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ROMAN ANTECEDENTS OF THE PRESENT-DAY USE OF RIVER SHORES AND MARGINS IN SPAIN*

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I. INTRODUCTION

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We know that Roman law did not recognize, as we do today, the general category of servitudes[1] nor what have come to be

[1] However, as BIONDI, B. observes, *Las servidumbres*, trans. into Castilian from the original Italian edition (*Le servitù*, Milano, 1967), annotated extensively from Spanish common law by JOSÉ MANUEL GONZÁLEZ PORRAS, Madrid, 1978, pp. 14-15, the doctrine of easements or servitudes derives from Roman law, entering modern law via the Romanist tradition, which has not modified the structure of the institution. As such, the doctrine has survived not only the technical language but also the structure of this law. It should be stressed that in this monumental work the Italian Romanist presents the structure and discipline of *servitutes*, which, notwithstanding the legislative innovations that have overtaken them in the course of the intervening centuries, present the markedly linear and coherent character that characterised them under Roman law. Similarly, GONZÁLEZ PORRAS, in BIONDO, *Las servidumbres*, cit., reminds us that "Roman law did not provide us with a definition of *servitute*, nor did it hold any abstract idea of the term, that might house a varied content in accordance with the will of the parties, rather it simply offered a series of types or 'figures'; however, it elaborated a series of fundamental principles that have served since then, in keeping with ancient tradition, to give us the most accurate idea of the meaning and significance of the institution. Principles which, elevated to the category of true axioms, have entered most present-day legal systems (cf. LONGO, C., *La categoría delle servitutes nel Diritto romano classico, BIDR*, 11 (1898)". Vid. MANZANO, A., recens. BIONDO BIONDI, *Las servidumbres*, cit., *Revista Crítica de Derecho Inmobiliario*, 677 (May-June, 2003) pp. 1941-1951.

known as "legal servitudes"[2]; but, as credited by various sources, Roman law did *ex lege* recognise certain restrictions on the private ownership of immovable property[3], be it for reasons of private interest, that is, of neighbourly relations, or for reasons of public interest[4] and referred to, therefore, specifically

[2] BIONDI, *ibidem*, p. 1319, notes that according to secular tradition, dating back to the *Corpus Juris* and extending to include 19th century codes and scholars of civil law, the legal limitations on ownership have been referred to as servitudes, to which the adjective "legal" has been added to indicate that the relationship emanates directly from the law. This terminology has its own history, which the aforementioned author recalls, briefly on pp. 1319-1322. On legal servitudes in Roman sources and, especially, in the Justinian Law, vid. BRUGI, B., *Studi nella dottrina romana delle servitù prediali, Archivio Giuridico*, 25 (1880) pp. 321 ff.; 27 (1881) pp. 145 ff.; 29 (1883) pp. 521 ff.; 32 (1884) pp. 206 ff.; and 33 (1884) pp. 237 ff.; BIANCHI, F., *Trattato della servitù legali nel diritto civile italiano,* vol. 1, Lanciano, 1888.

[3] According to CORBI, L., *Origen de la propiedad romana y de sus limitaciones, Proyecto social: Revista de relaciones laborales*, 2 (1994) pp. 83-94, p. 87: "The legal limitations recognised by Roman law, that is, those whose origin lie in the law and that are entirely independent of the will of the parties, affected almost exclusively property and slave owners". The same claim was made earlier by BONFANTE, P., *Istituzioni di Diritto romano*, Milan, 1987 (reimpr. of the 10th ed.), p. 256; and BIONDI, *Istituzioni di Diritto romano*, Milan, 1972 (reimpr. of the 4th ed.), pp. 268-269.

[4] Full ownership rights in Roman law did not exclude, therefore, possible limitations of the owner's powers, the oldest manifestations of which, according to BONFANTE and BIONDI (id. n. 3), were established to

by Romanists as the "limitations of public law"[5], although under no circumstances could these be classified as *servitutes*[6].

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protect property in relations between neighbours. However, they were subsequently extended *ex lege* as new social needs arose, above all in areas of relevance to the community, including agriculture, urban planning, hygiene and aesthetics. For SCAPINI, N., *I limiti legali della proprietà nell'evoluzione storica del Diritto romano*, Parma, 1998, p. 9, at least after the *Leges Duodecim Tabularum*, the absolute dominion with which individual ownership rights were identified in the Archaic period encountered certain limits of a sacral or legal-religious character; limits that multiplied in the periods that followed, above all, in the Lower Empire and later in the Justinian Law. I concur with the author, *ibidem*, that the extensive and varied number of constraints imposed by the legal system on *dominium* is, in the light of the sources, irrefutable and that they should, therefore, be taken into consideration when addressing the problem of the definition of property rights.

[5] In this regard, cf. SCAPINI, *I limiti legali della proprietà*, cit., p. 12; TOMÁS, G., *La servidumbre en interés general de la navegación. Un análisis histórico, Estudios jurídicos en memoria de José María Lidón*, Juan I. Echano Basaldúa (coord.), Bilbao, 2002, pp. 1323-1343, p. 1325 (= *Limitations à la propriété riveraine et libre navigation fluviale, RIDA*, 48-3rd Series (2001) pp. 361-372, p. 362).

[6] Cf. AZNAR, R., *Navegación fluvial y limitaciones del dominio en el reino de Valencia, Historia de la propiedad. Servidumbres y limitaciones del dominio. VI. Encuentro interdisciplinar. Salamanca, 17-19 September 2008*, coord. Salustino de Dios, Javier Infante, Ricardo Robledo, Eugenia Torijano, Madrid, 2009, pp. 331-350, p. 332. BIONDI, *Las servidumbres*, cit., p. 1321, after noting that in the legislative language of the post-classical and Justinian era the term

It would seem to me that SCAPINI is right when he claims that under Roman law, unlike modern law, it was conceptually inconceivable for property to have a public or social function[7], because as BONFANTE shows property would have been considered the maximum expression of the independence of the citizen owner and, therefore, what today are known as the "limitations of public law" of private ownership can only be classifiable if they are understood as constraints established in the interests of the community that prevail, exceptionally, over the interests of the individual, for political, social, economic or even ethical-religious reasons. The absolute freedom which, as a rule, the owner enjoyed in relation to the material use of the object and which was made concrete, according to the definition of the mediaeval jurists in a *ius utendi et abutendi*, shows that what today is known as the "social or public function of property"[8] was totally alien to Roman legal

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servitutes was used to refer to certain limitations of ownership (in particular, those involving neighbourly relations), point out, however, that these texts, starting with the *glossa*, are considered by the critics to have been appended.

[7] As SCAPINI states, *op. cit.*, p. 11, the modern doctrine of civil law, in relation to the principle that "property always has a public function" (as sanctioned by the Italian Civil Code and the Constitution), finds in the limitation of property rights in the interests of the public the means for making this public goal effective.

thinking, with the result that only a community interest (identified in modern terminology in terms of the State) could lead to the "legal system" establishing significant limitations on the private ownership rights of property and, to a lesser extent, on those of movable assets[9].

The aim of this study is simply to corroborate, in the light of the texts, that current legal regulations in Spain governing the use of river shores and margins[10] constitute, in general, and with certain qualifications, a coherent manifestation of the essence of Roman law for new regulations[11].

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[8] Art. 33 of the 1978 Spanish Constitution, after recognising the right to private property and inheritance, provides in section 2 that "The social function of these rights shall determine the limits of their content in accordance with the law". On the meaning and scope of the social function of property, *vid.* NOGUERA DE LA MUELA, B., *Las servidumbres de la Ley de Costas de 1988*, Madrid, 1995, pp. 69-86, and the extensive bibliography cited therein; COLINA, R., *La función social de la propiedad en la constitución española de 1978*, Barcelona, 1997, as well as the extensive bibliography on the subject.

[9] SCAPINI, *I limiti legali della proprietà*, cit., p. 12.

[10] Art. 553. 1 of the 1889 Civil Code; the 2001 Consolidated Water Act (*Texto refundido de la Ley de Aguas*) and the 1986 Publicly Owned Water Regulations (*Reglamento de Dominio Público Hidráulico*). Vid. modifications to these two legal texts in ns. 69 and 70, respectively.

However, before presenting what constitutes *per se* the aim of this study, I believe it interesting to make some general observations, which, in my opinion, will allow us to assess, more rigorously, the role played by Roman law in the current configuration of the subject that concerns us here.

The first thing to note is that in the Roman law of the classical period, not even the limitations on ownership that regulated the neighbourly relations for private interests were classified as *servitutes*[12]. Ultimately, what prevented the classical jurists from any attempt at framing the "legal limitations of ownership" as *servitutes* was the different structure presented by each of these specific limitations in relation to each other and to the *servitutes*, reflected in the judicial protection afforded them[13]. While the *servitutes* constitute a precise legal category, to the point of allowing a general concept to be constructed, with precise contours and a well-defined structure[14], the legal limitations of

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[11] Cf. ALBURQUERQUE, J. M., *Las orillas de los ríos públicos en Derecho Romano: tratamiento interdictal y jurisprudencial (D. 43, 12, 1, 5), Derecho y opinión*, Universidad de Córdoba, 9 (2001) pp. 163-173, p. 170.

[12] In the compilation of Justinian, as confirmed by the Institutions, the Digest and the Code, the limitations of ownership were systematically excluded from the rubric of "*de servitutibus*".

[13] BIONDI, *Las servidumbres*, cit., pp. 1319-1320.

ownership, including those associated with neighbourly relations, are so heterogeneous and have such a diverse legal regulation, that their systematisation as a general concept is a very difficult task[15]. Therefore, we must conclude, in line with BIONDI, that the Romans did not recognise a unitary system or any collective name to designate what we now refer to as the "legal limitations of ownership[16]".

The subsequent confusion between praedial servitudes and other restrictions on the ownership of land has as its starting point, according to various scholars, the tendency consolidated in Justinian law to extend the consideration of *servitutes* to certain limitations of ownership of a non-conventional origin that involve a relationship between properties and which have a similar structure to genuine *servitutes;* limitations that will eventually be classified as "legal easements or servitudes". A category that the doctors of the *Ius commune* collect and expand, given that they contain all the legal limitations of ownership,

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[14] Vid. BIONDI, *ibidem*, pp. 10-24, in this regard.

[15] BIONDI, *op. cit.*, p. 1320. The author states, on p. 1321, that each limitation differs from the next in terms of its structure, object, purpose and what it protects and, therefore, he claims that the diversity of these limitations means that in the works of jurists there is no trace of any systematisation or any attempt at denominating them as a single category.

[16] BIONDI, *Las servidumbres*, cit., p. 1321.

including many figures quite removed from the *servitutes*, and which find continuity in subsequent doctrine and legislation[17]. Thus, traditional doctrine erroneously classified many of the limitations of ownership imposed *ex lege* as "legal servitudes", limitations which, however, as I noted above, Roman law did not consider to be *servitutes*, as their structure was quite different. Evidence of this is provided by the owners of riparian properties, whose ownership rights were limited by the law on grounds of public interest, obliging them to suffer all that is necessary to ensure the public *usus* of the river and its banks. Indeed, the classical Roman jurists are very clear that this relationship between use and ownership has nothing to do with the structure of the servitudes, since they lack, among other things, the first of their assumptions, the relationship between

[17] BERMEJO, M. A, *Limitaciones de dominio y servidumbres prediales en los siglos medievales, Historia de la propiedad. Servidumbres y limitaciones del dominio, VI. Encuentro interdisciplinar. Salamanca, 17-19 September 2008,* coord. Salustino de Dios, Javier Infante, Ricardo Robledo, Eugenia Torijano, Madrid, 2009, pp. 13 ff., p. 60. On p. 78, the author holds that this whole legal edifice built up around the institution of *servitutes*, and perfectly articulated in classical law, must have entered into crisis during the post-classical era, victim, above all, to the effects of popularisation. In his view, this new situation is reflected in the tendency to consider what are merely limitations of ownership as *servitutes.* BIONDI, *id.* n. 16, as I pointed out previously in n. 6, stresses, however, that the post-classical and Justinian texts that would come to confirm this trend, starting with the *Glossa*, are considered by the critics as having been appended.

two estates or properties, and this is sufficient grounds not to mix different institutions under the same heading[18]. As such, contemporary doctrine has in part rejected the category of legal servitudes[19], despite the fact, as we shall see, that the Spanish Civil Code continues to use it to describe a series of cases that do not in reality fall under this heading[20].

This confusion between legal servitudes and *ex lege* limitations of ownership, lying outside Roman law and yet one of the most controversial questions of doctrine in the vast field of servitudes and easements, inevitably falls beyond the scope of this study and, therefore, all I wish to emphasize at this point is that, ultimately, what allows or would allow us to qualify certain limitations of ownership as legal servitudes are certain analogous structures, that is, those that fully respond to the right one estate has over another with regard to the use or enjoyment of that estate, since this is the essence of servitudes, independently of whether they are based directly on the law or the will of man[21].

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[18] BIONDI, *Las servidumbres*, cit., p. 1343 draws a similar conclusion.

[19] BIONDI, *ibidem,* p. 1344.

[20] Vid. *infra*, epigraph III. Art. 553.1 of the Spanish Civil Code and the water acts in relation to the use of the river shores and the river margins.

[21] Cf. BIONDI, *op. cit.*, p. 1323.

The discussion up to this point acquires sense if we bear in mind that the aim of this study, as the title suggests, is to examine the so-called legal limitations on ownership rights attributable to public interests or, more specifically, the restriction imposed on owners of riparian properties by virtue of which they must suffer all that is necessary to ensure the public *usus* of the river and its banks[22], which means, *in fine*, as we shall see, a restriction that affects a specific area of their riparian property, that is, the zone adjoining the public river, forming part of its banks and referred to in the texts as the *ripae*.

II. ROMAN LEGAL SYSTEM GOVERNING THE PUBLIC RIVER BANKS[23]

[22] In this regard, cf. VOLTERRA, E., *Instituciones de Derecho privado*, trans. into Castilian by Daza Martínez, Madrid, 1986, p. 319, and the authors cited in *id*. p., n. 5. However, for BONFANTE, *Corso di Diritto romano. La proprietà,* II-1º, Roma, 1926, p. 261, only the Justinian system suggests that the *usus publicus riparum* is a legal limitation on ownership.

[23] It is widely understood that the major rivers that carry commercial and passenger traffic were considered public. On the distinction between public and private rivers, which is alluded to in D. 43, 12, 1, 3 *Ulp. 68 ad ed*., vid. among others, BURDESE, A., v. *"Flumen", NNDI* (1957) pp. 414-416; and ASTUTI, G., v. *"Acque", ED,* I (1958) pp. 346-387, pp. 350-351. In short, as TOMÁS observes in *La servidumbre en interés general de la navegación,* cit., p. 1325, n. 5, the interest in this distinction lies, above all, in the application of the interdicts *de fluminibus,* applied only to public rivers.

2. 1. Some conceptual clarifications

The overall goal of this study *per se* requires, as a preliminary measure, that we seek to determine an accurate definition of the term *ripae* as used in Roman law; that is, we need to identify, as far as it is possible, the geological zone (or frame) to which this term refers, without overlooking the fact that Spanish doctrine in general translates it indistinctly as the *orillas* (river banks) or *riberas* (river shores)[24]. The primary sources themselves offer two definitions, one provided by ULPIAN, in D. 43, 12, 1, 5 *68 ad ed.*, and the other by PAULUS, in D. 43, 12, 3, 1 and 2 *16 ad. Sab.*, although ALBURQUERQUE warns us of the problem that

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Likewise, on the interdictal protection of the public rivers and their banks, vid. LAZO, P., *El régimen jurídico de las aguas y la protección interdictal de los ríos públicos en el Derecho Romano, Rev. Estud. Hist.-Jurid.,* 21 (1999) pp. 65-74; ALBURQUERQUE, *Las orillas de los ríos*, cit., pp. 171 ff.; *id. La protección o defensa del uso colectivo de las cosas de dominio público: especial referencia a los interdictos de publicis locis (loca, itinere, viae, flumina, ripae)*, Madrid, 2002, and *El cauce y las orillas de los ríos públicos en Derecho Romano. Visión interdictal y jurisprudencial (D. 43, 12, 1, 7 and D. 43, 12, 1, 5), Anuario da Facultade de Dereito*, 7 (2003) pp. 37-61.

[24] However, Art. 553. 1 of the Spanish Civil Code and prevailing regulations relating to water differentiate "*las riberas de las orillas o márgenes del río*" ("the shores from the banks and the margins of the river", which is why here I choose to translate the word *ripae* with "banks".

can arise when comparing, in principle, the legal duality with respect to this concept[25].

In accordance with the foregoing, I turn now to examine the above cited texts in which *ripa* is defined.

In D. 43, 12, 1, 5 *Ulp. 68 ad ed.* we read:

Ripa autem ita recte definietur id, quod flumen continet naturalem rigorem cursus sui tenens: ceterum si quando vel imbribus vel mari vel qua alia ratione ad tempus excrevit, ripas non mutat: nemo denique dixit nilum, qui incremento suo aegyptum operit, ripas suas mutare vel ampliare. Nam cum ad perpetuam sui mensuram redierit, ripae alvei eius muniendae sunt. Si tamen naturaliter creverit, ut perpetuum incrementum nanctus sit, vel alio flumine admixto vel qua alia ratione, dubio procul dicendum est ripas quoque eum mutasse, quemadmodum si alveo mutato alia coepit currere.

ULPIAN, at the beginning of this extract, defines a *ripa* as that which contains the river in its 'natural rigour', that is, the normal flow of the river current[26]. In short, when the jurist

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[25] ALBURQUERQUE, *Las orillas de los ríos*, cit., p. 163.

[26] As we are reminded by FERNÁNDEZ DE BUJÁN, A., *Derecho Público Romano y recepción del Derecho Romano en Europa,* 5th ed., Madrid, 2000, pp. 270 ff (= *Derecho Público Romano. Recepción, jurisdicción y arbitraje*, 15th ed., Madrid, 2012), the academic output on this subject is considerable,

writes *quod flumen continet naturalem rigorem cursus sui tenens,* he refers to what is strictly speaking the limit of the river bed (that is, the terrain covered by the river's normal course) and which in Spanish might be referred to as *ribera* (river shore)[27]. He goes on to distinguish between two possibilities depending on whether the rise in water level is extraordinary or seasonal, or on the contrary, it is natural and permanent, in order to highlight the various consequences that the swelling of the river might have for its banks.

In the first case, that is, when the rise in the water level is seasonal, either because of rains, the tides, or for any other reason, ULPIAN concludes that *ripas non mutat*[28]. In support of this conclusion he gives the following example of flooding resulting form the swelling of a river: Thus, no one ever said that the Nile -*nemo denique dixit nilum*-, which covers Egypt with

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although for our purposes here, reference should be made to the bibliography cited by ALBURQUERQUE, *Las orillas de los ríos*, cit., on p. 164, n. 2.

[27] Note, in this sense, that the 2001 Consolidated Water Act (Art 4= Art. 4 of the 1986 Publicly Owned Water Regulations), defines *cauce* (river bed), that is, the bed or natural stream bed of a continuous or discontinuous current as "the land covered by water under maximum normal rises"; and the *riberas* (shores) (Art. 6= Art. 6 of the aforementioned Regulations) as "the lateral fringes of public river beds situated above the low water level …"

[28] In this sense, vid. also D. 43, 12, 1, 9 *Ulp. 68 ad ed.*

its flood waters -*qui incremento suo aegyptum operit*-, changes or enlarges its banks -*ripas suas mutare vel ampliare*-, because when it recovers its normal size -*Nam cum ad perpetuam sui mensuram redierit*-, the banks of the river bed should be repaired -*ripae alvei eius muniendae sunt*. However, in the second case contemplated in the text, if the rise in the water level is natural, and the river growth is permanent, because the waters of another river now feed into it, or for some other cause, then we would undoubtedly have to conclude, in the words of ULPIAN, that the *ripas mutasse*, just as if, having changed its river bed, it begins to flow elsewhere.

Likewise, PAULUS, in D. 43, 12, 3, 1 and 2 *16 ad Sab*, defines *ripa* in the following terms:

Ripa ea putatur esse, quae plenissimum flumen continent (1). Secundum ripas fluminum loca non omnia publica sunt, cum ripae cedant, ex quo primum a plano vergere incipit usque ad aquam (2).

The jurist, after affirming in D. 43, 12, 3, 1, that he considers the banks to be the lateral confines of the river when its waters have risen to their highest point, warns, however, in D. 43, 12, 3, 2, that not all the terrain adjoining the banks of the river are public, because these terrains only form part of the river bank from the point that the plain slopes down towards the water[29].

[29] For ALBURQUERQUE, *Las orillas de los ríos*, cit., p. 165, this explicit, brief definition offered by PAULUS appears to be clearer.

The reading of these extracts allows us to note that PAULUS first, in common with ULPIAN, defines the *ripae* by referring to the course of the river delimited by the lateral confines of the river bed, although, in so doing, he alludes to the maximum flood level of the watercourse[30], and that, secondly, PAULUS also fixes the spatial limits (or the zone of terrain) specifically occupied by the river banks[31], a matter of great importance for the purposes of determining, in accordance with the object of study, which part or strip of terrain adjoining the public river is referred to in the sources as being of *usus publicus riparum*.

Thus, a comparison of the two definitions highlights that while ULPIAN refers to the *ripae* as that which contain the river's natural or normal watercourse *-quod flumen continet naturalem rigorem cursus sui tenens-*, PAULUS takes into account the river's highest water level *-quae plenissimum flumen continent-*. However, this does not, I believe, mean that the jurists' statements cannot be reconciled and that we are, therefore, faced by a legal contradiction with respect to the concept of the *ripae*.

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[30] Vid. *supra*, n. 27.

[31] In a similar vein Art. 6 of the 2001 Consolidated Water Act (= Art. 6 of the 1986 Publicly Owned Water Regulations) defines the *márgenes* (margins) of the river as "the lands that border the riverbed …"

SCHERILLO[32] points out that ULPIAN in establishing the natural water level as his general criterion did not do so thinking in a normal and permanent rise in the river's water level, but rather thinking of a flood, as, I believe, the jurist makes clear in the extract cited[33], whereas PAULUS was obviously not thinking of a flood, but rather a normal, seasonal rise in the water level[34]. Likewise ALBURQUERQUE[35], after acknowledging that the discrepancy exists, although that it could be considered less relevant were we to share the stance taken by SCHERILLO, admits, however, that the contradiction would not have been so evident when the compilers included the texts under the same heading[36]; and that, therefore, it can be

[32] *Lezioni di Diritto romano. Le cose*, Milano, 1945, p. 114.

[33] D. 43, 12, 1, 5 *Ulp. 68 ad ed.:… ceterum si quando vel imbribus vel mari vel qua alia ratione ad tempus excrevit, ripas non mutat: nemo denique dixit nilum, qui incremento suo aegyptum operit, ripas suas mutare vel ampliare. Nam cum ad perpetuam sui mensuram redierit, ripae alvei eius muniendae sunt.*

[34] In this sense, as noted, the 2001 Consolidated Water Act (Art 4 = Art. 4 of the 1986 Publicly Owned Water Regulations), defines *cauce* (river bed), as follows; "The bed or natural stream bed of a continuous or discontinuous current is the land covered by water under maximum normal rises".

[35] *Las orillas de los ríos*, cit., p. 166.

said that it was PAULUS who based his definition on a normal rise in water level, although he used the phrase *quae plenissimum flumen continent*, and not on an extraordinary flood event.

The *ripae*, as defined by ULPIAN, raises a dual problem: on the one hand, as they coincide, largely, with the limits of the river bed[37], that is, with what today is referred to as the shores of the river[38], their true limits are virtually imperceptible; and, on the other, as a result of this, a difficulty arises from the actual use of *ripae* defined in this way, as the most usual condition is that the terrain that contains the watercourse is always covered by the water. PAULUS, in contrast, by considering a *ripa* to include all the strip of land occupied by the slope of the land as it descends to the water, recognises that it occupies a greater area, regardless of the fact that the maximum rise in water level might expand or reduce this terrain[39].

Thus, in line with the preceding discussion it can be seen that the excerpts examined allow us to fix the limits of the terrain

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[36] D. 43, 12. *De fluminibus. Ne quid in flumine publico ripave eius fiat, quo peius navigetur.*

[37] Vid. n. 34.

[38] Vid. the definition of *ribera* (shore) in n. 27.

[39] Cf. ALBURQUERQUE, *Las orillas de los ríos*, cit., p. 166.

occupied by the banks of the public rivers. For ULPIAN these would be the inner limits, while for PAULUS they are the outer limits, so that between the two we might identify the existence of a strip of land that can be said to constitute technically the *ripa*[40]. However, I believe that, in line with ALBURQUERQUE, in order to define this strip or area of land, we do not have to combine the two legal opinions, since, in accordance with *communis opinio*, it can be inferred that the interpretation offered by PAULUS is clearly much closer to reality[41].

Finally, the definition of PAULUS would indicate *per se* that the banks of the public river are that part of the terrain that slopes down to the water level and which confines the river to its normal or ordinary course, and, therefore, that they include that strip of a riparian property that occupies this part of the terrain.

2. 2. The *usus publicus riparum*[42]

Having clarified the geological frame or zone occupied by the banks of the public rivers, based on a close reading of the legal

[40] Cf. among others, GROSSO, G., *Corso di Diritto romano. Le cose*, Torino, 1941, p. 141; and SCHERILLO, *Lezioni di Diritto romano. Le cose*, cit., p. 114.

[41] ALBURQUERQUE, *id*. n. 39.

[42] In this section I use the term *ripa* with its technical sense, that is, as the strip of terrain adjoining the river.

texts cited, I can now proceed to examine the legal regime that, in the final instance provides, as we shall see, for the *usus publicus riparum*, of which these texts speak, a legal limitation on the ownership of riparian properties.

Roman jurists accepted without discussion the freedom to navigate and fish on large public rivers. This freedom implied the recognition of the public use of the river and of its river banks – ancillaries to the fluvial channel – in order to ensure that such essential economic activities as river navigation (a fundamental mode of transport both for people and goods) and fishing, could be conducted without obstacle, which, in theory, the private individual, the riparian landowner, could impose by way of his *dominium*[43]. This general use of rivers, as well as of their banks, was defended via the *actio iniuriarum*[44] and the so-called interdicts of *fluminibus* (D. 43, 12-15)[45], with the ultimate

[43] SCPAPINI, *I limiti legali della proprietà*, cit., p. 55. On the Roman protection of the free navigation of the rivers, vid. BONFANTE, *Corso di Diritto romano*, II-1ª, cit., pp. 72-89; COSTA, E., *Le acque nel diritto romano*, Bologna, 1919; BURDESE, v. "*Flumen*", cit., pp. 414-416; ASTUTI, v. "*Acque*", cit., pp. 346-387; ROBINSON, O., *Ancient Rome, City planning and administration*, London-New York, 1992.

[44] Vid. the texts cited by TOMÁS, *La servidumbre en interés general de la navegación,* cit., p. 1325, n. 8.

goal of protecting, first and foremost, fishing and navigation. In addition to these legal mechanisms, as THOMAS highlights, at the beginning of the Empire a special custodianship (*curatores aquarum et riparum*) was created, whose role was to guard the river banks, to take the requisite measures during the floods that often affected the *ripae*, to clean and guarantee the public use of the river and its banks and, in short, to keep waterways free and unobstructed[46].

It is unquestionable, as becomes clear from the sources, that ownership of the river banks, although belonging to the owners of the riparian properties, could constitute a limitation to the public use necessary to satisfy the needs, above all, of navigation and fishing. The texts, therefore, qualify the *usus publicus riparum* as a "limitation of public law" or, what amounts to the same, as a restriction imposed by the law, on the grounds of public interest, on the ownership of riparian landholders, that is, on properties that include the river banks

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[45] Vid. ALBURQUERQUE, *Las orillas de los ríos*, cit., pp. 166 ff., and the bibliography therein; LAZO, *El régimen jurídico de las aguas*, cit., pp. 65 ff.; TOMÁS, *ibidem*, sources and bibliography cited on pp. 1325-1326, ns. 9-12.

[46] TOMÁS, *op. cit.*, p. 1326. On the *cura Tiberis*, vid. HOMO, L., *Rome impériale et l'urbanisme dans l'Antiquité*, Paris, 1951-1971, pp. 244-245; LE GALL, J., *Le Tibre. Fleuve de Rome dans l'Antiquité*, Paris, 1953; and ROBINSON, *Ancient Rome, City planning*, cit., pp. 3 and 26, pp. 83-94.

and which, therefore, are subject to this common use[47]. In short, this limitation on the right of ownership of riparian properties supposes, ultimately, that their owners are obliged to endure or tolerate, *ex lege*, all that is necessary for the common use of the river and its banks and, consequently, they may not take any action to prevent such use.

After this brief *excursus*, I turn now to examine the extracts that recognize, expressly, both the private ownership of the banks as well as their *usus publicus*[48].

D. 41, 1, 30, 1 *Pomp. 34 ad Sab.*: *Celsus filius, si in ripa fluminis, quae secundum agrum meum sit, arbor nata sit, meam esse ait, quia solum ipsum meum privatum est, usus autem eius publicus intellegitur. Et ideo cum exsiccatus esset alveus, proximorum fit, quia iam populus eo non utitur.*

In this passage the jurist CELSUS the younger claims that if on the river bank, which adjoins my field, a tree begins to grow, it is mine, because this same terrain is also mine, although the use of it is understood to belong to the public, but when the bed

[47] Cf. SCAPINI, *I limiti legali della proprietà*, cit., p. 55; TOMÁS, *La servidumbre en interés general de la navegación*, cit., p. 1325. Vid. ALBURQUERQUE, *Las orillas de los ríos*, cit., pp. 169 ff., who prefers to speak of a "limited or partial public right to the river banks".

[48] On the texts from which the public use of the river banks can be deduced, D. 43, 12, 4 *Scaev. 5 respons.;* D. 41, 1, 15 *Nerat. 4 regul.*, or that recognise, albeit indirectly, the ownership of the river banks, D. 43, 12, 1, 6 *Ulp. 68 ad ed.*, vid. ALBURQUERQUE, *op. cit.*, pp. 168-169.

dries up it becomes the property of those nearest to it, because the *populus* no longer use it.

The opinion of CELSUS the younger, which is later echoed by POMPONIUS, leaves us in no doubt as to the legal status of the river banks: they belong, as do the trees that grow on them, to the owners of the riparian properties that form part of them, but their use is public or common.

Likewise, GAIUS in D. 1, 8, 5 pr. *2 rer. cottid. sive aur.* states:

Riparum usus publicus est iure gentium sicut ipsius fluminis. Itaque navem ad eas appellere, funes ex arboribus ibi natis religare, retia siccare et ex mare reducere, onus aliquid in his reponere cuilibet liberum est, sicuti per ipsum flumen navigare. Sed proprietas illorum est, quorum praediis haerent: qua de causa arbores quoque in his natae eorundem sunt.

The jurist, after noting that the use of the banks is public in accordance with *ius gentium*, as is the river, informs us of some of the activities that can be performed on them: people can bring their boats on to them, tie ropes to the trees that grow there, put their nets out to dry and take them out of the "sea water"[49], load and unload their goods, and navigate the river

[49] On the phrase *retia siccare et ex mare reducere* in the text, ZOZ, M. G., *Riflessioni in tema di res publicae*, Turin, 1999, p. 105, n. 318, postulates that it is very probably an erroneous insertion, because following a comparison

itself. However, as Gaius goes on to acknowledge, ownership of the banks and, therefore, of the trees that grow on them, belongs to those whose property adjoins them.

Thus, this extract not only confirms what was established in the extract above, D. 41, 1, 30, 1, that is, the public's right to use the river banks, despite the fact their ownership and that of the trees that grow on these lands correspond to the owners of the riparian properties, but it also shows us that the reason why the use of the banks is public is found in the *ius gentium*, as is the explanation for the public use of the river: And, also, that the *usus publicus riparum* would include, in short, all those activities necessary for the common use of the river and, therefore, that anyone can undertake them, since by virtue of this use the riparian landowners are required to tolerate them.

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of the corresponding fragment of the Institutions, we see that this phrase also appears in I. 2, 1, 5 and that it obviously refers to the use of the sea shore. However, as can be corroborated, the *usus publicus* under *ius gentium* is applied equally to the sea shores and the river banks. In I. 2, 1, 5 the public use of the sea and its shores are recognised. This issue aside, I agree with ALBUQUERQUE, *Las orillas de los ríos*, cit., p. 168, n. 10., that it seems appropriate to extend, by analogy, the range of activities that users of both sea shores and river banks can undertake, including for example, putting out their nets to dry, throwing them into the water and pulling them out, or, as the author notes, ultimately, we could mention all the activities involved in fishing and navigation.

It is true, as can be inferred from the range of different activities described by GAIUS, that they are generally specific to navigation and fishing, since, as we have seen, the common use of the banks seeks to guarantee the prevalent interest of the community so that it might satisfy freely the aforementioned needs given their economic importance (navigation and fishing). Having said that, however, this does not mean that the public use of the river margins is reduced to these sole purposes[50] and, in this sense, it is worth mentioning, by way of example, other possible uses. The testimony provided in D. 43, 14, 1, 9 *Ulp. 68 ad ed*. indicates that the owners of riparian land adjoining a public river should allow right of access to the banks for farmers to bring their livestock to the waters to drink[51].

Likewise, the Justinian Institutions did not change, in the slightest, the legal regime governing the river banks described by the classical jurists, as evidenced by I. 2, 1, 4, which reproduces, almost verbatim, the extract examined above from GAIUS[52].

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[50] Vid. ALBURQUERQUE, *op. cit.,* pp. 171 ff., in which he analyses the interdictal protection of the banks of the public rivers.

[51] D. 43, 14, 1, 9: *Idem ait tale interdictum competere, ne cui vis fiat, quo minus pecus ad flumen publicum ripamve fluminis publici appellatur.*

[52] However, unlike D. 1, 8, 5 pr., it does not contain the phrase *retia siccare et ex mare reducere*. For a discussion of this, vid. n. 49.

Riparum quoque usus publicus est iuris gentium sicut ipsius fluminis: itaque navem ad eas appellere, funes ex arboribus ibi natis religare, onus aliquid in his reponere cuilibet liberum est, sicuti per ipsum flumen navigare. sed proprietas earum illorum est quorum praediis haerent: qua de causa arbores quoque in iisdem natae eorundem sunt.

Although the interdicts that protect the use and enjoyment of public rivers[53], as well as those that safeguard their banks[54], fall outside the scope of this study[55], I consider it opportune nevertheless to stress that ULPIAN, who informs us in his texts about these interdicts, cites various acts or activities that cannot be carried out on the public rivers or on their banks in order, in most cases, to avoid being a hindrance to navigation[56]. For

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[53] LAZO, *El régimen jurídico de las aguas,* cit., pp. 65 ff., notes that the notions of use and enjoyment can refer, first, to the use of water without threatening its further existence, and second, to that of its consumption or alteration.

[54] Vid. D. 43, 12, 1 pr. *Ulp. 68 ad ed*. (on public rivers and their banks); D. 43, 13, 1 pr. *Ulp. 68 ad. ed*. (on public rivers and their banks); D. 43, 14, 1 pr. *Ulp. 68 ad. ed.*; and more specifically, on the repair of river banks, D. 43, 15, 1 pr. *Ulp. 68 ad ed.*

[55] On this interdictal protection, vid. bibliography cited in n. 45.

[56] ALBURQUERQUE, *Las orillas de los ríos*, cit., p. 171. In his view, the mere recognition of the public interest should not therefore justify, in certain

example the Praetor prohibits making or putting anything into the public river or on its banks that might interfere with the navigation and the anchorage of river craft (D. 43, 12, 1 pr.), or impede the water from flowing with its normal intensity (D. 43, 13, 1 pr.); the Praetor also prohibits the use of any violence that might impede navigation on the public river or the loading and unloading of boats on the banks (D. 43, 14, 1 pr.); as well as undertaking any kind of building work in the river or on its banks to protect the banks or an adjoining field (D. 43, 15, 1 pr.).

In short, in line with ALBURQUERQUE, we need to consider the convenience or otherwise of ULPIAN including in the extract contained in D. 43, 12, 1, 15 *68 ad. ed.*[57] other impediments that might reduce the effectiveness of the goal pursued by the interdict (that is, safeguarding the navigation and anchorage of water craft), including, for example, as FISCHER points out, planting trees on the river banks and the construction on the banks of buildings that obstruct access to the river jetties, etc.. These, however, are not expressly

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cases, the absence of greater precision with regard to other uses. On this question, vid. *op. cit.*, pp. 171 ff.

[57] *Deterior statio itemque iter navigio fieri videtur, si usus eius corrumpatur vel difficilior fiat aut minor vel rarior aut si in totum auferatur. Proinde sive derivetur aqua, ut exiguior facta minus sit navigabilis, vel si dilatetur, aut diffusa brevem aquam faciat, vel contra sic coangustetur, et rapidius flumen faciat, vel si quid aliud fiat quod navigationem incommodet difficilioremve faciat vel prorsus impediat, interdicto locus erit.*

mentioned by the jurist in this text, but they can, in the opinion of the aforementioned Spanish Romanist, be deduced from the extracts included in D. 43, 12, 1, in particular, from the wording used in the Praetorian interdict (*De fluminibus. Ne quid in flumine publico ripave eius fiat, quo peius navigetur*)[58].

III. ART. 553.1 OF THE SPANISH CIVIL CODE AND WATER LEGISLATION CONCERNING THE USE OF RIVER SHORES AND MARGINS

The preamble to the 1866 Water Act (*Ley de Aguas*)[59] referred to the difficulty of establishing a general rule with regard to the ownership of the shores, because Law 6, under title 28 *Partida* 3ª), adhering to the traditions of Roman law, declared them to belong to "those, whose inherited lands adjoin them", albeit subject to certain public servitudes[60]. Thus, in those places where the riparian landowners, in exercise of the right conferred on them by the *Ley de Partidas*, had possessed the river shores, then they could continue to enjoy ownership of

[58] ALBURQUERQUE, *op. cit.*, p. 173.

[59] On the antecedents of this Act, vid. PÉREZ PÉREZ, E., *Estudios jurídicos sobre propiedad, aprovechamiento y gestión del agua*, Madrid, 1993, pp. 36 ff.

[60] As stated in the preamble to the 1866 Water Act, this was because it was considered more prudent to leave the matter for the Civil Code to clarify, but it never did so.

them, notwithstanding that the Administration could expropriate them on grounds of their public utility. But where, having waived that right, the landowners had abandoned the banks or had never taken possession of them, considering them to be public, then the river shores retained this public character[61].

Art. 73 of the 1866 Water Act, in common with Art. 36 of the subsequent Act of 13 June 1879, provided that: "The river shores, even when they are of private ownership by virtue of an ancient law or custom, are subject in their entire length and in their margins, within a three-metre zone, to the servitude of public use for the general interest of navigation, fishing and salvage. However, when the relief of the terrain or other legitimate causes so require it, the area of this servitude will be widened or narrowed, reconciling as far as possible all interests"[62]. Thus, a "right of servitude" is established that guarantees the public use of the space required to undertake

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[61] PÉREZ PÉREZ, *Las servidumbres en materia de aguas, Real Academia de Legislación y Jurisprudencia, Cuadernos 11*, Murcia, 2002, pp. 19 ff. The servitude of the towpath and others inherent to the riparian properties were regulated in Arts. 152 to 165 of the 1866 Water Act, while Art. 36 of the 1879 Water Act regulated the servitude of public use in the general interest of navigation, floatage, fishing and salvage, and Arts. 112 to 125 the servitude of the towpath and others inherent to the riparian properties.

[62] Vid. the provisions of development: Spanish Royal Order 5 September 1881 and 28 June 1921.

traditional activities related to navigation, fishing and salvage. This regulation, although based on the premise that the river shore is publicly owned, contemplates, however, the possibility that private river shores may exist "by virtue of an ancient law or custom".

This "public use servitude" was subsequently incorporated into the 1889 Spanish Civil Code (henceforth CC), among the legal servitudes concerning water[63] (in book II, chapter II, title VII), specifically, in Art. 553. 1, which broadly transcribes Art. 36 of the 1879 Water Act and, as such, fails to clarify the existence of

[63] In the civil law literature concerning their historical precedents, legal servitudes are usually attributed to those who undertook the systematisation of the French Code. Indeed, as GONZÁLEZ PORRAS points out, in BIONDI, *Las servidumbres*, cit., p. 1330, they appear in the work of DOMAT and POTHIER (although, note, that while the expression 'legal servitudes' does not appear, natural servitudes are mentioned as a counterpoint to voluntary servitudes). This French distinction enters the Spanish bill of 1851, Art. 482 of which states that "servitudes derive from the law or from the will of the owners." GARCÍA GOYENA comments (in relation to Art. 476 of the bill) that "under this heading, having given the name of legal servitudes to certain obligations that Roman law did not include within that category, and which it treated separately, it could occur that the obligation or servitude did not refer precisely to the use of a given property, but rather to many properties in general or to public spaces and services". Thus, the bill entered the draft legislation of 1882-1888 and from here entered the present Civil Code.

private shores "by virtue of ancient law or custom", which Spanish case law has subsequently confirmed[64].

Art. 553. 1 of the CC provides that "The shores of rivers, even when they are of private ownership, are subject in their entire length and in their margins, within a zone of three meters, to the servitude of public use for the general interest of navigation, fishing and salvage".

Apart from other inaccuracies that the Spanish CC commits in relation to servitudes, I consider it opportune to stress here that the Code itself gives rise to even further confusion when it explains the meaning of legal servitudes, as Art. 549 extends the concept in a somewhat exaggerated fashion, in short, incorrectly, by stating that "servitudes imposed by law are established either for public utility or the interest of individuals". As such, this definition covers, in relation to the two alternatives mentioned, real servitudes as well as the normal limitations imposed by ownership, and so the latter cannot therefore be included under the concept of servitude[65]. In this line, modern Spanish doctrine, as GONZÁLEZ PORRAS points out, stresses the ambiguity of the CC when it lists under

[64] In this regard, vid. the Council of State's Decision, 11 July 1968 (Exp. 35.948) and the Supreme Court Ruling of 17 February 1979, albeit of a highly exceptional character.

[65] Vid. the bibliography on this subject in NOGUERA DE LA MUELA, *Las servidumbres de la Ley de Costas*, cit., p. 94, n. 284.

the heading of "legal servitudes" a series of cases that cannot be considered as such[66] and, so, in the words of ALBADALEJO[67], what we have is a somewhat unfortunate classification, since "most of what are called legal servitudes are simply limits on ownership".

In light of the above it should be noted that the Civil Code, in Art. 553.1, uses the term *servidumbre* somewhat unfortunately, since what it describes as a "servitude of public use for the general interest of navigation, fishing and salvage" is, strictly speaking (as is apparent from the Roman texts) a legal limitation of ownership of the riparian properties for reasons of public interest.

It is true that Spain's CC together with the praedial servitudes imposed on an immovable property for the benefit of another (Art. 530.1) do contemplate so-called personal servitudes, that is, those constituted on a property in favour of one or more persons, or of a community, to whom that property does not belong (Art. 531)[68]. But it is equally true that the requirement

[66] GONZÁLEZ PORRAS, *op. cit.*, p. 1330.

[67] *Derecho civil, III, Derecho de bienes*, vol. 1, *Parte general y derecho de propiedad*, 2nd ed., Barcelona, 1976, p. 370.

[68] On the difficulties posed by this category, practically unknown in any other codes (including, for example, the French Code the Italian Civil Code), vid. LACRUZ BERDEJO, J. L., *Elementos de Derecho Civil III.*

that the river shores and margins have a public use, of which the Roman sources speak and to which Art 553.1 of the CC refers, calling it a "servitude", does not fit under the heading of praedial servitudes, be it in Rome or in Spain today, since the first assumption is lacking, the right one estate has over another with regard to the use or enjoyment of that estate, and nor does it fit under the heading of what today are known as personal servitudes, since their content, the public use for general interests of navigation, fishing and salvage, greatly exceeds their scope.

In short, the CC, like the 2001 Consolidated Water Act (*Texto refundido de la Ley de Aguas*, henceforth, TRLA)[69] and the 1986 Publicly Owned Water Regulations (*Reglamento de Dominio Público Hidráulico*, henceforth, RDPH)[70], do not distinguish between the terms "servitudes" and "limitations" in relation to

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Derechos reales, vol. II, *Derechos reales limitados. Situaciones de cotitularidad*, Barcelona, 1991, p. 121.

[69] Amended by Royal Decree-Law 4/13 April 2007.

[70] The most important amendments include: Royal Decree 509/15 March 1996, a further development of Royal Decree-Law 11/28 December 1995, by which the regulations governing the treatment of urban waste waters were established; Royal Decree 1290/7 September 2012; and Royal Decree 670/6 September 2013, an amendment of the RDPH, concerning the register of waters and criteria for assessing the damage to the water domain.

water (a use that is clearly lacking in the necessary technical rigour), and a problem emphasised not only by the civil doctrine[71], but also by Spain's Constitutional Court in its Decision 227/29 November 1988[72].

The TRLA, unlike the CC, provides a definition of the river shores and margins. Thus, Art. 6.1 (= Art. 35 of the 1879 Water Act, Art. 6 of the 1985 Water Act and Art. 6 of the RDPH) establishes that the river shores are "lateral strips of public waterways situated above the low-water level" and the margins are "the terrain bordering the river channels". In relation to

[71] DEL ARCO TORRES, M. A. and PONS GONZÁLEZ, M., *Régimen jurídico de las servidumbres*, Granada, 1989, pp. 108-109, state, in relation to legal servitudes, that "the legislator uses this expression in a very broad sense, including situations that are not strictly servitudes but rather limitations of ownership (...) failing to identify clearly enough when we are dealing with genuine limitations of ownership, with the regulation of neighbourly relations imposed on properties or with actual rights of servitude". In the same vein, vid. bibliography cited by NOGUERA DE LA MUELA, *Las servidumbres de la Ley de Costas*, cit., p. 94, n. 284.

[72] The Court states that the provisions regulating servitudes do not refer to situations affecting ownership of public waters, but rather of praedial lands, usually riparian or adjoining the channels or beds of inland watercourses, with regard to which certain limitations are imposed on the owner's rights.

Arts. 4 and 6.1 of the TRLA[73] (= Arts. 4 and 6 of the RDPH) it can be inferred that while the shores are part of the riverbed or channel, and as such are part of the public domain, except where, as noted above, under "ancient law or custom" they exceptionally subsist as private shores[74], the margins or banks, *stricto sensu*, are the strips that border the river shores.

Therefore, in accordance with the TRLA it is the margins that can be qualified as a "servitude area for public use" (Art. 6. 1), although the CC claims that the river shores are subject to this limitation in their entire length and in their margins, within a zone of three meters (Art. 553. 1)[75].

Having said this it should be stressed that while the classification of "servitude" continues to be used with the

[73] Art. 4: "The bed or natural stream bed of a continuous or discontinuous current is the land covered by water under maximum normal rises".

[74] Art. 6 of the TRLA does not recognise the existence of river shores under private ownership, unlike the 1879 Water Act which, in Art. 36, refers to those that are of this nature by virtue of ancient law or custom. However, given that the transitional provisions of the 1985 Water Act do not explicitly allude to cases of private ownership, it should be understood that the private nature of these river shores is maintained, although, as PÉREZ PÉREZ notes in *Las servidumbres en materia de aguas,* cit., p. 20, the use of these properties will be subject to the same legal restrictions placed on the river margins.

[75] Cf. PÉREZ PÉREZ, *ibidem,* pp. 19-20.

administrative doctrine to refer to the "area of public use" (Art. 6 of the TRLA and Arts. 6 and 7 of the RDPH), it is not regulated among the servitudes, rather it is a real limitation of ownership in defence of the common interest[76], as it always was, using modern terminology, in Roman law.

Today the river margins are subject in their entire length to a series of administrative limitations that are expressed, by regulation, in the so-called "area of servitude of public use of five metres in width" (Art. 6. 1a the TRLA that amends Art. 553 1 CC), whose goals, as specified by the RDPH, are as follows: "a) access for service personnel monitoring the channel; b) access for river fishing; c) access for the salvage of persons or goods; d) occasional anchorage of river craft when necessary" (Art. 7. 1). The regulation cited also establishes what property owners in these areas can and cannot do, establishing in this regard that they can freely sow and plant non- tree species, provided they do not impede access, but they cannot, however, build on them without obtaining proper authorization, which will be granted only in justified cases; adding that the

[76] NOGUERA DE LA MUELA, v. *Servidumbres de aguas, Diccionario de Derecho de aguas*, Antonio Embid Irujo (Director), 2007, pp. 902-911, p. 910. In this regard, vid. Constitutional Court Decision (S. 3rd) 6 July 1989. On the concept of the administrative servitude and the distinction between a servitude and a limitation, vid. *id.*, *Las servidumbres de la Ley de Costas*, cit., pp. 92-99 and pp. 103-105.

plantation of tree species requires authorization from the river basin's authority (art. 7. 2). It also allows the area of servitude to be modified for reasons of topography and hydrography or if so required by the characteristics of a water exploitation project, after duly submitting an application justifying the reasons for allowing public use (Art. 8 RDPH).

Spain's water legislation also establishes, along the length of the water channel, a *zona de policía* (or restricted-use zone) 100 metres in width[77], to protect the publicly owned waters and river system. In this zone the land use and all activities conducted must adhere (Art. 6. 1b TRLA) to the corresponding provisions in RDPH[78], which states that any work or construction requires the prior administrative authorization of the river basin authority[79], regardless of the special cases regulated by the same (Art. 9. 3 RDPH)[80].

[77] This zone, as provided for under Art. 96 TRLA, also applies to the margins of lakes, lagoons and reservoirs.

[78] Art. 9. 1 specifies these activities as: a) Substantial alterations in the natural slope of the land; b) Water aggregate extractions; c) Constructions of all types, be they permanent or temporary; d) Any other use or activity that interferes with the water current regime or which might cause damage or deterioration to the public water system.

[79] Regarding the undertaking of any kind of construction work in a river basin's *zona de policía*, vid. Arts. 78. 1 and 173. 7-8 of the RDPH, amended by Royal Decree 1290/7 September 2012.

Today these limitations, in particular the 100-metre restricted-use zone, have established themselves as one of the legal administrative tools for the protection of the environment[81], a new objective to be added to traditional goals of protecting fishing, salvage and river navigation[82].

IV. CONCLUSION

In summary, the examination undertaken here of the Roman sources and of current Spanish legislation concerning the use of the river shores and river margins allows us to conclude, in accordance with the object of study, that what today is unfortunately known in Spain as *zona de servidumbre de uso público* (servitude zone for public use) and the *zona de policía* (restricted-use zone) are in fact limitations under public (administrative) law of the ownership of riparian properties and, therefore, that the current regulation of this use

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[80] On the modification of the limits of the *zona de policía*, vid. Art. 9.2 RDPH. Likewise, on the protection of groundwater from risks of contamination, vid. NOGUERA DE LA MUELA, v. *Servidumbres de aguas*, cit., pp. 910-911.

[81] SANCHÉZ MORÓN, M., *"Aspectos ambientales del Derecho de aguas", Curso de Verano de la Universidad Autónoma de Madrid y el Foro de Aguas*, July 1996.

[82] TOMÁS, *La servidumbre en interés general de la navegación,* cit., p. 1343

constitutes, in general and with certain qualifications, as noted in the introduction to this study, a coherent manifestation of the essence of Roman law for the new regulations.

Finally, once more, this study illustrates the importance of Roman law as a tool for the "critique" and "interpretation" of current positive law, because only from the perspective provided by Roman law can we understand the latter. Roman law, as we have seen in these pages, allows us to critically examine today's regulations before we can proceed to their interpretation[83].

[83] TORRENT, A., *El Derecho Romano como instrumento de la crítica del Derecho Positivo, Homenaje a Juan Berchmans Vallet de Goytisolo*, I, Madrid, 1988, pp. 753-764.