opinie, iż roszczenie takie winno być realizowane z zastosowaniem *actio in rem* opartej na morskim zwyczaju lub bliżej nieokreślonej *condictio ex lege* (Zimmermann, 1996, 410).

Główny twórca austriackiego ABGB Franz von Zeiller (1751–1829) należał do zwolenników koncepcji prawa natury, które w znacznej mierze opierały się na założeniu rezygnacji z rzymskiego systemu skargowego i na zasadzie *ubi ius, ibi remedium* (Zimmermann, 1996, 410). Przy redakcji § 1043 ABGB Zeiller całkowicie świadomie nawiązywał do *lex Rhodia* oraz do dorobku średniowiecznych glosatorów i komentatorów, ignorując jednocześnie nieprzydatne przy rozszerzonym zakresie zastosowania zasady rodyjskiej poglądy rzymskiej jurysprudencji na wykorzystanie kontraktu najmu, jako podstawy dochodzenia roszczenia (zob. Zeiller, 1812, 333). Paradoksalnie, uzasadniał on umieszczenie omawianej zasady wśród rozwiązań, dotyczących prowadzenia cudzych spraw bez zlecenia w interesie innych osób (§ 1036–1044 ABGB) stosunkowo zbliżonym charakterem tych przepisów do regulacji znanej z prawa morskiego (Zeiller, 1812, 333). Niemniej jednak, zarówno F. von Zeiller, jak i wzmiankowany na początku tej pracy, współtwórca polskiego kodeksu zobowiązań R. Longchamps de Bérier doskonale zdawali sobie sprawę z niedoskonałości tego rozwiązania i odmiennego od prowadzenia cudzych spraw bez zlecenia charakteru analizowanej instytucji prawnej[25]. Inny członek podkomisji odpowiedzialnej za opracowanie kodeksu zobowiązań, który jednak nie dożył zwieńczenia jej prac, Ernest Till (1846–1926), dostrzegał możliwość zastosowania przez poszkodowanego *actio negotiorum gestio* lub *actio de in rem verso* (zob. Peiper, 1934, 155). Za rażącą uchodzić musi zwłaszcza ta druga

[24] Pistoris (1596), Cons. XVI 9: *Unde et insert ibi gl. quod damnum, quod quis patitur pro communi utilitate, debeat ei ex publico sarciri. Imò et Bart. ibi inducit illum textum in argumentum, quod quando domus alicuius destruitur â vicinis, ne ignis ulterius transeat, debeat ei emndari a vicinis, quia pro communi utilitate factum est.*

[25] Longchamps de Bérier (1938), 213 wskazywał, że: „Początek tej instytucji [tj. określonej w art. 122 k.z. – uwaga B.Z.] tkwi w rzymskiej *lex Rhodia de jactu*, opierającej się na przeświadczeniu, że jeżeli w wspólnym niebezpieczeństwie jedna osoba ponosi szkodę w tym celu, aby od wszystkich odwrócić to niebezpieczeństwo (…), to słuszność wymaga, aby wszyscy, którzy przez to odnieśli korzyść, przyczynili się do pokrycia tej szkody. (…). Obojętnym jest, czy poniesienie szkody nastąpiło dobrowolnie, czy przymusowo, np. wskutek działania osób trzecich lub władzy. Tem różni się stan faktyczny art. 122 od prowadzenia cudzej sprawy, które wymaga zamiaru przysporzenia drugiemu korzyści".

propozycja, biorąc pod uwagę fakt, że dotyczyła ona odpowiedzialności kontraktowej zwierzchnika za zobowiązania zaciągane przez niewolników[26].

Poczynione ustalenia prowadzą do wniosku, że aktualne umiejscowienie przepisu, dotyczącego odpowiedzialności za szkodę poniesioną w cudzym lub wspólnym interesie w tytule dotyczącym czynów niedozwolonych (art. 415–449 k.c.) pozbawione jest nie tylko sensu dogmatycznego, ale również uzasadnienia historycznego[27]. Dokonany przegląd różnych koncepcji dotyczących podstaw tej odpowiedzialności, jakie pojawiły się na przestrzeni setek lat, prowadzić musi do wniosku, że ma ona swoisty charakter (odpowiedzialność *sui generis*) (Kaliński, 2018, 21; Machnikowski, Śmieja, 2018, 802). Wspólnym elementem, który przewija się nieprzerwanie od czasów rzymskich, jest natomiast uzasadnienie omawianej regulacji względami słuszności (*aequitas*)[28]. Właśnie ten „słusznościowy" charakter obowiązku naprawienia szkody powstałej w cudzym lub we wspólnym interesie uzasadnia jej nieustanną aktualność, skłaniając kolejne pokolenia prawników do podejmowania refleksji nad jej istotą i charakterem. Niestety, w przeciwieństwie do autorów przedwojennych, dziś niewielu chyba pamięta, że przedmiotem ich dociekań jest instytucja, która wywodzi się wprost ze starożytnych praw morskich.

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[28] Zob. D. 14.2.2 pr.; D. 14.2.5; gl. *Aequissimum* ad 14.2.2 pr.; Pistoris (1596), Cons. XVI 19; Lauterbach (1707), lib. XIV, tit. 2, 14; Leyser (1776), sp. CLX, II. Element słusznościowy podkreślany jest również współcześnie. Zob. wyrok SN z dnia 14 stycznia 2015 r., II CSK 248/14, LEX nr 1645258; Safjan (2018), 1532.

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Bartosz Zalewski

FROM ROMAN MARITIME LAW TO POLISH LAW OF OBLIGATIONS. SOME COMMENTS ON THE HISTORICAL GENESIS OF ART. 438 OF THE CIVIL CODE

According to art. 438 of the Polish Civil Code: "Whoever suffers a material loss, forcibly or even voluntarily, in order to prevent damage to another person or to avoid common danger, is entitled to claim compensation for the loss sustained, in suitable proportions, from people who benefitted from it." This institution finds its origin in the *lex Rhodia de iactu*, known in Roman law. The proposal to extend the Rhodian rule to cases other than those related to the danger for the ship is the heritage of medieval school of glossators. However, the transposition of an institution adapted to the conditions of maritime transport to the contemporary law of obligations is associated with specific problems. This particularly applies to the new character of this institution. The analysis of historical sources indicates that it is a *sui generis* liability that cannot be attributed to tort liability or *negotiorum gestio*.

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PRAWO ŻEGLARSKIE – PYTANIE O STATUS DYSCYPLINY I PROGRAM BADAŃ

1. Współcześnie prawo cały czas ewoluuje, obejmując swym zakresem coraz to nowe aspekty rzeczywistości, a liczba norm prawnych w systemie prawa znacznie wzrasta. Zmiany te dotyczą zarówno samej treści prawa, jak i teorii, a szerzej także jego filozofii. Dotyczy to również sposobów porządkowania prawa. Ustalone jeszcze w jurysprudencji rzymskiej jego podziały, choć nadal ważne, okazują się tylko częściowo adekwatne do współczesności, zapewniając jednak choćby pozorny porządek, a co za tym idzie komfort osób uprawiających prawo. Dziś podlegają one daleko idącej weryfikacji i modyfikacji. Z jednej strony dochodzi do dalszej segmentacji i szczegółowych podziałów prawa, a tym samym profesjonalizacji działalności samych prawników. Z drugiej zaś współczesność wymusza, coraz to dalej idąc, multidyscyplinarność. Przechodzi się więc od wertykalnego do horyzontalnego postrzegania prawa, co w konsekwencji rodzi potrzebę wyodrębniania interdyscyplinarnych dziedzin szczegółowych. Efektem tego jest współcześnie, można rzec, skrajna specjalizacja w celu sprostania i rozwiązywania konkretnych problemów prawnych. Specjalizacja ta dokonuje się jednak zazwyczaj w ramach poszczególnych gałęzi prawa (zob. na ten temat Zeidler, 2014, 23–24).

Jednak w praktyce prawnicy, zmagając się z konkretnymi sprawami, muszą często odwoływać się do wielu różnych i rozrzuconych po systemie prawa regulacji. Co więcej, muszą sięgać do regulacji ponadkrajowych, europejskich i międzynarodowych. *Signum temporis* okazuje się konieczność wychodzenia poza te historyczne i teoretyczne w swej istocie podziały. Wszak „Problemy naukowe dotyczą świata, w tym świata społecznego – i na ogół nie mogą być rozwiązywane tylko w ramach przedmiotu i metody jednej z dyscyplin czy tym bardziej subdyscyplin" (Izdebski, 2008, 51). I dlatego cechą współczesnej nauki w ogóle staje się

interdyscyplinarność oraz konieczność współpracy przedstawicieli różnych nauk i dziedzin wiedzy wobec niemożności samodzielnego rozwiązywania złożonych problemów naukowych i praktycznych (Zeidler, 2014, 23–24).

Prawoznawstwo podlega wewnętrznemu porządkowaniu, tak jak porządkowaniu podlega samo prawo. Pierwsze jest w istocie konsekwencją tego drugiego. Jednakże to prawoznawstwo, a zwłaszcza teoria prawa, wywiera doniosły wpływ na porządkowanie samego prawa. System prawny podlega różnym podziałom, w ramach których dzieli się i klasyfikuje normy prawne będące jego elementami. W systemie prawnym pomiędzy normami prawnymi zachodzą związki, które mogą mieć charakter związków treściowych, związków hierarchicznych, związków formalnych itd. Jak zauważa Janusz Guść (2007, 11): „Podziałów aktów normatywnych dokonywać można też ze względu na ich moc prawną oraz usytuowanie norm zawartych w tych aktach w ramach przyjmowanych w prawoznawstwie dyferencjacji systemu prawa, wyróżniając np. akt normatywny poszczególnych gałęzi prawa, akt normatywny prawa publicznego i prywatnego, akt normatywny prawa materialnego i formalnego etc.". W oparciu o związki treściowe między normami prawnymi wyodrębnia się różne gałęzie i dziedziny prawa (zob. Zeidler, 2014, 24).

Jakiś jeden ustalony wewnętrzny porządek prawa nie został nigdy ogłoszony, a wiele takich prób było obarczonych różnego rodzaju błędami, a także spotykało się z krytyką tych, którzy prezentowali pogląd inny, chociaż byłby on odmienny tylko w detalach. Niemniej jednak można wyróżnić taki zespół twierdzeń, który może nie powszechnie, ale w przeważającej większości jest akceptowalny i akceptowany. Ale pamiętać należy o tym, że to właśnie co do szczegółów będą się rodzić spory (Zeidler, 2014, 24).

Pierwszym stopniem porządkowania praw jest podział na prawo publiczne i prawo prywatne, który nawiązuje do rozróżnienia przyjmowanego już w prawie rzymskim. W dalszej kolejności prawo dzieli się na gałęzie prawa. „Prawo pozytywne jest podzielone na gałęzie. Wyodrębnienie poszczególnych gałęzi i ich nazwanie to w przeważającej mierze dzieło nauki prawa. Ustawodawca rzadko określa w sposób wyraźny, do jakiej gałęzi zalicza tworzone przez siebie normy, choć współcześnie respektuje na ogół podział wprowadzony przez naukę" (Stawecki, Winczorek, 2003, 117). Fragmentaryzacja prawa polega na wewnętrznym różnicowaniu się systemu prawnego i pogłębianiu się różnic pomiędzy gałęziami prawa lub też działami prawa w ramach tej samej gałęzi (tzw. dywersyfikacja prawa, dyferencjacja prawa) (Wiśniewski, 2007, 96–97). Poszczególne gałęzie prawa – ze względu na cechy przeważające – określa się najczęściej jako gałęzie prawa publicznego albo gałęzie prawa prywatnego. Przy czym współcześnie niektóre gałęzie prawa sytuują się na styku prawa publicznego i prywatnego i mają cechy właściwe dla tych obu rodzajów prawa (Stawecki, Winczorek, 2003, 121).

Powyżej przedstawiony porządek nie jest przyjmowany bez zastrzeżeń. Ten istotny szczegół, co do którego toczy się spór, to elastyczność w modyfikowaniu

niegdyś przyjętych sposobów porządkowania prawa. Stanowisko, które można określić jako konserwatywne, sprzeciwia się wprowadzaniu zmian w zakresie porządkowania prawa i jest przywiązane do tego, co trwa nieprzerwanie jeszcze od czasów starożytnych. Stanowisko, które można kreślić mianem nowoczesnego, nie tylko rozumie prawo inaczej, ale też wymaga uznawania modyfikowalności jego wewnętrznej struktury. Niezależnie od tego, które pozycje reprezentujemy, należy dojść do przekonania, że przecież zmienia się nie tylko samo prawo, ale także jego rozumienie i opisywanie oraz sposoby jego porządkowania (Zeidler, 2014, 26).

Pomimo wyżej zarysowanych tendencji w zakresie fragmentaryzacji prawa nie jestem zwolennikiem spontanicznego i przesadnie łatwego przyznawania niemal każdej wyodrębniającej się sferze regulacji prawnych statusu gałęzi prawa. Bezpieczniejsze jest mówienie o szczegółowych dziedzinach prawa, wyodrębniających się w ramach danych gałęzi prawa. Niemniej jednak współcześnie akceptowany jest pogląd mówiący o istnieniu obok albo częściej w ramach kilku gałęzi prawa tzw. kompleksowych gałęzi prawa, rozumianych jako wydzielony według określonych kryteriów zespół norm prawnych. Inaczej jest w przypadku subsydiarnych gałęzi prawa (tzw. subgałęzi), które wyróżniane są w granicach autonomicznych gałęzi prawa. Kompleksowe gałęzie prawa są wyróżniane na podstawie różnych kryteriów. W efekcie skutkuje to dychotomicznym podziałem systemu prawa – na daną wyróżnioną gałąź prawa oraz na wszelkie inne normy prawne (Wronkowska, 2001, 194). Kryterium podstawowym jest tu najczęściej cel i przedmiot regulacji. Jak podkreślają Tomasz Stawecki i Piotr Winczorek (2003, 120): „W ostatnich dziesięcioleciach obserwuje się przyspieszenie procesu podziału prawa na gałęzie, co jest m.in. związane z przeobrażeniami w sferze kultury prawnej społeczeństw, z powiększeniem przedmiotowego zakresu działania władz publicznych, z wymogami, jakie stawia cywilizacja techniczna". Podobnie wydziela się specyficzne dziedziny prawa, najczęściej wedle kryterium przedmiotu regulacji, jak choćby prawo sportowe czy prawo turystyczne. Nie jest wówczas konieczne spełnienie wszystkich czy choćby przeważającej liczby kryteriów wydzielenia gałęzi prawa (Zeidler, 2014, 26–33).

2. W świetle powyższych rozważań należy zadać pytanie o status prawa żeglarskiego. Czy możemy mówić o takim zespole wyodrębnionych norm prawnych, które łącznie tworzą oddzielną regulację zasługującą na uznanie za osobną – z całą pewnością nie gałąź, ale – dziedzinę prawa? Pierwszym ustaleniem niech będzie tu, że ogół norm dotyczących uprawiania żeglugi na morzu nazwiemy umownie prawem żeglugowym (*lex generalis*). W jego ramach wyróżnia się ten zespół norm, który dotyczy żeglarstwa (*lex specialis*). Mamy więc tu do czynienia z regulacją ogólną i jej uszczegółowieniem, zaś w przypadku kolizji norm zupełnie prosto sięgamy do reguły *lex specialis derogat legi generali*, oczywiście wraz z wszystkimi warunkami dopuszczalności jej zastosowania. To akurat nie

jest skomplikowane. Sytuację prawną uprawiania żeglarstwa komplikują przed wszystkim inne, poniżej wskazane zastrzeżenia. Wpływa to istotnie na bardzo zróżnicowaną sytuację prawną i tym samym faktyczną żeglarzy, czyli osób uprawiających żeglarstwo.

Po pierwsze, należy zauważyć, że regulacje dotyczące uprawiania żeglugi mają charakter zarówno publicznoprawny (prawo morza), jak i prywatnoprawny (prawo morskie). Dotyczą wszystkich podmiotów uprawiających żeglugę, szczególnie – z natury rzeczy – koncentrując się na zawodowym jej uprawianiu. Źródeł prawa żeglugowego można więc poszukiwać tak w prawie publicznym, jak i w prawie prywatnym.

Po wtóre, inne regulacje dotyczą zawodowego, profesjonalnego uprawiania żeglugi, a także żeglarstwa, inne rekreacyjnego czy sportowego. Aby sytuację jeszcze skomplikować, ujmując zagadnienie jeszcze szerzej, należy dodać, że różne regulacje dotyczą tzw. marynarki handlowej, a różne marynarki wojennej. W przypadku tego ostatniego podziału, o ile mamy wspólny rdzeń regulacji, są też obszary całkowicie różne i tym samym różnie regulowane. A może być tak, że regulacje dotyczące marynarki wojennej będą miały zastosowanie do jachtów, tak jak to jest z jachtami Ośrodka Szkolenia Żeglarskiego Marynarki Wojennej w Gdyni.

Po trzecie, trzeba też pamiętać, że zasadniczo różni się żeglarstwo morskie od żeglarstwa śródlądowego. W przypadku tego drugiego mamy do czynienia z podporządkowaniem takiej aktywności prawu krajowemu i równocześnie z wyłączeniem jej co do zasady spod regulacji prawa morza i prawa morskiego.

Po czwarte, z zagadnieniem trzecim wiąże się bezpośrednio zagadnienie zakresu terytorialnego obowiązywania prawa. Otóż z jednej strony regulacje prawne dotyczące uprawiania żeglugi są ujednolicane – przede wszystkim ze względu na wartość i zasadę podstawową, jaką jest bezpieczeństwo żeglugi – w prawie międzynarodowym. Podobnież mają się kwestie dotyczące wód terytorialnych, wyłącznej strefy ekonomicznej, morza otwartego itd. Jednak w przypadku uprawiania żeglugi na wodach terytorialnych każdorazowo podlega się prawu tego państwa, którego to są wody terytorialne. A tu już w szczegółach odnajdujemy często istotne różnice, tak jak różni się prawo w poszczególnych państwach, zwłaszcza gdy porównywać państwa odległe geograficznie, a tym bardziej państwa należące do różnych kultur prawnych.

Po piąte, państwo często deleguje część swych kompetencji władczych organizacjom pozapaństwowym, różnego rodzaju stowarzyszeniom, takim jak w Wielkiej Brytanii Royal Yacht Association czy w kraju Polski Związek Żeglarski. Ich zadania, w tym ustawowo określane, dotyczą nie tylko spraw związanych z organizacją sportu, co jest głównym zadaniem polskich związków sportowych. Na przykład PZŻ nadzoruje cały system uzyskiwania uprawnień żeglarskich, a także wydaje oficjalne dokumenty je potwierdzające. RYA jest uprawnione np. do prowadzenia szkoleń, egzaminowania i wystawiania certyfikatów radiowych.

Po szóste, powyższe należy uzupełnić regulacjami wewnętrznie obowiązującymi w związkach sportowych, czyli właśnie w Polskim Związku Żeglarskim, a także w międzynarodowych organizacjach żeglarskich, przede wszystkich w tych, które organizują międzynarodową rywalizację sportową, głównie na poziomie mistrzostw świata, a także w ramach ruchu olimpijskiego[1]. Czyli należy brać tu pod uwagę wszystkie te regulacje – zarówno prawne, jak i wewnątrzorganizacyjne, które wyznaczają ramy działalności związków sportowych i poszczególnych klubów sportowych (por. też Szydzik, 2018b). W tym kontekście pojawia się jeszcze jedno rozróżnienie – na żeglarstwo turystyczno-rekreacyjne i żeglarstwo sportowe, gdzie to ostatnie wiąże się bezpośrednio z rywalizacją sportową. Ta zaś jest doregulowana przez różnego rodzaju regulaminy regat, ogólne zasady danej dyscypliny itp.

3. Te wszystkie wątpliwości i pytania łączą się z postulatem oraz z pewnymi propozycjami dotyczącymi uporządkowania tytułowej materii. Odnosząc się do naukowej refleksji na ten temat w literaturze krajowej, należy nadmienić, że ukazały się trzy niezwykle interesujące i bardzo dobre prace prawnicze dotyczące żeglarstwa: *Morska i oceaniczna żegluga jachtowa w świetle prawa międzynarodowego publicznego* autorstwa Barbary Stępień (2013), a także *Prawo dla żeglarzy* autorstwa Bartosza Ziemblickiego (2015). Przede wszystkim w zakresie prawa morza zostało tam już bardzo wiele zrelacjonowane i uporządkowane. O ile pierwsza z tych prac dotyczy głównie prawa międzynarodowego (prawa morza), to druga, choć te zagadnienia w niej przeważają, jednak poszerzona jest o zagadnienia cywilnoprawne, sprawy dotyczące nie tylko żeglarstwa morskiego, ale i śródlądzia, poruszono w niej także szereg ważnych aspektów praktycznych. W końcu trzecią ważną publikacją na temat prawa żeglarskiego jest znakomita książka także Barbary Stępień (2016) pt. *Prawo międzynarodowe publiczne a bezpieczeństwo żeglugi morskiej*.

Obok tego znaleźć można również trochę artykułów, najczęściej o charakterze popularnonaukowym, pojawiających się w tzw. prasie fachowej, jak choćby w miesięczniku „Żagle" (Zeidler, 2012). W końcu, w wielu książkach na temat żeglarstwa, w tym w podręcznikach żeglarstwa, całkiem dużo uwagi poświęca się prawnym aspektom uprawiania żeglarstwa[2]. W końcu warto wspomnieć o zorganizowanym 18 kwietnia 2013 r. na Wydziale Prawa i Administracji Uniwersytetu Gdańskiego przez Koło Naukowe Prawa Sportowego UG i ELSA Gdańsk – przy okazji II Ogólnopolskiej Konferencji Prawa Sportowego „Sport pomiędzy reglamentacją a liberalizacją" – seminarium eksperckim „Prawno-organizacyjne problemy żeglarstwa w Polsce", w którym wzięli udział z jednej strony prawnicy zajmujący się tematyką prawa morza i prawa morskiego, z drugiej wielu ważnych

[1] Na ten temat referaty na konferencjach wygłaszała Aleksandra Szydzik: Szydzik (2017); Szydzik (2018a).

[2] Tu na polskim rynku wydawniczym prym wiedzie Oficyna Wydawnicza „Alma-Press".

przedstawicieli środowiska żeglarskiego w Polsce. Jednak wszystko to daje obraz bardzo rozproszonej i jakże zróżnicowanej i skomplikowanej materii.

W konsekwencji tego na Wydziale Prawa i Administracji Uniwersytetu Gdańskiego zrodziła się inicjatywa napisania książki pt. *Vademecum prawa dla żeglarzy*, mającej być praktyczną pomocą dla wszystkich żeglarzy, którzy jakże często gubią się w gąszczu złożonych przepisów prawnych, a dotyczących niebywale ważnych zagadnień, bo przecież w pierwszej kolejności związanych z bezpieczeństwem na wodzie. O pomyśle tym rozmawiałem jeszcze ze śp. dr. Krzysztofem Zawalskim, pomysłodawcą i współtwórcą oraz dyrektorem Narodowego Centrum Żeglarstwa przy Akademii Wychowania Fizycznego i Sportu w Gdańsku, a także z kpt. jacht. Kubą Jakubczykiem, który w 2012 r. zainicjował i współorganizował na Wydziale Prawa i Administracji UG pierwszą Ogólnopolską Konferencję Prawa Sportowego. To wówczas ten pomysł powstał i jest „drobnymi krokami" realizowany wspólnie z kpt. jacht. kmdr por. rez. Piotrem Ostrowskim.

Profesjonalne uprawianie danego rodzaju aktywności wymaga bowiem znajomości prawa. Także wtedy, gdy dany rodzaj aktywności nie jest naszą domeną profesjonalną, a jedynie rekreacją, wypoczynkiem, przygodą czy sportem, znajomość norm, które jego dotyczą, jest ze wszech stron pożądana. Do kanonu edukacji prawniczej należą łacińskie paremie: *ignorantia iuris non excusat* oraz *ignorantia iuris nocet*, czyli „nieznajomość prawa nie usprawiedliwia" oraz „nieznajomość prawa szkodzi". Bowiem w przypadku naruszenia obowiązujących norm prawnych nie można usprawiedliwiać się tym, że się nie wiedziało o ich istnieniu czy treści. Choć równocześnie nie ma obowiązku znać tych regulacji, to jednak jednym z podstawowych założeń każdego systemu prawnego jest kontrfaktyczne, choć powszechnie przyjmowane, założenie powszechnej znajomości prawa. Tym samym jego znajomość jest zwyczajnie korzystna dla osób zajmujących się danym rodzajem aktywności, w tym i żeglarstwem.

Celem refleksji nad prawem żeglarskim jest wprowadzenie w zawiłą problematykę normatywną dotyczącą uprawiania żeglarstwa. Ma to być pomocne przede wszystkim w praktyce, w sytuacjach zwyczajnych, jak i w sytuacjach nadzwyczajnych, wszelkiego rodzaju stanach zagrożenia i różnego rodzaju przypadkach i wypadkach, które nieodłącznie towarzyszą tej formie aktywności. Bowiem żeglarstwo to nie tylko sama przyjemność, to także wielka odpowiedzialność za zdrowie i życie ludzkie, a także za mienie – najczęściej znacznej wartości – które wykorzystywane jest w uprawianiu żeglarstwa. Z oczywistych względów wiele informacji jest osobom zajmującym się żeglarstwem powszechnie znanych. Jest to oczywiste wobec faktu, że nie można żeglować, ignorując przepisy dotyczące żeglowania. Ich znajomość jest podstawą uzyskiwania kolejnych stopni żeglarskich, a umiejętność ich zastosowania często decyduje nie tylko o przebiegu danego zdarzenia, ale także o jego dalszych konsekwencjach. Jakby tego było mało, sądzę, że większość osób nie zdaje sobie nawet sprawy z tego, jak wiele aspektów uprawiania żeglarstwa jest uregulowanych prawnie, zaś ogromna część ich wie-

dzy to w istocie wiedza na temat samego prawa. Jednak jest to najczęściej „wiedza nieuświadomiona", wiedza porozrzucana, fragmentaryczna, mająca charakter wybitnie aplikacyjny, a mająca swe źródło najczęściej w doświadczeniu. Głównym celem wykładu prawa żeglarskiego jest więc, z jednej strony, uświadomienie złożoności prawnych aspektów żeglarstwa, z drugiej zaś, ułożenie tej materii, uporządkowanie, doprecyzowanie, w końcu oparcie bezpośrednio na właściwych, obowiązujących i aktualnych aktach normatywnych.

Winien to być ni mniej, ni więcej w miarę uporządkowany wykład, na który składać się muszą węzłowe zagadnienia prawne związane z żeglarstwem. Niemniej jednak trudno jest wyczerpać obszerną materię prawa w żeglarstwie. Oczywiście można rzecz, że „chorobą zawodową" prawników jest normatywizowanie otaczającej ich rzeczywistości, patrzenie na nią przez pryzmat praw i obowiązków wynikających z treści obowiązującego prawa. Ale taka postawa jest w rzeczywistości korzystna nie tylko dla samych prawników, lecz także dla innych osób, które pragną świadomie i odpowiedzialnie uprawiać żeglarstwo.

Aby uzmysłowić sobie, jak szerokie są zagadnienia dotyczące żeglugi, warto sięgnąć choćby do aktów normatywnych dotyczących poruszanej tu problematyki. Są to również takie akty prawodawcze, które nie dotyczą wprost uprawiania żeglarstwa, ale dotyczą uprawiania żeglugi (*lex generalis*), której żeglarstwo jest szczególnym rodzajem (*lex specialis*). Często żeglarstwo jest wyłączone spod niektórych regulacji dotyczących żeglugi w ogólności. Choć równocześnie dotyczą go regulacje szczegółowe, które nie znajdują zastosowania dla żeglugi handlowej i pasażerskiej. Zazwyczaj jest jednak tak, że w przypadku żeglarstwa dochodzi do złagodzenia rygorów i wymogów, jakie dotyczą żeglugi w ogólności. Pamiętać jednak należy, że złagodzenie wymogów to nie ich wyłączenie ani rezygnacja z nich.

4. W tym miejscu, abstrahując już od spraw związanych z porządkowaniem prawa, warto przyjrzeć się i omówić pokrótce węzłowe problemy prawa żeglarskiego – czyli te zagadnienia, które pozostają kluczowe w żeglarstwie, a które zostały znormatywizowane tak na poziomie prawa krajowego, jak i często wcześniej na poziomie prawa międzynarodowego. Warto nadmienić, że o większości z nich jest choćby wspomniane w kodeksie morskim[3], choć swe uszczegółowienie zagadnienia te znajdują także w innych licznych aktach normatywnych.

Pierwszą, najogólniejszą kwestią jest ustalenie prawa właściwego, co łączy się z zagadnieniem terytorialnego obowiązywania prawa, i różnic treści obowiązującego prawa w różnych państwach na świecie. Wiąże się to z tym, że prawo danego kraju obowiązuje na terytorium tego kraju. Tym samym każdy, kto przebywa na terytorium Polski, winien przestrzegać prawa polskiego, nawet jeśli nie ma pojęcia o jego treści. Łączy się to ze wspomnianym wyżej kontrfaktycznym za-

[3] Zob. ustawa z dnia 18 września 2001 r. – Kodeks morski (Dz. U. z 2018 r., poz. 2175; dalej: k.m.).

łożeniem powszechnej znajomości prawa, w konsekwencji którego to założenia nikt nie może tłumaczyć się nieznajomością prawa, w sytuacji, gdy je naruszy. Pamiętać dalej należy, że nawet w ramach prawa krajowego – tu prawa polskiego – w sposób istotny różni się rygor prawny uprawiania żeglarstwa morskiego oraz żeglarstwa śródlądowego. Tylko częściowo te dwa rodzaje żeglarstwa – w warstwie prawnej – się spotykają. Zagadnienia żeglarstwa śródlądowego nie mieszczą się ani w kategorii prawa morskiego, ani w kategorii prawa morza. Co więcej – choć nie dotyczy to już problematyki terytorialnego obowiązywania prawa, a kwestii podmiotowych – różni się także rygor prawny uprawiania żeglarstwa profesjonalnego, zawodowego oraz rekreacyjnego, a także sportowego. Żeglując poza polskimi wodami terytorialnymi, należy jednak pamiętać o innych łącznikach, które decydują o tym, że prawo polskie także bardzo daleko od naszego kraju może nas obowiązywać – o łączniku bandery oraz o łączniku obywatelstwa.

Drugie zagadnienie szczegółowe dotyczy właśnie bandery. Bandera na jachcie to wymóg przepisów międzynarodowych oraz krajowych, które ukształtowane zostały na przestrzeni wieków i należąc do norm zwyczajowych, zostały później skodyfikowane. Podstawową funkcją bandery jest oznaczenie i okazanie przynależności państwowej statku. „Zgodnie z prawem międzynarodowym każdy statek handlowy, każdy okręt wojenny musi mieć przynależność państwową, a widomym tego znakiem jest bandera państwa, pod którą statek czy okręt uprawia żeglugę. Gdyby warunek przynależności państwowej nie został przez dany statek czy okręt spełniony, mogłyby one być uznane za jednostki pirackie, a w konsekwencji – zatrzymane, przy próbie ucieczki zaś nawet zatopione" (Koczorowski, Koziarski, Pluta, 1972, 9). Nie stawiając sprawy tak radykalnie, nie jest sprawą obojętną prawnie używanie bandery, a wszelkie, dość częste „zabawy" polegające na posługiwaniu się banderą, do której jacht nie ma prawa, lub brak bandery w prawnie wymaganych okolicznościach należy jednoznacznie skrytykować. Pewna dowolność dotyczy żeglarstwa śródlądowego, ale w przypadku korzystania z morza konieczne jest przestrzeganie przepisów obowiązującego prawa. Kluczowym pojęciem łączącym się z banderą na jachcie jest tzw. prawo bandery. Natomiast szczegółowe zagadnienia związane z oddawaniem honorów banderze na własnym jachcie oraz na innych statkach, a w szczególności okrętach wojennych, regulują normy zwyczajowe. Warto więc pamiętać, że o ile kluczowa jest tu regulacja prawna, to także normy ceremoniału morskiego i etykiety jachtowej mają zastosowanie. Z resztą te ostatnie mają zastosowanie w całym spektrum spraw dotyczących żeglarstwa, a co prawnie ważne, część zawartych tam norm współtworzy tzw. dobrą praktykę morską (zob. też Koczorowski, Koziarski, Pluta, 2008; Czajewski, 2009).

Trzecim zagadnieniem szczegółowym są uprawnienia i stopnie jachtowe. Aby uprawiać żeglarstwo, konieczne jest posiadanie wiedzy i określonych umiejętności, przy czym różne rodzaje żeglarstwa wymagają często bardzo różnych umiejętności. System weryfikowania umiejętności żeglarskich opiera się na stopniach

żeglarskich. Był on zmienny w czasie, w tym zmieniały się same stopnie. Ostatnie daleko idące zmiany zostały w prawie krajowym wprowadzone w 2013 r. – ułatwiając w konsekwencji dostęp do uprawiania żeglarstwa, co jednak z punktu widzenia bezpieczeństwa żeglugi wcale nie musi być oceniane pozytywnie.

Po czwarte, postacią centralną i najważniejszą na statku jest kapitan, rozumiany jako osoba dowodząca jachtem, nie zaś jako osoba posiadająca stopień kapitana jachtowego. Zgodnie z art. 53 § 1 k.m. kapitan sprawuje kierownictwo statku i wykonuje inne funkcje przewidziane przepisami. Zaś wszystkie osoby znajdujące się na statku obowiązane są podporządkować się zarządzeniom kapitana wydanym w celu zapewnienia bezpieczeństwa i porządku na statku (art. 53 § 2 k.m.). Kapitan musi mieć najszersze kompetencje, umiejętności, a także wiedzę w zakresie regulacji prawnych. Rozważań na temat obowiązków kapitana w literaturze żeglarskiej jest bardzo dużo i są one konsekwencją norm ogólnych dotyczących kapitana statku. Obowiązki ustawowe uzupełniają tzw. zasady dobrej praktyki morskiej, o której wspomnę jeszcze dalej, a także komentarze do niej w literaturze przedmiotu, jak np.: „Stwierdzenie, że każdy kapitan ma obowiązek znać zdolności manewrowe prowadzonej przez siebie jednostki, wydaje się truizmem, warto o tym jednakże od czasu do czasu przypomnieć" (Dziewulski, 2004, 139). Pokazuje to – choć tylko fragmentarycznie – jak obszerną wiedzą i umiejętnościami musi się wykazywać kapitan. Jest on odpowiedzialny niemal za wszystko, co wydarzy się na jachcie, zwłaszcza, jeśli będzie to zdarzenie powodujące uszczerbek na zdrowiu, a nawet śmierć osoby przebywającej na jachcie, jak również szkody materialne.

Po piąte, ważna jest też regulacja dotycząca innych członków załogi, a także osób przebywających na statku niebędących członkami załogi statki. Radykalnie inna jest sytuacja prawna, w tym prawa i obowiązku, osób wykonujących pracę na morzu[4], inna osób rekreacyjnie uprawiających żeglarstwo, jeszcze inna tzw. pasażerów, czyli osób przebywających na statku w drodze, ale niewykonujących czynności związanych z żeglugą. Łączy się to także bezpośrednio z zagadnieniem wymogów szkoleniowych dla członków załóg statków morskich, co wynika z metazasady bezpieczeństwa na morzu. Ta zasada, do której jeszcze nawiążę, jest uzasadnieniem i zarazem podstawą większości regulacji dotyczących uprawiania żeglugi, a co za tym idzie także żeglarstwa.

Po szóste, to, co dotyczy żeglugi, czyli statku w drodze, to prawo drogi, tzw. MPDM (międzynarodowe prawo drogi morskiej). Przepisy żeglarskie stanowią o tym, jak należy zachowywać się na wodzie oraz kto ma na wodzie pierwszeństwo – podobnie jak przepisy dotyczące ruchu drogowego. Jednym z najważniejszych zagadnień dotyczących żeglugi jest więc prawo drogi. Dotyczy ono

[4] Zob. szerzej: Konwencja o pracy na morzu, przyjęta przez Konferencję Ogólną Międzynarodowej Organizacji Pracy w Genewie dnia 23 lutego 2006 r. (Dz. U. z 2013 r., poz. 845) oraz ustawa z dnia 5 sierpnia 2015 r. o pracy na morzu (tekst jedn.: Dz. U. z 2018 r., poz. 616, ze zm.); na ten temat szeroko pisze Monika Tomaszewska.

pierwszeństwa jednego statku w stosunku do drugiego, gdy te znajdują się na kursie kolizyjnym. Zagadnienie to jest dziś szczegółowo regulowane prawnie, zaś podstawowym źródłem prawa w tym zakresie jest tzw. konwencja MPDM[5]. Mamy tu do czynienia ze szczególnymi regulacjami w przypadku statków na silniku i statków na żaglach. Można tu przykładowo przywołać następujące zasady: jednostka płynąca na żaglach ma pierwszeństwo przed jednostką płynącą na silniku. Jednak zasada ograniczonego zaufania dotyczy tego, że nawet jeśli ma się pierwszeństwo, nie należy go bezwzględnie egzekwować, ponieważ nie można mieć pewności, czy osoby prowadzące drugi statek znają zasady prawa drogi, a jeśli tak, to czy zamierzają się do nich zastosować. Lepiej bowiem, nawet mając pierwszeństwo, ustąpić, niż narażać siebie, załogę i jacht na uszczerbek. Oczywiście zasad tych jest znaczenie więcej i podlegają one dalszemu uszczegółowieniu oraz są uzupełniane komentarzami doktryny. Uzupełniają je także orzeczenia Izb Morskich w Polsce oraz w innych państwach innych organów, które orzekają w sprawach wypadków na morzu.

Siódmym doniosłym zagadnieniem jest bezpieczeństwo na morzu, a jeśli uwzględnić także żeglarstwo śródlądowe, to szerzej bezpieczeństwo na wodzie. Tu kluczowe znaczenie ma konwencja SOLAS[6], a w prawie krajowym ustawa z dnia 18 sierpnia 2011 r. o bezpieczeństwie morskim (tekst jedn.: Dz. U. z 2018 r., poz. 181, ze zm.), a także rozporządzenie Ministra Transportu, Budownictwa i Gospodarki Morskiej z dnia 28 lutego 2012 r. w sprawie bezpiecznego uprawiania żeglugi przez jachty morskie (tekst jedn.: Dz. U. z. 2016 r., poz. 1557). Kwestią podstawową jest z jednej strony odpowiednie przygotowanie jachtu do żeglugi, z drugiej właściwe przygotowanie osób mających uprawiać żeglugę. Z tym zagadnieniem wiąże się także kwestia przeciwdziałania zanieczyszczeniom morza przez statki[7].

Ósmym tematem jest regulacja w zakresie łączności na morzu, w tym sposobów jej prowadzenia, a także określonych uprawnień radiooperatora. Szczególnie ważne są tu uregulowane prawnie procedury dotyczące tego, w jaki sposób wzywać pomoc, wykorzystując w tym celu radio.

Zaraz za tym dziewiątą kwestią jest postępowanie w przypadku awarii lub wypadku na morzu. Zasada ogólna stanowi, że w przypadku awarii lub wypadku należy przede wszystkim ratować załogę, a w dalszej kolejności starać się nie powiększać szkód będących następstwem takiego zdarzenia. W przypadku poważnych wypadków, połączonych ze śmiercią, znacznym uszkodzeniem ciała, zatonięciem jachtu lub innymi szkodami materialnymi znacznej wysokości należy niezwłocznie zawiadomić właściwe organy. Prowadzący jacht winien przy-

[5] Zob. Konwencja w sprawie międzynarodowych przepisów o zapobieganiu zderzeniom na morzu z 1972 r., sporządzona w Londynie dnia 20 października 1972 r. (Dz. U. z 1977 r. Nr 15, poz. 61).

[6] Zob. Międzynarodowa konwencja o bezpieczeństwie życia na morzu, sporządzona w Londynie dnia 17 czerwca 1960 r. (Dz. U. z 1966 r., Nr 52, poz. 315).

[7] Zob. ustawa z dnia 16 marca 1995 r. o zapobieganiu zanieczyszczenia morza przez statki (tekst jedn.: Dz. U. z 2017 r., poz. 2000).

gotować szczegółowy opis zdarzenia, wraz z godziną, datą, miejscem zdarzenia, jego przebiegiem, przyczynami i skutkami oraz z niezbędną dokumentacją, w tym zdjęciową. Wskazać tam również należy osoby uczestniczące w zdarzeniu, członków załogi, a także ewentualnych świadków. Po wypadku nie należy tarasować szlaku żeglownego. Tym samym należy – jak to tylko stanie się możliwe – usunąć jachty uczestniczące w wypadku. Warto przywołać tu następujące spostrzeżenie: „Z lektury »Prawa i Orzecznictwa Morskiego« wyłania się dość ponury obraz jachtu, na którym po utracie członka załogi prowadzono poszukiwania w sposób chaotyczny i w rezultacie bezskuteczny. Brak zapisów czasu, prędkości, drogi jachtu, jak też nienanoszenie pozycji jednostki na mapę zwykle powoduje, że ustalenie już po godzinie dokładnej pozycji ratowanego oraz samego jachtu staje się praktycznie niemożliwe" (zob. Dziewulski, 2014, 200).

W związku z powyższym punktem, ale także wcześniej podnoszonymi, pozostaje szerokie zagadnienie ratownictwa morskiego – czyli punkt dziesiąty.

Jedenastym doniosłym problemem prawnym jest odpowiedzialność za wszelkie zdarzenia na morzu, zwłaszcza za wypadki. Ważne jest też, aby poza udokumentowaniem szkody, nie podejmować naprawy uszkodzonego jachtu przed dokonaniem oględzin i wykonaniem dokumentacji przez przedstawiciela ubezpieczyciela. Trzeba też podjąć działania mające na celu zapobieżenie powiększenia szkody. W tym punkcie warto również wspomnieć o Izbach Morskich[8] i Państwowej Komisji Badań Wypadków Morskich[9].

W końcu zaś po dwunaste, cywilnoprawnym zagadnieniem jest kwestia ubezpieczenia – jachtów, ale też może to dotyczyć ubezpieczania osób, w tym także ubezpieczenia od odpowiedzialności cywilnej sternika.

5. Oczywiście lista ta, obejmująca najważniejsze w praktyce regulacje prawne, jest otwarta i tak można ją poszerzać o inne jeszcze zagadnienia dotyczące żeglarstwa, jak i uszczegóławiać w ramach punktów wyżej wskazanych. Na samym końcu należy podkreślić, że chyba w każdym z wyżej podniesionych zagadnień możemy mieć do czynienia z koniecznością wyjścia poza system prawny dzięki generalnej klauzuli odsyłającej do dobrej praktyki morskiej (zob. Zeidler, Ostrowski, 2014). To zagadnienie pozwala uzmysłowić sobie, że w ramach prawa żeglarskiego można wyodrębnić cały zespół zagadnień teoretycznych, których opracowanie pozwoli stworzyć teorię prawa żeglarskiego.

Wszystko to pokazuje jak bardzo złożoną, wieloaspektową, lecz zarazem fascynującą materią jest prawo żeglarskie. W żadnym razie nie jest to gałąź prawa, tak jak gałęzią prawa nie jest prawo turystyczne czy prawo sportowe. Jest to jednak wyodrębniona ze względu na przedmiot regulacji, a w tym rodzaj i charakter działalności żeglarzy, dziedzina prawa, która w pierwszej kolejności ma

[8] Zob. ustawa z dnia 1 grudnia 1961 r. o izbach morskich (tekst jedn.: Dz. U. z 2016 r., poz. 1207).

[9] Zob. ustawa z dnia 31 sierpnia 2012 r. o Państwowej Komisji Badania Wypadków Morskich (tekst jedn.: Dz. U. z 2018 r., poz. 925, ze zm.).

służyć zapewnieniu bezpieczeństwa osób na wodzie. Ów nakaz ma charakter zasady prawa, a w ramach dziedziny, jaką jest prawo żeglarskie, jest to metazasada. I właśnie ona jest uzasadnieniem oraz podstawą większości regulacji dotyczących uprawiania żeglugi, a co za tym idzie także żeglarstwa. W końcu należy podkreślić, że regulacje dotyczące uprawiania żeglugi mają charakter *lex generalis*, a te dotyczące uprawiania żeglarstwa to *lex specialis*.

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SAILING LAW – A QUESTION ABOUT THE STATUS OF THE DISCIPLINE AND THE RESEARCH PROGRAM

The traditionally established divisions of law are currently subject to modification occurring in line with the phenomenon of regulating more and more human activities. While the division between public and private law, as well as the catalog of legal branches is still quite stable, more specific areas of law are visible, indicated mostly according to their subject. Sailing law (also called boating law) is the case.

The collectivity of norms regulating offshore sailing is most often referred to as maritime law (*lex generalis*), and it covers norms regulating sailing, i.e. sailing law (*lex specialis*). However, sailing is subject to very complex and heterogenous regulations. The article lists the most significant legal provisions in practice. More aspects of sailing can be included and specified as indicated in the article.

Each aspect mentioned above may require going beyond the legal system due to the general clause referring to the best maritime practices. This helps us to realize that sailing law can be divided into sets of theoretical aspects pertaining to the creation of the theory of sailing law.

It all reflects the complexity and beauty of sailing law. It is not a branch of law. However, due to the subject of its applicability and the specificity of sailors, it is an area of law ensuring safety on the water. This precaution has the nature of a legal principle justifying and being the basis for most of the regulations applicable to maritime transport, therefore, also sailing.

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