Forever Young

Celebrating 50 Years of the World Heritage Convention

edited by
Elisa Baroncini, Bert Demarsin, Ana Gemma López Martín,
Raquel Regueiro Dubra, Ruxandra-Iulia Stoica

with the collaboration of Manuel Ganarin and Alessandra Quarta

Volume I

6 *Un'anima per il diritto: andare più in alto*

Collana diretta da Geraldina Boni

Mucchi Editore

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6

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L'orizzonte meramente tecnicistico su cui ogni tipo di riflessione sembra oggi rischiare di appiattirsi non solo non cancella quegli interrogativi fondamentali che si confermano ineludibili per ciascuna disciplina in cui si ramifica il pensiero giuridico: ma li rivela, anzi, in tutta la loro impellenza. È dunque a tale necessità che facciamo riferimento nel cogliere e sottolineare il bisogno che si avverte di 'un'anima per il diritto', ispirandoci in modo particolare a quegli ammonimenti che Aleksandr Solženicyn rivolgeva a studiosi e accademici dell'Università di Harvard nel 1978 e che, a distanza di decenni, mantengono intatta la loro validità. Muovendo dalla domanda «se mi chiedessero: vorrebbe proporre al suo paese, quale modello, l'Occidente così com'è oggi?, dovrei rispondere con franchezza: no, non potrei raccomandare la vostra società come ideale per la trasformazione della nostra. Data la ricchezza di crescita spirituale che in questo secolo il nostro paese ha acquistato nella sofferenza, il sistema occidentale, nel suo attuale stato di esaurimento spirituale, non presenta per noi alcuna attrattiva»* – dichiarazione che si riempie di significato alla luce della vicenda personale, tanto dolorosa quanto nota, di colui che l'ha pronunciata –, l'intellettuale russo individuava infatti con profetica lucidità i sintomi e le cause di tale declino. In questo senso, ad interpellarci in modo precipuo in quanto giuristi è soprattutto l'osservazione secondo cui «in conformità ai propri obiettivi la società occidentale ha scelto la forma d'esistenza che le era più comoda e che io definirei giuridica»: una 'forma d'esistenza' che tuttavia è stata assunta come fondamento esclusivo e per ciò stesso privata dell'anelito a una dimensione superiore capace di giustificarla. Con l'inevitabile, correlata conseguenza che «l'autolimitazione liberamente accettata è una cosa che non si vede quasi mai: tutti praticano per contro l'autoespansione, condotta fino all'estrema capienza delle leggi, fino a che le cornici giuridiche cominciano a scricchiolare». Sono queste le premesse da cui scaturisce quel complesso di valutazioni che trova la sua sintesi più efficace nella seguente affermazione, dalla quale intendiamo a nostra volta prendere idealmente le mosse: «No, la società non può restare in un abisso senza leggi come da noi, ma è anche derisoria la proposta di collocarsi, come qui da voi, sulla superficie tirata a specchio di un giuridismo senz'anima». Se è tale monito a costituire il principio ispiratore della presente collana di studi, quest'ultima trova nella stessa fonte anche la stella polare da seguire per cercare risposte. Essa, rinvenibile in tutti i passaggi più pregnanti del discorso, si scolpisce icasticamente nell'esortazione – che facciamo nostra – con cui si chiude: «E nessuno, sulla Terra, ha altra via d'uscita che questa: andare più in alto».

* La traduzione italiana citata è tratta da Aleksandr Solženicyn, *Discorso alla Harvard University, Cambridge (MA) 8 giugno 1978*, in Id., *Il respiro della coscienza. Saggi e interventi sulla vera libertà 1967-1974. Con il discorso all'Università di Harvard del 1978*, a cura di Sergio Rapetti, Jaca Book, Milano, 2015, pp. 219-236.

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Section I

From Cultural Property to World Heritage

Ivano Pontoriero

PROTECTION OF CULTURAL HERITAGE IN ROMAN LAW*

Abstract: The development of the concept of cultural heritage is foreign to the Roman legal experience and it is, therefore, not possible to identify the construction of an organic and coherent system of protections. Specific provisions, since the end of the republic, are aimed at preserving urban decorum (*decus urbium*). Among these, the SC. Hosidianum (47 CE) prohibits the buying and selling of buildings aimed at the demolition and reuse of building materials. The same *ratio* of protection of urban decorum inspires the provisions of the subsequent SC. Acilianum (122 CE), which prohibits bequeathing by legacy of things joined to buildings (*ea quae aedibus iuncta sunt*). A rescript by Alexander Severus (C.I. 8.10.2 [*Imp. Alex. A. Diogenes*, a. 222]) emphasizes that the owners are not allowed to disfigure the public view (*publicus deformetur adspectus*). More generally, it must not be neglected the role played, also with reference to developments of the Roman tradition, by the praetorian interdicts *ad publicam utilitatem pertinentea* (D. 43.1.2.1 [Paul. 63 *ad ed.*]), by the jurisprudential elaboration of the category of the *res in usu publico* (D. 43.8.2.5 [Ulp. 68 *ad ed.*]), by the use of procedural instruments with widespread legitimation (*actiones populares*). In late antiquity, the need to preserve cultural heritage sometimes seems to manifest itself with greater intensity (C.Th. 16.10.8; Nov. Maior. 4). Belisarius asks Totila (Proc., Οἱ ὑπὲρ τῶν πολέμων λόγοι, 7.22.11) to spare from destruction the city of Rome, a monument to posterity of the value of all (μνημεῖα τῆς πάντων ἀρετῆς τοῖς ἐπιγενησομένοις), thus avoiding committing a serious crime against men of all times (ἀδίκημα μέγα ἐς τοὺς ἀνθρώπους τοῦ παντὸς αἰῶνος).

1. *Introduction*

The development of the concept of cultural heritage is absolutely foreign to Roman law across its entire historical arc, for which it is not possible to identify the construction of an ordered, coherent system of protections within it[1].

* Double-blind peer reviewed content.

[1] The development of the concept of cultural heritage, on the basis of the French concept of *patrimoine national*, and the creation of organised systems of

However, many of the legal instruments that made it possible to create concrete forms of cultural heritage protection, of various range and intensity, are deeply rooted in Roman law and its later interpretation in the Romanistic tradition[2]. Here, I'm referring in particular to the development of the *dicatio ad patriam*, «romanistica, ma non romana [concerning Romanistic tradition, but not Roman]», as recently observed[3], the use of procedural instruments that allowed members of the public to bring action in the name of collective interest (*actiones populares*, *interdicta popularia*)[4], the jurisprudentially created

protections did not emerge until the nineteenth century. See F. Fasolino, *Dalla tutela alla cura del patrimonio culturale: l'utilità di una riflessione storico-giuridica*, in *Cura e tutela dei beni culturali*, edited by G.M. Esposito, F. Fasolino, Milano, 2020, p. 2 (= *La tutela dei beni culturali nell'esperienza giuridica romana*, edited by F. Fasolino, Milano, 2020, p. 2) and L. Solidoro, *Politiche e soluzioni organizzative del patrimonio culturale nell'Impero romano*, *ibid.*, pp. 61-68 (= *La tutela dei beni culturali*, cit., pp. 61-68). An important moment in this regard for the provinces of the Papal State was the issue, during the papacy of Pius VII, of an edict on antiquities and excavations by Cardinal Bartolomeo Pacca on 7 April 1820. The measures introduced by the Papal State were then copied by some of the other Italian States and in Europe. In the Kingdom of Sardinia, however, the pre-eminent value of private property continued to be recognised. The difficulty of reconciling such different traditions, one based on the idea of *utilitas pubblica*, the other on the importance attributed to property rights, made the path towards the promulgation of the Rava-Rosadi law of 1909 long and arduous. For a summary, see D. Mastrangelo, *Dall'Editto Pacca ai decreti modificativi del Codice Urbani. Breve storia della normativa sui beni culturali*[2], Rome, 2011, pp. 9-18.

[2] As observed by L. Solidoro in *Politiche*, cit., pp. 62-65 (= *La tutela dei beni culturali*, cit., pp. 62-65).

[3] On the *dicatio ad patriam*, see S. Randazzo, *I beni e la loro fruizione, fra pubblico e privato: a proposito della «dicatio ad patriam»*, in *Antologia giuridica romanistica ed antiquaria*, vol. II, edited by L. Gagliardi, Milano, 2018, pp. 349-378; L. Solidoro, *Politiche*, cit., pp. 80-89 (= *La tutela dei beni culturali*, cit., pp. 80-89) and, more recently, the exhaustive account in M. Falcon, *'Dicatio ad patriam'. La collocazione in pubblico di beni privati nella riflessione dei giuristi romani*, Napoli, 2020. For the apt words cited in the text, see p. 19.

[4] With special reference to the subject of landscape preservation in antiquity, see G. Lustig, *La tutela del paesaggio in Roma*, in *Il Filangieri*, 43, 1918, pp. 476-479. On procedural instruments that allowed members of the public to bring action in the name of collective interest, including with consideration of the present, see A. Di Porto, *Interdetti popolari e tutela delle «res in usu publico»*, in *Diritto e processo nella esperienza romana. Atti del Seminario torinese (4-5 dicembre 1991)*

categories of *res in usu publico*[5] and *res communes omnium*[6] and, most

in memoria di G. Provera, Napoli, 1994, pp. 483-520 (= Id., *Res in usu publico e 'beni comuni'. Il nodo della tutela*, Torino, 2013, pp. 3-42); G. Sanna, *L'azione popolare come strumento di tutela dei "beni pubblici": alcune riflessioni tra "bene pubblico" ambiente nell'ordinamento giuridico italiano e res publicae nel sistema giuridico romano*, in *Diritto@Storia*, 5, 2006; A. Trisciuoglio, *Consideraciones generales sobre la tutela de las res publicae y de sus usos en la experiencia romana*, in *Hacia un derecho administrativo y fiscal romano*, edited by A. Fernández De Buján, G. Gerez Kraemer, B. Malave Osuna, Madrid, 2011, pp. 151-160; S. Settis, *Azione popolare. Cittadini per il bene comune*, Torino, 2012, in particular pp. 221-228; as well as A. Saccoccio, *La tutela dei beni comuni. Per il recupero delle azioni popolari romane come mezzo di difesa delle res communes omnium e delle res in usu publico*, in *Diritto@Storia*, 11, 2013, pp. 7-21. Procedural instruments that allowed members of the public to bring action in the name of collective interest also made it possible to create forms of landscape protection in antiquity: see A. Di Porto, *La tutela della salubritas fra editto e giurisprudenza*, I, *Il ruolo di Labeone*, Milano, 1990, pp. 131-151; Id., L. Gagliardi, *Prohibitions concerning polluting discharges in Roman Law*, in *Contributions to the History of Occupational and Environmental Prevention. 1st International Conference on the History of Occupational and Environmental Prevention, Rome, Italy; 4-6 October 1998*, edited by A. Grieco, S. Iavicoli, G. Berlinguer, Amsterdam, 1999, pp. 121-134; Id., *Salubritas e forme di tutela in età romana. Il ruolo del civis*, Torino, 2014; L. Solidoro, *La tutela dell'ambiente nella sua evoluzione storica. L'esperienza del mondo antico*, Torino, 2009, pp. 91-94.

[5] In addition to the contributions by Andrea Di Porto and Antonio Saccoccio cited in the previous note, see J.M. Alburquerque, *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, pp. 27-54. For an excellent summary of the historiographic debate on *res in usu publico*, see A. Schiavon, *Interdetti 'de locis publicis' ed emersione della categoria delle res in usu publico*, Napoli, 2019, pp. 1-10. For *res in usu publico*, also see *infra*, § 3.

[6] On *res communes omnium*, see M. Falcon, *'Res communes omnium'. Vicende storiche e interesse attuale di una categoria romana*, in *I beni di interesse pubblico nell'esperienza giuridica romana*, vol. I, edited by L. Garofalo, Napoli, 2016, pp. 107-163; D. Dursi, *Res communes omnium. Dalle necessità economiche alla disciplina giuridica*, Napoli, 2017, pp. 5-40; R. Basile, *«Res communes omnium». Disciplina giuridica e profili (a-)sistematici*, in *Index. Quaderni camerti di studi romanistici*, 48, 2020, pp. 307-322; D. Dursi, *Aelius Marcianus. Institutionum libri. I-V*, Roma, 2019, pp. 153-156; R. Marini, *'Mare commune omnium est'. A proposito di D. 47, 10, 13, 7 (Ulp. 57 ad ed.)*, in *Bullettino dell'Istituto di Diritto Romano "Vittorio Scialoja"*, 115, 2021, pp. 289-304. With reference to the idea of common good and the interpretation of Article 9 of the Italian Constitution, see S. Settis, *Paesaggio, Costituzione, cemento. La battaglia per l'ambiente contro il degrado civile*, Torino, 2010, pp. 304-313; Id., *La cultura come bene comune e la Costituzione tradita*, in *Il costituzionalista riluttante. Scritti per G. Zagrebelsky*, edited by A. Giorgis, E.

importantly, the development of the concept of *utilitas publica*[7].

These necessary clarifications having been made, we may now turn to consideration, proceeding inevitably by *exempla*, of a few traces of the attention of Roman law, taken here in its historical dimension, to cultural and landscape protection.

2. *Provisions for protecting the* decus urbium

Provisions for the preservation of the urban decorum (*decus urbium*) were enacted as early as the end of the Republic[8]. The mu-

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Grosso, J. Luther, Torino, 2016, pp. 389-397. For important clarifications on *res communes omnium* and *res in usu publico*, see G. Santucci, *'Beni comuni'. Note minime di ordine metodologico*, Κοινωνία, 44/II, 2020, pp. 1395-1406.

[7] On which, with reference to antiquity, see J. Gaudemet, *Utilitas publica*, in *Revue Historique de Droit Français et Étranger*, 28, 1951, pp. 465-499 (= *Études de droit romain*, vol. II, Camerino, 1979, pp. 163-197); M. Navarra, *Ricerche sulla utilitas nel pensiero dei giuristi romani*, Torino, 2002, in particular pp. 81-90; as well as R. Scevola, *Utilitas publica*, 2 vols., Padova, 2012, I: *Emersione nel pensiero greco-romano*; II: *Elaborazione della giurisprudenza severiana*. On the use of this idea in the field of cultural heritage protection, from the Middle Ages to the modern period, see S. Settis, *Paesaggio, Costituzione, cemento, La battaglia per l'ambiente contro il degrado civile*, cit., pp. 97-110, which identifies reference to the concept of *publica utilitas* as the underlying theme of various provisions enacted in Italy between 1162 and 1819.

[8] The expression *decus urbium* is documented for the first time with reference to the third interdict included under the title *Si opus novum nuntiatum erit* (*E.* 257c), in D. 39.1.20.10 (Ulp. 71 *ad ed.*): *Hoc interdictum prohibitorium est, ne quis prohibeat facere volentem eum qui satisdedit: etenim pertinet ad decus urbium aedificia non derelinqui* [This interdict is prohibitory and is to stop anyone preventing the carrying out of work by someone who has given security; for the nonabandonment of buildings is something that affects the embellishment of cities (translation A. Watson)]. See O. Lenel, *Das edictum perpetuum. Ein Versuch zu seiner Wiederherstellung*[3], Leipzig, 1927, p. 486; L. Labruna, *Vim fieri veto. Alle radici di un'ideologia*, Napoli, 1971 (repr. 2017), p. 34; D. Mantovani, *Giuristi romani e storia dell'economia antica. Elementi per una dialettica*, in *Il diritto allo stato puro? Le fonti giuridiche romane come documento della società antica*, edited by C. Buzzacchi, I. Fargnoli, Milano, 2021, p. 203. In D. 43.8.2.17 (Ulp. 68 *ad ed.*) and D. 43.8.7 (Iul. 48 *dig.*) it is argued that the city must not be marred by ruins (*ne ruinis urbs deformetur*). On this point, see G. Santucci, *Operis novi nuntiatio iuris publici tuendi gratia*, Padova, 2001, p. 139, n. 102. The two texts shall be consid-

nicipal laws required property owners to refrain from unroofing, demolishing or marring their buildings without providing for their restoration[9]. The oldest of these laws, relative to the *municipium* of Taranto, also expressly stated that the owner was required to ensure that any work done on the property would not leave it in worse condition (*nisei quod non deterius restituturus erit*)[10]. It is of particular interest here that the repression of the breach of law was

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ered below, § 3. On the subject of protection of the urban decorum, see C. Corbo, *Diritto e decoro urbano in Roma antica*, Napoli, 2019, pp. 69-146. More recently, with special reference to legislative trends in late antiquity, also see the summary in A. Trisciuoglio, *Temas de derecho administrativo romano comparado*, Madrid, 2021, pp. 89-91.

[9] The *lex municipii Tarentini*, datable between 89 and 62 BCE, the *lex coloniae Genetivae Iuliae* or *Ursunensis* (44 BCE) and the *leges Irnitana* and *Malacitana* (82-84 CE). On these provisions, see M. Sargenti, *La disciplina urbanistica a Roma nella normativa di età tardo repubblicana e imperiale*, in *La città antica come fatto di cultura. Atti del Convegno di Como e Bellaggio. 16/19 giugno 1979*, Como, 1983, pp. 267-271 (= *Scritti di Manlio Sargenti [1947-2006]*, Napoli, 2011, pp. 1019-1023); F. Lamberti, *«Tabulae Irnitanae». Municipalità e «ius Romanorum»*, Napoli, 1993, pp. 85-92; A. Calzada, *La demolición de edificios en la legislación municipal (siglos I a.C. – I d.C.)*, in *Studia et Documenta Historiae et Iuris*, 76, 2010, pp. 115-134; L. Franchini, *La tutela dei beni immobili privati di interesse storico-artistico nell'esperienza romana*, in *I beni di interesse pubblico nell'esperienza giuridica romana*, vol. II, edited by L. Garofalo, Napoli, 2016, pp. 696-702; A. Grillone, *La gestione immobiliare urbana tra la tarda repubblica e l'età dei Severi. Profili giuridici. Con Prefazione di* L. Capogrossi Colognesi, Torino, 2019, pp. 173-183; F. Procchi, *Profili giuridici delle insulae a Roma antica*, I, *Contesto urbano, esigenze abitative ed investimenti immobiliari tra tarda repubblica e alto impero*, Torino, 2020, pp. 191-194; P. Buongiorno, *Sulle tracce della legislazione 'ad modum aedificiorum': ritorno ad A. Berger*, in *Seminarios Complutenses de Derecho Romano*, 34, 2021, pp. 64-69.

[10] *Lex Tar.*, VIIII.4, l. 33 (in *FIRA*, I², n. 18, p. 168; in *RS*, I, n. 15, p. 304). On this point, see in particular F. Procchi, *Profili*, cit., p. 191 and note 44, who rightly observes: «questa precisazione compare esplicitamente solo nel testo della prima legge, ma deve essere considerata implicita nella regolamentazione della seconda, ché altrimenti sarebbe stata aggirabile sin troppo facilmente [this specification only appears explicitly in the text of the first law, but it must be considered implicit in the regulations of the second one, which would otherwise have been far too easy to get around]». See the earlier P. Garnsey, *Urban property investment*, in *Studies in Roman Property*, edited by M. Finley, Cambridge, 1976, pp. 133-134 (= *La proprietà a Roma. Guida storica e critica*, trans. by G. Barattelli, A. Fraschetti, Bari, 1980, p. 162).

entrusted to the instrument of action brought by a member of the public in the name of collective interest (*actio popularis*)[11]. As duly observed by Francesca Lamberti: «la comunità faceva leva, da un canto, sul senso civico dei propri membri, dall'altro non mancava di prevedere una ricompensa per l'attività di impulso processuale e

[11] D. 47.23 *De popularibus actionibus* opens with a Pauline fragment, which provides the concept of *actio popularis*. See D. 47.23.1 (Paul. 8 *ad ed.*): *Eam popularem actionem dicimus, quae suum* <sua vi*? Mommsen*> *ius populi tuetur* [We describe as a popular action one which looks to the public interest (translation A. Watson)]. On this definition, see F. Casavola, *Studi sulle azioni popolari romane. Le «actiones populares»*, Napoli, 1958, p. 18 and p. 97. According to the author, the term *populus* is «qui nulla più che l'empirico insieme degli individui che popolano la città e che rivendicano come *ius suum* il riconoscimento e la tutela di interessi, non ricompresi nella *res familiaris* ed estranei alla *res publica*, ma posti dall'ambiente comune in cui si svolgono le loro individuali e quotidiane attività. Questo *populus* è il *populus* dei passanti, degli utenti delle *res publicae* […]. L'*unus ex populo*, ciascun individuo in mezzo a questa folla di individui, ha un personale interesse alla repressione di quegli illeciti che ledano o compromettano l'incolumità del transito nelle strade, impediscano il libero e normale uso dei loca publica, vie, piazze, fiumi […] [here nothing more than the empirical whole of individuals who lived in the city and who claimed as *ius suum* the recognition and protection of interests, not included in the *res familiaris* and extraneous to the *res publica*, but situated in the shared environment where they carried out their individual and everyday activities. This *populus* was the *populus* of the passers-by, of the users of the *res publicae* … The *unus ex populo*, each individual in this crowd of individuals, had a personal interest in the repression of breaches of law that could be detrimental to or compromise safe passage in the streets or prevent the free and normal use of the *loca publica*, streets, squares, rivers …]». On this procedural tool and its reception in the Romanistic tradition, see the overview in M. Miglietta, v. *Azione popolare*, in *Enciclopedia di Bioetica e di Scienza Giuridica*, vol. I, Napoli, 2009, pp. 694-709. Title D. 47.23 contains exclusively edictal material and finds no parallel in the *Codex repetitae praelectionis*: see A. Soubie, *Recherches sur les origines des rubriques du Digeste*, Tarbes, 1960, pp. 67-68 and note 4. As observed in D. Mantovani, *Il problema d'origine dell'accusa popolare. Dalla «quaestio» unilaterale alla «quaestio» bilaterale*, Padova, 1989, p. 58, this was a «scelta sistematica che si distacca dai modelli classici non solo per l'inclusione della materia nella sezione criminalistica, ma prima ancora per la creazione di un titolo autonomo, come dimostra la provenienza dei frammenti che vi hanno trovato posto, derivati dalle varie *sedes* di commento alle singole azioni edittali [systematic choice that parts company with the classical models not just for the inclusion of the material in the crime section, but more importantly for the creation of an autonomous title, as demonstrated by the provenance of the fragments included there, drawn from the various *sedes* of commentary on the individual edictal actions]».

realizzazione della sanzione [the community appealed, on the one hand, to the public spirit of its own members and, on the other hand, provided for recompense for activity giving impetus to the proceedings and implementation of the sanction]»[12].

Then, there are two senatus consultua *de aedificiis non diruendis* from the first imperial period. The senatus consultum Hosidianum (47 CE), issued on the initiative of Claudius, forbade the sale of buildings for the purpose of demolition and reuse of the building materials (this conduct was described as a *cruentissimum genus negotiationis*), while the subsequent senatus consultum Volusianum, issued under Nero's principate (56 CE), confirming the rules and regulations of the first one, clarified a few points relative to their application, considering particular needs that had emerged from praxis[13]. During the Hadrianic period, the same *ratio* of protecting

[12] F. Lamberti, *«Tabulae Irnitanae»*, cit., pp. 91-92. On this point, also see F. Procchi, *La tutela urbanistica: un problema non nuovo. Considerazioni a margine del SC. Hosidianum*, in *Scritti in onore di A. Cristiani. Omaggio della Facoltà di Giurisprudenza dell'Università di Pisa*, Torino, 2001, pp. 659-660.

[13] The texts of the two senatus consulta were engraved on a bronze plate found at Herculaneum in 1600, now lost, but three transcriptions of it were made, upon which the current critical editions are based (in *CIL*, X, n. 1401, p. 158 [= *FIRA*, I², n. 45.I-II, pp. 288-290]). On this point, see M. Sargenti, *Due senatoconsulti. Politica edilizia nel primo secolo dell'impero e tecnica normativa*, in *Studi in onore di C. Sanfilippo*, vol. V, Milano, 1984, pp. 639-641 (= *Scritti*, cit., pp. 1039-1040); P. Buongiorno, *CIL X 1401 e il senatus consultum 'Osidiano'*, in *Iura*, 58, 2010, p. 237 and note 10; Id., *Senatus consulta claudianis temporibus facta. Una palingenesi delle deliberazioni senatorie dell'età di Claudio (41-54 d.C.)*, Napoli, 2010, pp. 237-238 and note 458; C. Gómez Buendía, *Conservación y estabilidad de los edificios en las fuentes jurídicas clásicas*, in *Hacia un derecho administrativo y fiscal romano*, vol. II, directed by A. Fernández de Buján, edited by G. Gerez Kraemer, Madrid, 2013, p. 209. The find in Herculaneum was not entirely accidental: the area had been hit by an earthquake in February 62 CE and was still basically an open worksite when it was destroyed by the eruption of Vesuvius in 79 CE. For the reconstruction work, a kind of dossier of city planning legislation was needed, hence the bronze plate, which contained the text of both senatus consulta. On this point, see, in particular, L. Cappelletti, *Norme per la tutela degli edifici negli statuti locali (secoli I a.C. – I d.C.)*, in *Bullettino dell'Istituto di Diritto Romano "Vittorio Scialoja"*, 111, 2017, p. 66 and note 28. The genesis of the senatus consultum Volusianum is connected to the *postulatio* of the *necessarii* of Alliatoria Celsilla. The latter owned plots of land with buildings on them in the Modena region known as

the urban decorum inspired the provisions of the senatus consultum Acilianum (122 CE), which prohibited making over things attached to buildings by legacy (D. 30.41.1 [Ulp. 21 *ad Sab.*]: *ea quae aedibus iuncta sunt*)[14].

campi Macri, where there had once been a market. On this site, located along the Secchia River in a fraction of Formigine called Magreta, see J. Ortalli, *I Campi Macri. Un mercato panitalico sulla via della lana*, in *La lana nella Cisalpina romana. Economia e società. Studi in onore di S. Pesavento Mattioli. Atti del Convegno (Padova-Verona, 18-20 maggio 2011)*, edited by M.S. Busana, P. Basso, Padova, 2012, pp. 195-211. The buildings were in a state of disrepair and there was no economic advantage in restoring them (*eaque edificia longa vetustate dilaberentur neque refecta usui essent futura, quia neque habitaret in iis quisquam nec vellet in deserta ac ruentia commigrare*). The woman was therefore found to be exempt from the application of the senatus consultum Hosidianum. On this point, see M. Sargenti, *La disciplina*, cit., pp. 279-281 (= *Scritti*, cit., pp. 1030-1032); B. Malavé Osuna, *La demolición de edificios en el derecho romano: una intervención del senado en el caso de Alliatoria Celsilla*, in *Mulier. Algunas Historias e Instituciones de Derecho Romano*, edited by R. Rodríguez López, M.J. Bravo Bosch, Madrid, 2015, pp. 225-239; as well as, more recently, A. Grillone, *La gestione*, cit., pp. 190-198 and F. Procchi, *Profili*, cit., pp. 199-201.

[14] The text of the senatus consultum Acilianum has not come down to us, but it was commented by jurists writing on the invalidity of legacies. See D. 30.41 (Ulp. 21 *ad Sab.*), D. 30.42 (Ulp. 2 *fideic.*), D. 30.43 (Ulp. 21 *ad Sab.*). On this point, see J.L. Murga, *El senado consulto Aciliano: ea quae iuncta sunt aedibus legari non possunt*, in *Bullettino dell'Istituto di Diritto Romano "Vittorio Scialoja"*, 79, 1976, pp. 155-192. Also see L. Franchini, *La tutela*, cit., pp. 714-721. The biographer of the *Historia Augusta* (*Vita Hadr.* 18.2: *constituit inter cetera, ut in nulla civitate domus aliqua transferendae ad aliam urbem ullius materiae causa diueretur* [established, among other things, that no house in any city may be demolished with the aim of transporting any material whatsoever to a different city]), most likely alludes to the senatus consultum Acilianum, taking into account, however, the interpretation provided by subsequent imperial constitutions from the Severan period (D. 30.41.3 and D. 30.41.5 [Ulp. 21 *ad Sab.*]). On this point, see the convincing analysis in F. Nasti, *I senatus consulta nella Historia Augusta. Provvedimenti senatori e opere giurisprudenziali*, in *Rappresentazione e uso dei senatus consulta nelle fonti letterarie del principato / Darstellung und Gebrauch der senatus consulta in den literarischen Quellen der Kaiserzeit*, edited by P. Buongiorno, G. Traina, Stuttgart, 2019, in particular pp. 249-260. On the passages from Ulpian's commentary, with specific reference to the interpretation of the phrase *ceterum de alia domo in aliam transferre quaedam exceptum est* found in C.I. 8.10.2 (*Imp. Alex. A. Diogeni*, a. 222), see Ead., *Mutare, detrahere, transferre: considerazioni sui senatusconsulta Osidiano, Aciliano e l'ad Sabinum di Ulpiano*, in *Studia et Documenta Historiae et Iuris*, 83, 2017, pp. 591-602.

It should be emphasised that there are significant differences between the provisions in the municipal laws and those in the senatus consultum Hosidianum, which emerge in the standardisation of the case in point, in the sphere of application of regulations and that of sanctions. In relation to the first, it needs to be noted that the senatus consultum highlights the buyer's intention to profit from the sale with a view to demolition: the sale needs to have been made *negotiandi causa*, and this might even be a reference to professional property speculators. The sphere of application is extended, in the case of the senatus consultum, across all of Italy and not just the cities. As for sanctions, the sanction provided for by the senatus consultum for the buyer was equal to twice the agreed price for the purchase of the property, whereas the municipal statutes provided for a sanction calculated in relation to its simple value[15].

The rules introduced by the senatus consultum Hosidianum were also mentioned – during the Severan period, about 150 years after their enactment – by Paul in his commentary on the edict[16]:

> D. 18.1.52 (Paul. 54 *ad ed.*): *Senatus censuit, ne quis domum villamve dirueret, quo plus sibi adquireretur neve quis negotiandi causa eorum*

[15] On these differences, see P. Garnsey, *Urban property investment*, cit., p. 134 (= *La proprietà a Roma*, cit., pp. 162-163).

[16] In the context of a lengthy digression on ownership and usucapion, see O. Lenel, *Das edictum*, cit., p. 25 and note 1. On this lengthy digression, see, in the most recent literature, G. Luchetti, *Paolo e i commentari edittali di epoca severiana: il legame con il passato*, in *Iulius Paulus. Ad edictum libri. I-III*, Rome, 2018, p. 54 and note 72. Justinian's commissioners, extracting the fragment from its original context, placed it in the title D. 18.1 *De contrahenda emptione et de pactis inter emptorem et venditorem compositis et quae res venire non possunt* [Conclusion of the contract of purchase, special terms agreed between the vendor and purchaser, and things which cannot be sold (translation A. Watson)]. For the Justinian origin of the title, see A. Soubie, *Recherches*, cit., pp. 119-121. Comparing it with the title C.I. 4.38 *De contrahenda empione*, it stands as evidence «d'un esprit minutieux, d'un goût assez discutable dont l'emphase, la verbosité sont en opposition avec la simplicité qui constitue généralement la marque des oeuvres classiques, dont les intitulés ont été souvent complétés». On the dating of Paul's commentary see A.L. de Petris, *La cronologia dei libri ad edictum*, in *Iulius Paulus. Ad edictum libri. I-III*, cit., pp. 27-36.

> *quid emeret venderetve: poena in eum, qui adversus senatus consultum fecisset, constituta est, ut duplum eius quanti emisset in aerarium inferre cogeretur, in eum vero, qui vendidisset, ut irrita fieret venditio. plane si mihi pretium solveris, cum tu duplum aerario debeas, repetes a me: quod a mea parte irrita facta est venditio. nec solum huic senatus consulto locus erit, si quis suam villam vel domum, sed et si alienam vendiderit* [The senate ordained that no one should destroy a dwelling or a country house, in order to make a profit thereby, nor buy or sell one for the purpose of such traffic; should anyone contravene the *senatus consultum*, the penalty provided is that the purchaser must pay double the price to the state treasury and that, for the vendor, the sale is void. Of course, if you have paid me the price, you can recover it from me, when you have to pay double to the treasury, since, from my point of view, the sale has been nullified. This *senatus consultum* applies not only when a man sells his own house, in town or country, but also when it is the house of another (translation A. Watson)].

Paul notes that the senate ruled that the sale of a building with the aim of demolishing it and reusing the materials was prohibited (*Senatus censuit, ne quis domum villamve dirueret, quo plus sibi adquireretur neve quis negotiandi causa eorum quid emeret venderetve*)[17]. He accurately explains the provided sanction: the buyer owed the state treasury double the price paid for the purchase, and the sale was rendered void for the seller (*poena in eum, qui adversus senatus consultum fecisset, constituta est, ut duplum eius quanti emisset in aerarium inferre cogeretur, in eum vero, qui vendidisset, ut irrita fieret venditio*)[18].

[17] The jurist's text is an accurate summary of the provisions of the senatus consultum Hosidianum, as referred in the subsequent senatus consultum Volusianum. Paul mentions just one senatus consultum, without distinguishing between the two provisions. On this point, see P. Buongiorno, *Senatus consulta*, cit., p. 239 and note 461. On the text, also see C. Gómez Buendía, *Conservación*, cit., p. 210.

[18] He prefers to use the category 'relative invalidity', F. Procchi, *La tutela*, cit., pp. 665-666; Id., *«Si quis negotiandi causa emisset quod aedificium…». Prime considerazioni su intenti negoziali e 'speculazione edilizia' nel Principato*, in *Labeo*, 47, 2001, pp. 413-414; Id., *Profili*, cit., p. 198 and note 73. On the difficulties of providing a precise dogmatic definition of this invalidity, see M. Talamanca,

The jurist further specifies that the buyer, owing double to the state treasury, would be able to claim back the price paid for the voided sale (*plane si mihi pretium solveris, cum tu duplum aerario debeas, repetes a me: quod a mea parte irrita facta est venditio*). The subsequent specification, that the senatus consultum would apply equally in the case of the sale of someone else's house (*nec solum huic senatus consulto locus erit, si quis suam villam vel domum, sed et si alienam vendiderit*), also traces back to the jurist's interpretation[19].

A rescript of Alexander Severus (C.I. 8.10.2 [*Imp. Alex. A. Diogeni*, a. 222]), referring to the previous prohibitions, emphasises that not even building owners were allowed to spoil the public view (*publicus deformetur adspectus*):

> C.I. 8.10.2 (*Imp. Alex. A. Diogeni*, a. 222): *Negotiandi causa aedificia demoliri et marmora detrahere edicto divi Vespasiani et senatus consulto vetitum est. ceterum de alia domo in aliam transferre quaedam licere exceptum est: sed nec dominis ita transferre licet, ut integris aedificiis depositis publicus deformetur adspectus* [By an edict of the deified Vespasian and a (prior) decree of the Senate, it was forbidden to demolish buildings and stripp off marble for speculation. But there is an exception permitting transfer of some things from one home to another (of the same owner); still, not even owners are allowed to transfer (materials) if the public vista is marred by entire buildings being torn down (translation F.H. Blume, B.W. Frier)].

Severus Alexander's chancery notes that it was forbidden by an edict of Vespasian and a senatus consultum to demolish buildings and remove the marbles in order to sell them (*Negotiandi causa ae-*

Pubblicazioni pervenute alla Direzione, in *Bullettino dell'Istituto di Diritto Romano "Vittorio Scialoja"*, 91, 1988, pp. 908-909 (on the reconstruction in J.M. Rainer, *Zum Senatusconsultum Hosidianum*, in *Tijdschrift voor Rechtsgeschiedenis*, 55, 1987, pp. 31-38). On this point, also see M. Talamanca, *Vendita (dir. rom.)*, in *Enciclopedia del Diritto*, vol. 46, Milano, 1993, p. 342.

[19] F. Procchi, *Profili*, cit., pp. 198-199. Contrary to that argued by Federico Procchi, I believe it is probable that the specification that the price paid by the buyer could be claimed back is a result of the interpretation by the Severan jurist.

dificia demoliri et marmora detrahere edicto divi Vespasiani et senatus consulto vetitum est)[20]. The lawfulness of transferring something from one house to another is noted as an exception (*ceterum de alia domo in aliam transferre quaedam licere exceptum est*), but owners were prohibited from demolishing buildings if this would mar the public view (*sed nec dominis ita transferre licet, ut integris aedificiis depositis publicus deformetur adspectus*)[21].

3. *Praetorian interdicts* ad publicam utilitatem pertinentia *and the jurisprudential formulation of the category* res in usu publico

More generally, we must also take into account, including with reference to later developments in the Romanistic tradition, the praetorian interdicts *ad publicam utilitatem pertinentia* (D. 43.1.2.1 [Paul. 63 *ad ed.*]) and the jurisprudential formulation of the category *res in usu publico* (D. 43.8.2.5 [Ulp. 68 *ad ed.*]). Paul's discussion of interdicts begins with a breakdown that highlights their respective functions:

> D. 43.1.2.1 (Paul. 63 *ad ed.*): *Interdicta autem competunt vel hominum causa vel divini iuris aut de religione, sicut est 'ne quid in loco sacro fiat'*

[20] The use of the expression *negotiandi causa* suggests that the senatus consultum in question was probably the Hosidianum. The senatus consultum Acilianum in fact took legacies into account. See Franchini, *La tutela*, cit., p. 710, note 56. If the senatus consultum in question was indeed the Hosidianum, the enumeration (*edicto divi Vespasiani et senatus consulto*) is of course not in chronological order. For a possible explanation, that appeals to the chancery's desire to emphasise the contribution of imperial legislation, see F. Procchi, *«Si quis»*, cit., p. 429 and P. Buongiorno, *Senatus consulta*, cit., pp. 240-241.

[21] See P. Buongiorno, *Senatus consulta*, cit., p. 240 and L. Franchini, *La tutela*, cit., p. 721. Closely examining the phrase *ceterum de alia domo in aliam transferre quaedam exceputm est,* it is argued in F. Nasti, *I senatus consulta*, cit., pp. 252-253, that, since the verb *transferre* is not used in the senatus consultum Hosidianum, Alexander Severus's secretary for petitions – and for that matter the biographer of the *Historia Augusta* – could have easily had in mind the content of the constitutions noted in Ulpian's *ad Sabinum* (see above, note 14).

> *vel 'quod factum est restituatur' et de mortuo inferendo vel sepulchro aedificando. hominum causa competunt vel ad publicam utilitatem pertinentia vel sui iuris tuendi causa vel officii tuendi causa vel rei familiaris. publicae utilitatis causa competit interdictum 'ut via publica uti liceat' et 'flumine publico' et 'ne quid fiat in via publica': iuris sui tuendi causa de liberis exhibendis, item de liberto exhibendo: officii causa de homine libero exhibendo: reliqua interdicta rei familiaris causa dantur* [Interdicts are in favor either of human beings or of divine law or religion, like the interdicts 'to prevent anything from being done in a sacred place', 'to make good what has been done', on interment of the dead, or on the building of a tomb. In favor of human beings are those which are for public welfare or for safeguarding rights, duties, or property. Available for public welfare are the interdicts to ensure freedom to use a public way or a public river, and that nothing should be done in a private way. For safeguarding personal rights are the interdicts for the production of children and freedmen. For duty are interdicts requiring the production of a freeman. Other interdicts are granted for the sake of personal property (translation A. Watson)].

This discussion, as has been rightly observed, starts with a classification – Gaius's *summa divisio* of the *res* into *res humani iuris* and *res divini iuris* – to then propose a categorisation of the interdicts by function[22]. Thus, the interdicts in favour of human beings (*hominum causa*) are identified as those that protect the *publica utilitas* (*ad publicam utilitatem pertinentia* or *publicae utilitatis causa*), a right (*sui iuris tuendi causa*), a duty (*officii causa*) and property (*rei familiaris causa*)[23].

[22] With reference to Gaius's *summa divisio* see, in particular, R. Scevola, *Utilitas publica*, II, cit., pp. 152-153 and note 85. On the attention to the functions of the interdicts, see M. Navarra, *Ricerche*, cit., pp. 115-116 and A. Schiavon, *Interdetti*, cit., pp. 50-51.

[23] For the exegesis, see G. Santucci, *Operis novi nuntiatio*, cit., pp. 48-55, which highlights the way that Paul's classification is: «caratterizzata da una forte tensione sistematica [characterised by a strong drive to find systematic order]». For Ulpian's parallel classification, contained in D. 43.1.1 pr. (Ulp. 67 *ad ed.*), see A. Schiavon, *Interdetti*, cit., pp. 11-21. On the various classifications of the interdicts proposed in Roman law texts, see, in general, S. Riccobono, *Interdicta*, in *Nuovo Digesto Italiano*, vol. 7, Torino, 1938, pp. 3-4 (= *Novissimo Digesto Italiano*,

Jurisprudence formulated, in parallel, the category of *res in usu publico*[24]. Limited as we inevitably are at present to proceeding solely *per exempla*, the three interdicts contained in the edict title *Ne quid in loco publico vel itinere fiat* (*E.* 237) permitted, among other things, the protection of things meant for public use[25]. Ulpian's commentary on the first of these interdicts underlines the fact that the relative provisions concerned both *publica utilitas* and private[26]:

> D. 43.8.2.1-2 (Ulp. 68 *ad ed.*): *Hoc interdictum prohibitorium est.* 2. *Et tam publicis utilitatibus quam privatorum per hoc prospicitur*. […] [This interdict is for prohibition. 2. It provides for both public and private welfare. (…) (translation A. Watson)].

The discussion then clarifies that the use of public places (*loca publica*) is the right of private citizens, *non quasi propria cuiusque*, but, instead, *iure civitatis*:

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vol. 8, Torino, 1962 [repr. 1982]), pp. 793-794); A. Biscardi, *La tutela interdittale ed il relativo processo. Corso di lezioni 1955-56*, edited by R. Martini, Siena, 1956, pp. 239-273 (= *Rivista di Diritto Romano*, 2, 2002, pp. [63]71-[74]82); L. Capogrossi Colognesi, *Interdetti (dir. rom.)*, in *Enciclopedia del Diritto*, vol. 21, Milano, 1971, pp. 905-909; A.M. Giomaro, *Interdicta*, in *Digesto delle Discipline Privatistiche (Sez. Civ.)*, vol. 9, Torino, 1993, pp. 506-508.

[24] Labeo (D. 43.8.2.3 [Ulp. 68 *ad ed.*]; D. 50.16.60.1 [Ulp. 69 *ad ed.*]), Celsus (D. 18.1.6 [Pomp. 9 *ad Sab.*]) and Ulpian made important contributions to the development of this concept. On the genesis of this category, «maturata a partire dall'interpretazione del campo di applicazione degli interdetti *de locis publicis* [developed starting from the interpretation of the applicative field of the interdicts *de locis publicis*]», see in particular A. Schiavon, *Interdetti*, cit., pp. 152-159.

[25] See O. Lenel, *Das edictum*, cit., pp. 458-459.

[26] This was the interdict *ne quid in loco publico fiat* (D. 43.8.2 pr. [Ulp. 68 *ad ed.*]): O. Lenel, *Das edictum*, cit., p. 458 and note 5. On the meaning of the reference to public and private use, see L. Capogrossi Colognesi, *La struttura della proprietà e la formazione dei «iura praediorum» nell'età repubblicana*, vol. 2, Milano, 1976, p. 12 and A. Palma, *Le strade romane nelle dottrine giuridiche e gromatiche dell'età del principato*, in *Aufstieg und Niedergang der römischen Welt*, vol. II.14, Berlin/New York, 1982, p. 860 and note 35. On this point, also see A. Schiavon, *Interdetti*, cit., p. 52 and note 141.

> D. 43.8.2.2 (Ulp. 68 *ad ed.*): […] *loca enim publica utique privatorum usibus deserviunt, iure scilicet civitatis, non quasi propria cuiusque, et tantum iuris habemus ad optinendum, quantum quilibet ex populo ad prohibendum habet. propter quod si quod forte opus in publico fiet, quod ad privati damnum redundet, prohibitorio interdicto potest conveniri, propter quam rem hoc interdictum propositum est* [(…) For public places serve both public and private uses, that is to say, as the property of the *civitas* and not of each individual, and we have as much right to enjoy them as anyone of the people has to prevent their misuse. On account of this, if any work should be undertaken in a public place that causes private damage, suit may be brought against it under this prohibitory interdict on account of which thing this interdict is available (translation A. Watson)].

Commenting on this text, Riccardo Orestano aptly observed: «l'uso dei *loca publica* spetta a tutti, senza che nessuno possa dirsene proprietario o possessore [the use of the *loca publica* was everyone's right, without anyone being able to call themselves their owner or proprietor]»[27]. Ulpian then further specifies the field of application of the relative edictal provisions:

> D. 43.8.2.5 (Ulp. 68 *ad ed.*): *Ad ea igitur loca hoc interdictum pertinet, quae publico usui destinata sunt, ut, si quid illic fiat, quod privato noceret, praetor intercederet interdicto suo* [This interdict therefore applies to those places which are intended for public use, so that if anything happens there which would harm a private citizen, the praetor may intervene with his interdict (translation A. Watson)].

The interdict concerns places meant for public use (*Ad ea igitur loca hoc interdictum pertinet, quae publico usui destinata sunt*) and the praetor's intervention had the scope of preventing conduct that

[27] See R. Orestano, *Il «problema delle persone giuridiche» in diritto romano*, vol. I, Torino, 1968, pp. 310-311. The author also refers the reader in this regard to D. 41.2.1.22 (Paul. 54 *ad ed.*).

could impair it (*ut, si quid illic fiat, quod privato noceret, praetor intercederet interdicto suo*)[28].

Commenting on these same edictal provisions, Julian reasons with reference to the need to preserve the urban decorum (*ne ruinis urbs deformetur*):

> D. 43.8.7 (Iul. 48 *dig.*): *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* [Just as anyone who built in a public place when nobody forbade him is not to be compelled to demolish for fear of ruins disfiguring the city, so anyone who builds in defiance of a praetorial edict must remove the building. Otherwise, the praetor's power would be empty and derisory (translation A. Watson)].

Julian's reasoning is reiterated verbatim by Ulpian in D. 43.8.2.17 (Ulp. 68 *ad ed.*)[29]. The Severan jurist gives a more rigor-

[28] On the right to bring suit in the interdict *ne quid in loco publico fiat* and for the exclusion of its popular nature, see M. Fiorentini, *Fiumi e mari nell'esperienza giuridica romana. Profili di tutela processuale e di inquadramento sistematico*, Milano, 2003, pp. 319-320 and note 91; Id., *L'acqua da bene economico a "res communis omnium" a bene collettivo*, *Analisi Giuridica dell'Economia*, vol. 1, 2010, pp. 48-49 (= *Natura e diritto nell'esperienza romana. Le cose, gli ambienti, i paesaggi*, Lecce, 2022, pp. 296-300); P. Ziliotto, *Pubbliche vie e tutela interdittale*, in *I beni di interesse pubblico nell'esperienza giuridica romana*, vol. I, cit., pp. 696-705; also see A. Schiavon, *Interdetti*, cit., pp. 219-226.

[29] D. 43.8.2.17 (Ulp. 68 *ad ed.*): *Si quis nemine prohibente in publico aedificaverit, non esse eum cogendum tollere, ne ruinis urbs deformetur, et quia prohibitorium est interdictum, non restitutorium. si tamen obstet id aedificium publico usui, utique is, qui operibus publicis procurat, debebit id deponere, aut si non obstet, solarium ei imponere: vectigal enim hoc sic appellatur solarium ex eo, quod pro solo pendatur* [If someone builds in a public place and nobody prevents him, he cannot then be compelled to demolish, for fear of ruins disfiguring the city and because the interdict is for prohibition, not restitution. But if his building obstructs public use, it must certainly be demolished by the official in charge of public works. If it does not, he must impose a *solarium* (ground-rent) on it. This rent is so called because it is paid for the *solum* (ground) (translation A. Watson)]. On the exclusively prohibitory nature of this interdict, which also emerges in D. 43.8.2.1 (Ulp. 68 *ad ed.*), see G. Melillo, *«Interdicta» e «operis novi nuntiatio iuris publici tuendi gratia»*, in *Labeo*, 12, 1966, pp. 186-187; also see A. Schiavon, *Interdetti*, cit., pp. 205-219.

ous systematic classification to the rule previously set out by Julian, also taking into consideration the consequences of building on public land that has been done *nullo prohibente*, which remain shadowy in the Julian's fragment[30].

4. *Late antiquity and the Justinian age: greater awareness?*

In late antiquity, the need to preserve cultural heritage seems to at times emerge with greater intensity[31]. A Constantinian constitution, passed down from the Justinian *Codex repetitae praelectionis* (C.I. 8.10.6), prohibited the use of valuable materials removed from city buildings to embellish country residences[32]. In the case of non-observance of the prohibition, the constitution provided for the confiscation of the building. The same constitution, howev-

[30] On the relationship between the two texts, see F. Mattioli, *Ricerche sui capita geminata*, vol. I, *I digesta di Giuliano e i libri ad edictum di Ulpiano*, Bologna, 2019, pp. 23-32.

[31] See M.G. Caenaro, *Forma urbis. La tutela del patrimonio storico-artistico in età imperiale*, in *L'esilio della bellezza*, edited by A. Camerotto, F. Pontani, Milano/Udine, 2013, pp. 159-160.

[32] C.I. 8.10.6 (*Imp. Constantinus A. Helpidio agenti vicem pp.*, a. 321): *Si quis post hanc legem civitate spoliata ornatum, hoc est marmora vel columnas, ad rura transtulerit, privetur ea possessione, quam ita ornaverit.* 1. *Si quis autem ex alia in aliam civitatem labentium parietum marmora vel columnas de propriis domibus in proprias transferre voluerit, quoniam utrobique haec esse publicum decus est, licenter hoc faciat: data similiter facultate etiam de possessione ornatum huiusmodi ad possessionem aliam transferendi, quamvis per muros vel etiam per mediam civitatem ea transferri necesse sit, ita ut ea solummodo quae illata fuerint civitatibus exportentur* [If, after this law, anyone despoils a city by removing decoration, i.e., marble or columns, to the countryside, he shall be deprived of the possession he thus decorated. 1. But if anyone wishes to convey the marble or columns of shaky walls from his property in one city to that in another, he shall do so lawfully, since it is a public ornament that these be in one place or the other. Permission is similarly granted to convey such decoration from one possession to another, even if it must be conveyed through the (city) walls or even through the middle of the city, but only those things that are brought in may be removed from cities (translation F.H. Blume, B.W. Frier)]. On the constitution, see B. Malavé Osuna, *El esplendor de las ciudades: decus publicum y estética urbana*, in *Fundamenta iuris. Terminología, principios e interpretatio*, edited by P. Resina Sola, Almería, 2012, pp. 142-146.

er, recognised the owner's right to move valuable materials from an unsafe building to one of his other properties.

Constantius II also prohibited depriving the *civitates* of their *ornamenta* and transferring it elsewhere (C.Th. 15.1.1)[33]. Julian, in turn, prohibited the removal of statues from the province where they were located (C.I. 8.10.7)[34].

The growing difficulty of obtaining building materials led people to see ancient monuments as 'quarries' that could be drawn from for building new structures or repairing existing ones[35]. The gradual rise of Christianity, especially after the issuance of the Edict

[33] C.Th. 15.1.1 (*Imp. Constantinus* <immo: Constantius> *A. ad Flavianum P[ro]c[onsulem] Afric[ae]*, a. 357): *Nemo propriis ornamentis esse privandas existimet civitates: fas si quidem non est acceptum a veteribus decus perdere civitatem veluti ad urbis alterius moenia transferendum* [No man shall suppose that municipalities may be deprived of their own ornaments, since indeed it was not considered right by the ancients that a municipality should lose its embellishments, as though they should be transferred to the buildings of another city (translation C. Pharr)]. The constitution is at the beginning of C.Th. 15.1 *De operibus publicis*. For the dating to 357, see O. Seeck, *Regesten der Kaiser und Päpste für die Jhare 311 bis 476 n. Chr.*, Stuttgart, 1919, p. 203 and p. 437. The constitution is sometimes even attributed to Constantine: see G. Lustig, *La tutela*, cit., p. 491. On the difficulty of dating, see P.O. Cuneo, *La legislazione di Costantino II, Costanzo II e Costante (337-361)*, Milano, 1997, pp. 312-313. For an overall reading of the constitutions contained in the title, for the most part aimed towards blocking the construction of new public buildings, proceeding with the restoration of the pre-existing ones. see B. Malavé Osuna, *Hacia una urbanidad no tan nueva. Los precedentes del planeamiento sostenible en los grandes Códigos Teodosiano y Justinianeo*, Madrid, 2021, pp. 99-167.

[34] C.I. 8.10.7 (*Imp. Iulianus A. ad Avitianum vicarium Africae*, a. 362): *Nemini columnas vel statuas cuiuscumque materiae ex alia eademque provincia vel auferre liceat vel movere* [No one is permitted either to carry off or to move columns or statues of whatever material from another province or the same one (translation F.H. Blume, B.W. Frier)]. For the dating to 362, see O. Seeck, *Regesten*, cit., p. 211 and p. 442. The provision was enacted within a broader regulatory context that included the *leges iungendae* C.Th. 8.5.15, C.Th. 11.28.1, C.Th. 15.3.2.

[35] See C. Kunderewicz, *La protection des monuments d'architecture antique dans le Code Théodosien*, in *Studi in onore di E. Volterra*, vol. IV, Milano, 1971, pp. 138-140. It got to the point that the emperor Julian was driven to complain that decoration was being removed from tombs to embellish dining rooms and colonnades: C.Th. 9.17.5 pr. (= C.I. 9.19.5). On this point, also see M.G. Caenaro, *Forma urbis*, cit., pp. 166-167.

of Thessalonica, spurred the crowds to destroy temples and pagan statues[36].

The culture sphere reacted, and the rhetorician Libanius took a firm position, addressing himself to Theodosius:

> Libanio, Πρὸς Θεοδόσιον τὸν βασιλέα ὑπὲρ τῶν ἱερῶν, 8 (ed. R. Förster): σὺ μὲν οὖν οὔθ' ἱερὰ κεκλεῖσθαι <ἐκέλευσας> οὔτε μηδένα προσιέναι οὔτε πῦρ οὔτε λιβανωτὸν οὔτε τὰς ἀπὸ τῶν ἄλλων θυμιαμάτων τιμὰς ἐξήλασας τῶν νεῶν οὐδὲ τῶν βωμῶν, οἱ δὲ μελανειμονοῦντες οὗτοι καὶ πλείω μὲν τῶν ἐλεφάντων ἐσθίοντες, πόνον δὲ παρέχοντες τῷ πλήθει τῶν ἐκπωμάτων τοῖς δι' ἁσμάτων αὐτοῖς παραπέμπουσι τὸ ποτόν, συγκρύπτοντες δὲ ταῦτα ὠχρότητι τῇ διὰ τέχνης αὐτοῖς πεπορισμένῃ μένοντος, ὦ βασιλεῦ, καὶ κρατοῦντος τοῦ νόμου θέουσιν ἐφ' ἱερὰ ξύλα φέροντες καὶ λίθους καὶ σίδηρον, οἱ δὲ καὶ ἄνευ τούτων χεῖρας καὶ πόδας. ἔπειτα Μυσῶν λεία καθαιρουμένων ὀροφῶν κατασκαπτομένων τοίχων, κατασπωμένων ἀγαλμάτων, ἀνασπωμένων βωμῶν, τοὺς ἱερεῖς δὲ ἢ σιγᾶν ἢ τεθνάναι δεῖ· τῶν πρώτων δὲ κειμένων δρόμος ἐπὶ τὰ δεύτερα καὶ τρίτα, καὶ τρόπαια τροπαίοις ἐναντία τῷ νόμῳ συνείρεται [You then have neither ordered the closure of temples nor banned entrance to them. From the temples and altars you have banished neither fire nor incense nor the offerings of other perfumes. But this black-robeb tribe, who eat more than elephants and, by the quantities of drink they consume, weary those that accompany their drinking with the singing of hymns, who hide these excesses under an artificially contrived pallor – these people, Sire, while the law yet remains in force, hasten to attack the temples with sticks and stones and bars of iron, and in some cases, disdaining these, with hands and feet. Then utter desolation follows, with the stripping of roofs, demolition of walls, the tearing down of statues and the overthrow of altars, and the priests must either keep quiet or die. After demolishing one, they scurry to another, and to a third, and trophy is piled on trophy, in contravention of the law (translation A.F. Norman)].

[36] C. Kunderewicz, *La protection*, cit., pp. 140-141. On anti-pagan repression in the fourth and fifth centuries, see L. De Giovanni, *Costantino e il mondo pagano*, Napoli, 1982, pp. 77-103; R. Romano, *Introduzione*, in Libanio, *In difesa dei templi*, edited by R. Romano, Napoli, 1982, pp. 7-16; A.D. Manfredini, *Antichità archeologiche e tesori nella storia del diritto*, Torino, 2018, pp. 59-64.

The imperial chancery sometimes stepped in to protect pagan religious buildings:

> C.Th. 16.10.8: (*Imppp. Gr[ati]anus, Val[entini]anus et Theod[osius] AAA. Palladio duci Osdroenae*, a. 382): *Aedem olim frequentiae dedicatam coetui et iam populo quoque communem, in qua simulacra feruntur posita artis pretio quam divinitate metienda iugiter patere publici consilii auctoritate decernimus neque huic rei obreptivum officere sinimus oraculum. Ut conventu urbis et frequenti coetu videatur, experientia tua omni votorum celebritate servata auctoritate nostri ita patere templum permittat oraculi, ne illic prohibitorum usus sacrificiorum huius occasione aditus permissus esse credatur* [By the authority of the public council We decree that the temple shall continually be open that was formerly dedicated to the assemblage of throngs of people and now also is for the common use of the people, and in which images are reported to have been placed which must be measured by the value of their art rather than by their divinity; We do not permit any divine imperial response that was surreptitiously obtained to prejudice this situation. In order that this temple may be seen by the assemblages of the city and by frequent crowds, Your Experience shall preserve all celebrations of festivities, and by the authority of Our divine imperial response, you shall permit the temple to be open, but in such a way that the performance of sacrifices forbidden therein may not be supposed to be permitted under the pretext of such access to the temple (translation C. Pharr)].

The constitution of Theodosius issued on 30 November 382 in Constantinople aimed to protect the temple of Edessa. It is especially significant that the *simulacra* found in the temple were to be considered in terms of their artistic, not religious, value (*simulacra feruntur posita artis pretio quam divinitate metienda*)[37].

[37] C. Kunderewicz, *La protection*, cit., p. 146; M. de Dominicis, *Quelques rémarques sur le bâtiment public à Rome dans les dispositions normatives du Bas Empire*, in *Accademia Romanistica Costantiniana. Atti. I° Convegno internazionale (Spello – Foligno – Perugia 18-20 settembre 1973)*, Perugia, 1975, p. 136.

A constitution of Honorius (C.Th. 16.10.15 = C.I. 1.11.3), issued in Ravenna on 29 January 399, had an identical protective aim[38]:

> C.Th. 16.10.15 (*Impp. Arcad[ius] et Honorius AA. Macrobio vicario Hispaniarum et Procliano vicario quinque provinciarum*, a. 399): *Sicut sacrificia prohibemus, ita volumus publicorum operum ornamenta servari. Ac ne sibi aliqua auctoritate blandiantur, qui ea conantur evertere, si quod rescriptum, si qua lex forte praetenditur. Erutae huiusmodi chartae ex eorum manibus ad nostram scientiam referantur, si inlicitis evectiones aut suo aut alieno nomine potuerint demonstrare, quas oblatas ad nos mitti decernimus. Qui vero talibus cursum praebuerint, binas auri libras inferre cogantur* [Just as We forbid sacrifices, so it is Our will that the ornaments of public works shall be preserved. If any person should attempt to destroy such works, he shall not have the right to flatter himself as relying on any authority, if perchance he should produce any rescript or any law as his defense. Such documents shall be torn from his hands and referred to Our Wisdom. If any person should be able to show illicit post warrants, either in his own name or that of another, We decree that such post warrants shall be delivered and sent to Us. Those persons who ave granted the right to the public post to such persons shall be forced to pay two pounds of gold each (translation C. Pharr)].

The position taken in imperial legislation oscillated, however, and some constitutions even ordered the destruction of pagan temples, seen as sources of superstition[39].

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[38] See G. Lustig, *La tutela*, cit., p. 491 and M. de Dominicis, *Quelques rémarques*, cit., p. 136. On the constitution, see, most recently, G. Maragno, *'Punire e sorvegliare'. Sanzioni in oro imperatori burocrazia*, Napoli, 2020, pp. 386-387.

[39] C.Th. 16.10.16 (*Idem AA. ad Eutychianum p[raefectum] p[raetorio]*, a. 399): *Si qua in agris templa sunt, sine turba ac tumultu diruantur. His enim deiectis atque sublatis omnis superstitioni materia consumetur* [If there should be any temples in the country districts, they shall be torn down without disturbance or tumult. For when they are torn down and removed, the material basis for all superstition will be destroyed (translation C. Pharr)]. Also see the subsequent C.Th. 16.10.25 (*Impp. Theod[osius] et Val[entini]anus AA. Isidoro p[raefecto] p[raetori]o*, a. 435): *Omnibus*

One extremely important document relative to the situation of Roman architectural heritage in the fifth century and other pressing conservation matters noted by the imperial chancery is the Nov. 4 *De aedificiis publicis* of Majorian, the last great emperor of the *pars Occidentis*, issued in Ravenna on 11 July 458[40]. In the *principium* of the constitution, we find a strong condemnation of the practice of demolishing buildings in order to obtain building materials:

> Nov. Maior. 4 (*Impp. Leo et Maiorianus AA. Aemiliano p[raefecto] u[rbi]*, a. 458): *Nobis r(em) p(ublicam) moderantibus volumus emendari, quod iam dudum ad decolorandam urbis venerabilis faciem detestabamur admitti. Aedes si quidem publicas in quibus omnis Romanae civitatis consistit ornatus, passim dirui plectenda urbani officii suggestione manifestum est. dum necessaria publico operi saxa finguntur, antiquarum aedium dissipatur speciosa constructio et ut parvum aliquid reparetur, magna diruuntur. Hinc iam occasio nascitur, ut etiam unusquisque privatum aedificium construens per gratiam iudicum in urbe positorum praesumere de publicis locis necessaria et transferre non dubitet, cum haec, quae ad splendorem urbium pertinent, adfectione civica debeant etiam sub reparatione servari* [While We rule the State, it is Our will to correct the practice whose commission We have long detested, whereby the appearance of the venerable City is marred. Indeed, it is manifest that the public buildings, in which the adornment of the entire

sceleratae mentis paganae exsecrandis hostiarum immolationibus damnandisque sacrificiis ceterisque antiquiorum sanctionum auctoritate prohibitis interdicimus cunctaque eorum fana templa delubra, si qua etiam nunc restant integra, praecepto magistratuum destrui conlocationeque venerandae Christianae religionis signi expiari praecipimus, scientibus universis, si quem huic legi aput competentem iudicem idoneis probationibus inlusisse constiterit, eum morte esse multandum [We interdict all persons of criminal pagan mind from the accursed immolation of victims, from damnable sacrifices and from all other such practices that are prohibited by the authority of the more ancient sanctions. We command that all their fanes, temples, and shrines, if even now any remain entire, shall be destroyed by the command of the magistrates, and shall be purified by the erection of the sign of the venerable Christian religion. All men shall know that if it is should appear, by suitable proof before a competent judge, that any person has mocked this law, he shall be punished with death (translation C. Pharr)].

[40] de Dominicis, *Quelques rémarques*, *cit.*, pp. 129-131; M.G. Caenaro, *Forma urbis*, cit., pp. 167-171; C. Corbo, *Diritto e decoro urbano*, cit., pp. 21-67.

> City of Rome consists are being destroyed everywhere by the punishable recommendation of the office of the Prefect of the City. While it is pretended that the stones are necessary for public works, the beautiful structures of the ancient buildings are being scattered, and in order that something small may be repaired, great things are being destroyed. Hence the occasion now arises that also each and every person who is constructing a private edifice, through the favoritism of the judges who are situated in the City, does not hesitate to take presumptuously and to transfer the necessary materials from the public places, although those things which belong to the splendor of the cities ought to be preserved by civic affection, even under the necessity of repair (translation C. Pharr)].

After noting the damaging practice of demolition and reuse of building materials, the emperor emphasised that everything that contributes to the splendour of the city has to be preserved by the love of the citizens and restored (*quae ad splendorem urbium pertinent, adfectione civica debeant etiam sub reparatione servari*). The constitution provides for a ban, upon threat of serious pecuniary or, indeed, afflictive sanctions, on demolishing or tampering with ancient buildings[41].

[41] Nov. Maior. 4.1: *Idcirco generali lege sancimus cuncta aedificia quaeve in templis aliisque monumentis a veteribus condita propter usum vel amoenitatem publicam subrexerunt, ita a nullo destrui atque contingi, ut iudex, qui hoc fieri statuerit, quinquaginta librarum auri inlatione feriatur; adparitores vero atque numerarios, qui iubenti obtemperaverint et sua neutiquam suggestione restiterint, fustuario supplicio subditos manuum quoque amissione truncandos, per quas servanda veterum monumenta temerantur* [Therefore, by this general law We sanction that all the buildings that have been founded by the ancients as temples and as other monuments and that were constructed for the public use or pleasure shall not be destroyed by any person, and that it shall transpire that a judge who should decree that this be done shall be punished by the payment of fifty pounds of gold. If his apparitors and accountants should obey him when he so orders and should not resist him in any way by their own recommendation, they shall be subjected to the punishment of cudgeling, and they shall also be mutilated by the loss of their hands, through which the monuments of the ancients that should be preserved are desecrated (translation C. Pharr)]. On this system of sanctions, see in particular G. Maragno, *Punire e sorvegliare*, cit., pp. 486-487.

The imperial chancery planned to revoke all previous concessions that permitted the demolition of ancient buildings and reuse of the building materials[42]. Exceptions were possible in extremely limited cases, following confirmation of the impossibility of repairing the pre-existing building and solely for reasons of public interest, with the consent of the senate and subject to imperial authorisation[43].

With reference to late antiquity, we should also note imperial provisions for protecting the view of the sea that could be enjoyed

[42] Nov. Maior. 4.2: *Ex his quoque locis quae sibi conpetitorum hactenus vindicavit revocanda subreptio, nihil iubemus auferri: quae ad ius publicum nihilominus redeuntia ablatarum rerum volumus reformatione reparari, submota in posterum licentia conpetendi* [We also order that from such places nothing shall be taken away that petitioners have heretofore vindicated to themselves by surreptitious actions that must be annulled; it is Our will that such places shall nevertheless return to the public ownership and shall be repaired by the restoration of the materials which have been taken away. The right to such petitions shall be abolished in the future (translation C. Pharr)].

[43] Nov. Maior. 4.3-4: *Si quid sane aut propter publicam alterius operis constructionem aut propter desperatum reparationis usum necessaria consideratione deponendum est, hoc apud amplissimum venerandi senatus ordinem congruis instructionibus praecipimus adlegari et, cum ex deliberato fieri oportere censuerit, ad mansuetudinis nostrae conscientiam referatur, ut, quod reparari nullo modo viderimus posse, in alterius operis nihilominus publici transferri iubeamus ornatum, Aemiliane p(arens) k(arissime) a(tque) a(mantissime).* 4. *Quapropter inlustris magnitudo tua saluberrimam sanctionem propositis divulgabit edictis, ut, quae pro utilitate urbis aeternae provide constituta sunt, famulatu congruo et devotione serventur* [Of course, if any building must be torn down for necessary considerations, for the public construction of another work or on account of the desperate need of repair, We direct that such claim shall be alleged with the suitable documents before the Most August Order of the venerable Senate. When it has decreed, after deliberation, that this must be done, the matter shall be referred to the knowledge of Our Clemency, so that We may order that such building shall nevertheless be transferred to the adornment of another public work, if We should see that it can in no way be repaired, O Aemilianus, dearest and most beloved Father. 4. Wherefore, Your Illustrious Magnitude by posting edicts shall publish this most salutary sanction, in order that those provisions which have been prudently established for the welfare of the Eternal City may be preserved with suitable obedience and devotion (translation C. Pharr)].

from certain buildings, starting with the constitution of Zeno contained in C.I. 8.10.12[44].

The Anonymus Valesianus, 12.71, describes Theoderic as an *amator fabricarum et restaurator civitatum*[45]:

> Anonymus Valesianus, *Pars posterior: Theodericiana*, 12.71 (ed. M. Festy): *Erat enim amator fabricarum et restaurator civitatum. Hic aquaeductum Ravennae restauravit quem princeps Traianus fecerat, et post multa tempora aquam introduxit; palatium usque ad perfectum fecit, quem non dedicavit; portica circa palatium perfecit. Item Veronae thermas et palatium fecit et a porta usque ad palatium porticum reddidit; aquaeductum, quod per multa tempora destructum fuerat, renovavit et aquam intromisit; muros alios novos circuit civitatem. Item Ticino palatium, thermas, amphiteatrum et alios muros civitatis fecit. Sed et per alias civitates multa beneficia praestitit* [He was besides a lover of building and restorer of cities. At Ravenna he repaired the aqueduct which the emperor Trajan had constructed, and thus brought water into the city after a long time. He completely finished the palace, but did not dedicate it. He completed the colonnades around the palace. He also built baths and a palace at Verona, and added a colonnade extending all the way from the gate to the Palace; besides that, he restored the aqueduct at Verona, which had long since been destroyed, and brought water into the city, as well as surrounding the city with new walls. Also at Ticinum he built a palace, baths, and an amphitheatre, besides new city walls. He also showed many favours to the other cities (translation J.C. Rolfe)].

Profound awareness that Rome's vast heritage needed to be protected from destruction seems to emerge in Belasarius's letter to Totila, as recorded by Procopius of Caesarea in his account of the

[44] See Lustig, *La tutela*, *cit.*, pp. 561-564. In the more recent literature, see the reconstruction in F. Fasolino, *Note in tema di prospetto, veduta e panorama in diritto romano*, in *Quaderni Lupiensi di Storia e Diritto*, 10, 2020, pp. 177-210.

[45] B. Saitta, *La civilitas di Teoderico. Rigore amministrativo, "tolleranza" religiosa e recupero dell'antico nell'Italia Ostrogota*, Roma, 1993, pp. 103-138; A. Pergoli Campanelli, *Cassiodoro alle origini dell'idea di restauro*, Milano, 2013, pp. 13-14; also see M.G. Caenaro, *Forma urbis*', cit., pp. 171-174.

Gothic War[46]. It was 547 CE and the war had been dragging on for twelve years. Totila was threatening to raze Rome to the ground and had already begun to destroy the city wall. When Belisarius learned of these events, he sent his messengers with a letter for Totila[47]:

> Procopius of Caesarea, Οἱ ὑπὲρ τῶν πολέμων λόγοι, 7.22.8-16 (ed. J. Haury): […] "Πόλεως μὲν κάλλη οὐκ ὄντα ἐργάζεσθαι ἀνθρώπων ἂν φρονίμων εὑρήματα εἶεν καὶ πολιτικῶς βιοτεύειν ἐπισταμένων, ὄντα δὲ ἀφανίζειν τοὺς γε ἀξυνέτους εἰκὸς καὶ γνώρισμα τοῦτο τῆς αὐτῶν φύσεως οὐκ αἰσχυνομένους χρόνῳ τῷ ὑστέρῳ ἀπολιπεῖν. (9) Ῥώμη μέντοι πόλεων ἁπασῶν, ὅσαι ὑφ' ἡλίῳ τυγχάνουσιν οὖσαι, μεγίστη τε καὶ ἀξιολογωτάτη ὡμολόγηται εἶναι. (10) οὐ γὰρ ἀνδρὸς ἑνὸς ἀρετῇ εἴργασται οὐδὲ χρόνου βραχέος δυνάμει ἐς τόσον μεγέθους τε καὶ κάλλους ἀφῖκται, ἀλλὰ βασιλέων μὲν πλῆθος, ἀνδρῶν δὲ ἀρίστων συμμορίαι πολλαί, χρόνου τε μῆκος καὶ πλούτου ἐξουσίας ὑπερβολὴ τά τε ἄλλα πάντα ἐκ πάσης τῆς γῆς καὶ τεχνίτας ἀνθρώπους ἐνταῦθα ξυναγαγεῖν ἴσχυσαν. (11) οὕτω τε τὴν πόλιν τοιαύτην, οἵανπερ ὁρᾷς, κατὰ βραχὺ τεκτηνάμενοι, μνημεῖα τῆς πάντων ἀρετῆς τοῖς ἐπιγενησομένοις ἀπέλιπον, ὥστε ἡ ἐς ταῦτα ἐπήρεια εἰκότως ἂν ἀδίκημα μέγα ἐς τοὺς ἀνθρώπους τοῦ παντὸς αἰῶνος δόξειεν εἶναι: (12) ἀφαιρεῖται γὰρ τοὺς μὲν προγεγενημένους τὴν τῆς ἀρετῆς μνήμην, τοὺς δὲ ὕστερον ἐπιγενησομένους τῶν ἔρ-

[46] See M.G. Caenaro, *Forma urbis*, cit., pp. 174-176 and L. Solidoro, *Politiche*, cit., pp. 101-102 (= *La tutela dei beni culturali*, cit., pp. 101-102).

[47] See Procopius of Caesarea, Οἱ ὑπὲρ τῶν πολέμων λόγοι, 7.22.6-7 (ed. J. Haury): […] Γνοὺς δὲ ταῦτα ὁ Τουτίλας ἔγνω Ῥώμην μὲν καθελεῖν ἐς ἔδαφος, τοῦ δὲ στρατοῦ τὸ μὲν πλεῖστον ἐνταῦθά πη ἀπολιπεῖν, τῷ δὲ ἄλλῳ ἐπί τε Ἰωάννην καὶ Λευκανοὺς ἰέναι. (7) τοῦ μὲν οὖν περιβόλου ἐν χώροις πολλοῖς τοσοῦτον καθεῖλεν ὅσον ἐς τριτημόριον τοῦ παντὸς μάλιστα. ἐμπιπρᾶν δὲ καὶ τῶν οἰκοδομιῶν τὰ κάλλιστά τε καὶ ἀξιολογώτατα ἔμελλε, Ῥώμην τε μηλόβοτον καταστήσεσθαι, ἀλλὰ Βελισάριος μαθὼν πρέσβεις τε καὶ γράμματα παρ' αὐτὸν ἔπεμψεν [(…) But when Totila learned this, he decided first to raze Rome to the ground, and then, while leaving most of his army in that neighbourhood, to march with the rest against John and the Lucanians. (7) Accordingly he tore down the fortifications in many places so that about one third of the defences were destroyed. And he was on the point also of burning the finest and most noteworthy of the buildings and making Rome a sheep-pasture, but Belisarius learned of his design and sent envoys with a letter to him (translation H.B. Dewing)].

γων τὴν θέαν. (13) τούτων δὲ τοιούτων ὄντων ἐκεῖνο εὖ ἴσθι, ὡς δυοῖν ἀνάγκη τὸ ἕτερον εἶναι. ἢ γὰρ ἡσσηθήσῃ βασιλέως ἐν τῷδε τῷ πόνῳ, ἢ περιέσῃ, ἂν οὕτω τύχοι. (14) ἢν μὲν οὖν νικῴης, Ῥώμην τε καθελών, οὐ τὴν ἑτέρου του, ἀλλὰ τὴν σαυτοῦ ἀπολωλεκὼς ἄν, ὦ βέλτιστε, εἴης, καὶ διαφυλάξας, κτήματι, ὡς τὸ εἰκός, τῶν πάντων καλλίστῳ πλουτήσεις: ἢν δέ γε τὴν χείρω σοι τύχην πληροῦσθαι ξυμβαίη, σώσαντι μὲν Ῥώμην χάρις ἂν σώζοιτο παρὰ τῷ νενικηκότι πολλή, διαφθείραντι δὲ φιλανθρωπίας τε οὐδεὶς ἔτι λελείψεται λόγος καὶ προσέσται τὸ μηδὲν τοῦ ἔργου ἀπόνασθαι. (15) καταλήψεται δέ σε καὶ δόξα τῆς πράξεως ἀξία πρὸς πάντων ἀνθρώπων, ἥπερ ἐφ ἑκάτερά σοι τῆς γνώμης ἑτοίμως ἕστηκεν, (16) ὁποῖα γὰρ ἂν τῶν ἀρχόντων τὰ ἔργα εἴη, τοιοῦτον ἀνάγκη καὶ ὑπὲρ αὐτῶν ὄνομα φέρεσθαι." τοσαῦτα μὲν Βελισάριος ἔγραψε ["While the creation of beauty in a city which has not been beautiful before could only proceed from men of wisdom who understand the meaning of civilization, the destruction of beauty which already exists would be naturally expected only of men who lack understanding, and who are not ashamed to leave to posterity this token of their character. (9) Now among all the cities under the sun Rome is agreed to be the greatest and the most noteworthy. (10) For it has not been created by the ability of one man, nor has it attained such greatness and beauty by a power of short duration, but a multitude of monarchs, many companies of the best men, a great lapse of time, and an extraordinary abundance of wealth have availed to bring together in that city all other things that are in the whole world, and skilled workers besides. (11) Thus, little by little, have they built the city, such as you behold it, thereby leaving to future generations memorials of the ability of them all, so that insult to these monuments would properly be considered a great crime against the men of all time; (12) for by such action the men of former generations are robbed of the memorials of their ability, and future generations of the sight of their works. (13) Such, then, being the facts of the case, be well assured of this, that one of two things must necessarily take place: either you will be defeated by the emperor in this struggle, or, should it so fall out, you will triumph over him. (14) Now, in the first place, supposing you are victorious, if you should dismantle Rome, you would not have destroyed the possession of some other man, but your own city, excellent Sir, and, on the other hand, if you preserve it, you will naturally enrich yourself by a possession the fairest

> of all; but if, in the second place, it should perchance fall to your lot to experience the worse fortune, in saving Rome you would be assured of abundant gratitude on the part of the victor, but by destroying the city you will make it certain that no plea for mercy will any longer be left to you, and in addition to this you will have reaped no benefit from the deed. (15) Furthermore, a reputation that corresponds with your conduct will be your portion among all men, and it stands waiting for you according as you decide either way. (16) For the quality of the acts of rulers determines, of necessity, the quality of the repute which they win from their acts." Such was the letter of Belisarius (translation H.B. Dewing)].

Belisarius asked Totila to spare Rome, a monument for posterity of value to everyone (μνημεῖα τῆς πάντων ἀρετῆς τοῖς ἐπιγενησομένοις), from destruction, thus avoiding committing a grave crime against humanity (ἀδίκημα μέγα ἐς τοὺς ἀνθρώπους τοῦ παντὸς αἰῶνος).

According to Procopius's account, Totila, after reading and rereading the letter many times, decided to abandon his plan and cause no further damage to the city[48].

5. *Concluding thoughts*

Here, I shall limit myself to a closing observation. From this brief survey, it emerges that the protection of ancient heritage, a need felt especially starting in the fourth century, growing stronger over the next 200 years, was not dictated solely by consideration of the

[48] Procopius of Caesarea, Οἱ ὑπὲρ τῶν πολέμων λόγοι, 7.22.17 (ed. J. Haury): Τουτίλας δὲ πολλάκις ἀναλεξάμενος τὴν ἐπιστολὴν καὶ τῆς παραινέσεως ἐς τὸ ἀκριβὲς πεποιημένος τὴν μάθησιν, ἐπείσθη τε καὶ Ῥώμην εἰργάσατο ἄχαρι περαιτέρω οὐδέν. σημήνας τε Βελισαρίῳ τὴν αὐτοῦ γνώμην τοὺς πρέσβεις εὐθὺς ἀπεπέμψατο [And Totila, after reading it over many time and coming to realize accurately the significance of the advice, was convinced and did Rome no further harm. So he sent a statement of his decision to Belisarius and immediately dismissed the envoys (translation H.B. Dewing)].

economic value and aesthetic prestige of this heritage. The preservation of the legacy of antiquity was also – and perhaps most importantly – a way to permit the survival of a culture and a value system, guaranteeing the 'moral cohesiveness' of the empire in the face of factors striving towards its disintegration[49].

[49] See C. Kunderewicz, *La protection*, cit., p. 153: «Les symboles visibles de cette communauté sont avant tout les monuments d'architecture antique, et c'est pourquoi les empereurs, désireux de renforcer la cohésion morale de l'Empire, n'épargnent pas les efforts pour que ce vénérable et glorieux héritage du passé se présente toujours intact devant lex yeux de la population tout entière dans toute sa majestueuse splendeur et beauté».

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Elisa Baroncini, Bert Demarsin, Ana Gemma López Martín, Raquel Regueiro Dubra, Ruxandra-Iulia Stoica

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