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Remarks on Common Possession Between Law and History

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Abstract: 'Common possession' can be designated as a distinguishing feature of the legal status of common goods, as opposed to the monopolistic character of real rights and especially property. The paper aims at proving how the study of the Roman legal category of *res in usu publico* can shed a light on the interpretation of existing legislation and ground a legal regulation of the commons based on possessory remedies.

Keywords: common possession, Italian Civil Code, possessory remedies, *res in usu publico*, Roman law

1 Common Goods, Common Possession, and *Dominium*

Both in Yan Thomas and Giorgio Agamben's reflections on public and common goods,[1] the reference to common possession is crucial. In this view, the 'collective'

1 On one hand, Yan Thomas (2002, 1435), maintains that «ces choses étaient dites «publiques» en ce sens précis qu'elles étaient librement accessibles à tous, comme si chacun des membres du *populus* eût sur elles un droit attaché à sa qualité de citoyen, imputé à ce qu'il y avait de public dans sa personne – comme si chacun fût porteur d'une double personnalité privée et politique, et qu'à ce second titre les choses de la cité lui appartenaient à lui comme à tous, mais inaliénablement»; a very similar point is also in Thomas (1991, 210 ss.); on Thomas' reflections on 'commons' between philosophy and law, see Spanò (2013, 50 ss). On the other hand, Giorgio Agamben developed his view on common possession as the foundation of a radically public legal space in a chapter of his philosophical inquiry concerning *homo sacer*: in Agamben (2013, 123 ss.), the philosopher claims for a paradigm of *usus facti* as opposed to *usus iuris*, a paradigm according to which members of a community (in that case, the friars) could use common goods without having any right over them. For further clarifications on Agamben's thought about common use and its relationship with the Roman and civilian legal tradition, see the contribution by Vatter (2016).

While the substantial content of the article has been outlined jointly, Tommaso dalla Massara is the author of the first paragraph, and Alvise Schiavon of the remaining paragraphs.

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nature of these goods is rooted in the collective co-possession by the citizens, in particular by avoiding the 'monopolistic' paradigm implicit in the system of ownership and *dominium*.

The theoretical paradigm of co-possession is essential to understanding the difference between the question concerning the holder of a *dominium*, the right of ownership, and the one concerning the legal rules governing the resource. The paradigm of collective possession over the commons shows the prevalence of everyone's possession over someone's ownership: in the language of Antonio Carcaterra,[2] a Roman law scholar who worked with Thomas, possession represents the «signoria imperante» (transl. '*commanding dominion*'), as opposed to ownership which represents the «signoria spettante» (transl. '*entitling dominion*').

Both philosophical inquiries and legal historical research outline a paradigm for managing 'commons' where the law is shaped by concrete praxises concerning the use of the resource by the community[3] (*usus publicus*, 'signoria imperante' by the community) rather than the recognition of abstract titles of ownership or *dominium*. This means that the legal status of the commons is shaped by the factual, material relations that the community established with the resource (according to the adagio *ex facto oritur ius*).

The centrality of possession in the legal regime of commons confirms that commons are 'the opposite of property', as affirmed by the title of a seminal workshop on the commons that took place in 2003.[4] The paradigm of (individual) ownership is not compatible with the reality of the commons and individual claims concerning the co-usage of a common cannot take the form of a traditional property claim.

2 *Usus Publicus*: An Historical Paradigm

The theoretical paradigm of 'common possession' is a useful tool to investigate both legal history and current issues concerning the legal management of common resources.

2 Carcaterra (1967, 19 ss).

3 The centrality of collective actions and praxises for the governance of the commons is part of the legacy that Ostrom (1990) left to scholars studying the commons, both from a sociological and from a legal perspective: more insights about the implication of this methodological assumption can be found in Acheson (2011) (respect to anthropological and sociological studies) and, concerning legal studies, in Funnell (2011, 10), where the author remembers to jurists and law-makers that «a resource arrangement that works in practice can work in theory».

4 The conference was organized in 2001 at the Duke University School of Law: an interesting report of the seminar is available in Boyle (2003, 1 ss).

From the first perspective, contemporary discussions about the normative character of common usage push to reevaluate the Roman legal category of *res in usu publico* (transl. '*things in the use of the public*'), which was a class of goods (especially roads and rivers)[5] toward which citizens had – *uti cives* – possessory claims vested in *interdicta*.[6]

According to an excerpt from Ulpian's Commentary to the Edict, Roman law recognized a class of public goods characterized by their availability to the public, as opposed to those considered as an asset of the State (*res in patrimonium aerarii* or *fisci*):[7] while the last can actually be considered properties of the State,[8] the legal relationship between *res in usu publico* and the community is difficult to reconstruct in terms of modern legal science, which usually reduces the question concerning the legal status of properties to the legal status of the holder of the correspondent right of ownership: in this perspective, the distinction between public and private properties lies in the different 'nature' of the holder of the right of ownership over them – a collective entity or a private individual. Whereas this criterion effortlessly applies to *res in patrimonium aerari* or *fisci*, in the case of *res in usu publico*, as pointed out by Riccardo Orestano among others, this approach is largely unsatisfactory:[9] in his view, the latter class of goods were not primarily regarded as the property of an individual (including collective individuals such as the State or local communities), but rather as the object of a collective possession by the citizens.

5 Jurists eventually broadened the notion of *res in usu publico*, including new things to the list, but the original core of the category was certainly represented by rivers (*flumina*) and roads (*viae*), as one may infer from the phrasing of a line taken from Ulpian's Commentary to Edict (67th book *ad Edictum*, D. 43.1.1.pr.).

6 A historical and systematic account of that corpus of interdicts protecting public goods can be found in Schiavon (2019).

7 Ulpian 56th Book *ad Edictum*, D.43.8.2.4-5.

8 The difference between *aerarium* and *fiscus*, in this context, depends on the evolution of the Roman constitutional structures from Republic (where the *aerarium populi romani* was considered the treasury of the Republic) to Principate (when the *fiscus Caesaris* emerged from being the personal asset of the Emperor to the treasury of the new constitutional assessment): for few basic information on these notions see a classic account in Jones (1950); the history of the development of *fiscus* is not undisputed and many prominent scholars went back to it: among others one should at least mention Millar (1963) and Brunt (1966); later Lo Cascio (2000, 97 ss). The use of the word 'State' to indicate the Roman institutional experience is highly controversial among legal historians: the contribution by Catalano (1974) is still a reliable starting point to tackle the subject.

9 Riccardo Orestano, an Italian Roman law scholar, devoted a vast part of his research to the history of the notion of 'juridical person' as well as to the reconstruction of the legal relationship between 'populus' and *res publicae*, specifically Orestano (1968). A brief outline of the history of juridical personality in Roman law can be found also in Duff (1938).

The problem of reconstructing the nature of these public goods should be faced by focusing on the judicial remedies established for their protection, according to the trial-oriented mentality of Roman jurists.[10] Ulpian's aforementioned text suggests a strong connection between the emergence of this class of public goods and the enactment in the Praetor's Edict of a corpus of *interdicta* vesting a spectrum of interests held by citizens toward those peculiar public goods.

Interdicts were private law remedies granted to individuals by the Praetor on the sole basis of his authority (*magis imperii quam iurisdictionis*).[11] Contrary to *actiones*, which, at least in the process *per formulas*, took the form of instructions to the judge for the assessment of the lawsuit,[12] interdicts were injunctions directly issued toward litigants, to act or to stop acting and remove the consequences of the behavior.[13] These orders were issued by the Praetor, after a simplified *causae cognitio*, on the presentation of specific facts, rather than on the averment of the breach of a right and namely the infringement of a property (legal) title. The most revealing examples of this feature of interdicts are possessory interdicts,[14] which were those interdicts aimed at protecting possession despite the existence of the correspondent right of ownership.

As previously mentioned, few *interdicta* for the protection of the interests of citizens to use *res in uso publico* were included in the Edict of the Praetor. Those *interdicta* vested various interests to use the public good with a possessory claim: they protected both individual interests to enjoy a specific advantage from the public good and collective interests for the public good (roads and rivers especially) to be available for the community. The Praetor would grant the relevant *interdictum* in favor of the individual which – in the light of the factual situation alleged – bore the relevant interest to use the good: in the case of *interdicta* protecting individual interests to the use of the good the sole person entitled to the remedy could be easily identified, whereas, in the case of interdicts protecting supra-individual interests to the maintenance of the material conditions of usability of the public good, the Praetor would

10 The strong connection between Roman legal science in the Classical age and civil law procedure has been recognized by most of Roman law scholars: most recently, it has been stressed in particular by Metzeger (2004).

11 The general features of interdicts, as well as their position within the system of the Praetorian Edict, are summarised in the classic account by Schulz (1951, 59 ss).

12 The legal character of *actiones* in the formulary procedure – regarded as orders pronounced by the Praetor to the judges, containing the essential guidelines for his judgment – is made particularly clear in Schultz (1951, 19 ss) and more recently in Du Plessis (2015, 74).

13 The peculiar difference between actions and interdicts within the formulary procedure has been usefully summarised by Metzger (1999, 208 ss).

14 The latest account in English on possessory interdicts in Roman law can be found in Baldus (2016). Descheemaeker (2014, 18 ss.) reports Roman interdict within a broader discussion concerning 'consequences of possession' from a legal-comparative perspective.

grant the correspondent remedy to whoever made a plea (*quivis de populo*).[15] The *interdicta* protecting the general usability of public goods could be instituted by everyone because every citizen has the interest to keep the usability of those goods.[16] Analogously to *interdicta* protecting individual possession, the access to these possessory remedies did not depend on the existence of a legal title for the exclusive use of the resource in favor of the claimant: the only relevant status for the access to these interdicts was the Roman *civitas*.

3 A Proposal *de iure interpretando*: art. 1145 Italian Civil Code

Far from being a mere matter for antiquarians, the Roman regulation of *res in usu publico* – by means of interdicts protecting different shades of factual interests over the public good – can help modern legal scholars in interpreting existing legislation to reshape the legal status of 'common goods'. A revealing example can be drawn by Italian law. It is surprising to find a reference to 'possession of things *extra commercium*' in art. 1145 of the Italian Civil Code (Codice Civile),[17] since it explicitly suggests the possibility to establish a system of possessory remedies protecting the common usage of public good on the ground of existing legislation. The article – included in the section concerning possession – states that the possession of things *extra commercium*, though ineffective (co. 1), can be exceptionally protected by means of possessory remedies (co. 2 and 3).

Its content and phrasing are problematic and its collocation within the conceptual framework of the Italian civil code is difficult.

According to Italian civil law, public goods are in general considered to be properties of the State (or of local communities), even though many scholars notice how the right of ownership over *demanio* and other classes of public goods has a peculiar

15 *Interdicta de locis publicis* vesting with possessory remedies the collective interest to keep the public good open to the public can be therefore juxtaposed to the so-called *actiones populares*, that were those actions the access to which was not limited to the holder of a specific right or interest, but rather open to every citizen: on this subject, the main contributions date back to the XIX century Roman legal history, see in particular Bruns (1864) and Fadda (1894); in recent years the subject of 'popular actions' has been revived by several authors, especially after the contribution by Di Porto (1994, 497 ss). A discussion of major legal issues concerning *actiones populares* in Schiavon (2019, 55 ss).

16 The jurist Julius Paulus defined *actiones populares* as those actions by which the people themself defended their own right: Paul. 8 ad ed. D. 47.23.2: *Eam popularem accusationem dicimus quae suum ius populi tuetur*.

17 The possible implications of article 1145 of the Italian Civil code for the regulation of common goods have been recently investigated by Albanese (2017).

character.[18] Therefore, the definition of public goods at issue in art. 1145 Codice Civile – identified as 'things extra commercium' (in the title), 'things on which no one can have a right' (co. 1), and 'public domain' (co. 2 and 3) – is surprisingly unclear. Furthermore, the fact that it states that the possession of public good is at the same time ineffective (co. 1) and vested in possessory remedies (co. 2–3) may sound paradoxical.[19]

The major issue in interpreting art. 1145 Codice Civile, though, concerns the conditions of applicability of possessory remedies (*azione di manutenzione e spoglio*)[20] against acts affecting the material benefit an individual enjoyed from the public good, that is the definition of the factual situation in which an individual can claim the possessory protection of his material interest in using the public good. Traditionally, Italian Courts maintained that only 'individual' possession, that is – according to the general definition provided in art. 1140 Codice civile – 'the material power over the object *correspondent to the exercise of the right of ownership* or another limited real right'[21] can be protected with the possessory remedies, also in the case of the object of possession being a public good. Consequently, the possessory remedies provided by co. 2 and 3 art. 1145 Codice civile can be applied only if a subject has a specific, peculiar, individualistic interest toward the public good, an interest that could be vested in a property right, whereas every claim concerning the possessory protection of interest to the public useability of the public good is rejected.

In doing so, Italian Courts understand the notion of possession included in art. 1145 Codice civile as it is the same as regular possession of private goods defined in art. 1140 Codice civile, even if art. 1145 explicitly states that it refers to 'things on which one cannot acquire a right'. With respect to public goods, besides the cases where one

18 As for the legal status of public goods in Italian law, the classic account dates back to Giannini (1963) and Cassese (1969); a recent overview – in the light of the discussion concerning normative evolutions and the emergence of the category of the 'commons' – in Cortese (2017), especially 135 ss.

19 The article is obviously not paradoxical, and the two paragraphs can be explained by referring to the dogmatic of Roman law: whereas this possession cannot lead to acquiring the right of ownership as consequence of usucapion (it's not a *possessio ad proprietem*), it can be nonetheless protected by possessory remedies (therefore can be paralleled to a *possessio ad interdicta*). Few remarks on the distinction between *possessio ad proprietatem* and *possessio ad interdicta* in the handbook by Mousourakis (2012, 156 ss.); see also Descheemaeker (2014, 8 ss.), which discuss the distinction in a broader comparative perspective.

20 An account in English about the history and the main features of Italian possessory actions can be found in Caterina (2014, 107 ss).

21 Mezzanotte (2018, 347 ss.) provides a useful account of Italian regulation of possession and interpretative trends within Italian legal scholars. An overview of the different notions of possession has been recently proposed by Emerich (2017, 171 ss). As for the reasons for protecting possession (a debate dating back to the well-known controversy between Savigny and Jhering), important remarks can be found in Gordley and Mattei (1996).

individually enjoys the good, a possessory claim aiming at the maintenance of the availability of the good to the public is conceivable. Some cases decided in Italian Courts,[22] though, open up the possibility to apply this piece of legislation to a broader *spectrum* of the factual situation: sometimes Courts have been stating that also the general interest to keep the conditions of usability of a public good can be a legitimate cause of action for instituting the possessory remedies provided by art. 1145 Codice Civile. The casuistic recorded in Roman law sources shows how possessory claims can be used to protect collective or super-individual interests.[23]

4 Provisional Conclusions

The two paragraphs above aimed at bridging Roman legal history and positive law and tried to draw a path toward a legal conception of co-possession of common goods. In the historical experience of ancient Roman law, one can find a remedy-based model of protection of common usage, based on the applicability of possessory remedies (*interdicta*) to public goods. In assessing recent interpretations of art. 1145 Codice Civile, we drew a path for an application *de iure condendo* of this model, where possessory remedies (*azione di manutenzione* and *di spoglio*) could be issued for the protection of the common usage of public goods.

In both scenarios, the legal protection of common goods is achieved by recognizing specific possessory claims concerning the use of the resource, rather than by granting an individual (here including a 'collective individual' as the State) with the general monopoly over its management and exploitation.[24] In this model,

22 Few decisions issued by the Italian Supreme Court seem to acknowledge the possibility that possessory remedies provided by art. 1145 Codice Civile can be granted also on the ground of the breach of collective interest to keep the public good open to the public: see e.g., Cassazione, Sezioni Unite, 04-12-2001, n. 15289, where the Italian Supreme Court sitting en banc explicitly overruled its previous doctrine and acknowledged the possibility to protect common use through art. 1145 Codice civile.

23 Discussions of cases concerning the applicability of possessory remedies to claims concerning the collective use of *res in usu publico* can be found in Ulpian's comment to the Praetorian Edict: see Schiavon (2019, 227 ss. and 337 ss).

24 Criticisms toward the absolute notion of property as emerged (at least) from the French Revolution and incapsulated in the French Civil Code have been raised by scholars having opposite points of view and are impossible to summarize: it's interesting to notice, though, that while in Italy they mainly took the form of 'leftist' critics to the bourgeois conception of property (the most cited authors being Rodotà (1981, 2013) and Grossi (1977, 2006), an overview in the recent commentary by Mattei (2015)), in the USA sharp criticisms toward the 'liberal' conception of ownership came largely from scholars having a law and economics background, especially in connection with intellectual property: possibly the author whose works had the largest echo worldwide is Eric Posner (see e.g.

the way to use the resource is not defined by the unilateral will of an individual granted with the right to exclude anyone else from decisions concerning the use of the resource but, rather, shaped by the convergence of different factual interests held by the citizens toward the public good.

The legal system, by providing factual criteria for the enforceability of those interests, selects the types of interest that concur in defining common good without setting a rigid, *a priori* order of prevalence among them: possessory claims are reconcilable in unity, beyond the hierarchical scheme governing the relations between real rights.[25]

Of course, this regulation, based on balancing different possessory interests outside a fixed hierarchical framework, questions the role of the judge as intended in Civil law systems. The fact that, as pointed out before, Romans called *interdicta* as remedies *magis imperii quam iurisdictionis* and that Italian Courts are cautious in applying art. 1145 Codice civile reveals the 'political' responsibility the Magistrate or the Judge needs to assume in this complex balancing.

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Posner and Weyl 2018). Recently, a useful and comprehensive overview of the different criticisms to this 'exclusive' and 'monopolistic' notion of property in Mattei and Quarta (2019, 24 ss).

25 In a similar perspective, Merrill and Smith (2020), advocate for an 'architectural approach' toward property law aimed at overcoming the traditional view of property as essentially grounded on the right to exclude others: the two authors highlight the complexity inherent in every regulation of interactions between humans and resources, and maintain therefore that legal science should dismiss the traditional tropes about the right of ownership and rather focus on the dynamics governing the different rules and principles constituting 'property law'. Dalla Massara (2014), though sharing the idea that ownership went through a 'refractive phenomenon' which puts radically in question its monolithic conception, is more cautious about the possibility of fully dismissing *ius ad alios excludendos* as a central feature of the right of ownership.

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