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PRIVATE AND PUBLIC INTEREST IN THE 'INTERDICTUM NE QUID IN LOCO PUBLICO FIAT'

1. INTRODUCTORY REMARKS

The compilers of the *Digest* of Justinian dedicated Book 43 to praetorian interdicts, including a set referred to in the literature as the *de locis publicis* interdicts.¹ Each of the items in the set basically relates to a particular type of public place under legal protection, such as roads, rivers and riversides, water sources and drainage networks.² The catalogue opens with the *ne quid in loco publico fiat* interdict, which differs distinctly from the rest in the collection and refers to all public places, not just to a specific type. In addition, it also defines the protection given to private individuals with an interest in the use of public places. So we could say that *ne quid in loco publico fiat* was concerned with both public and private interest. To verify this claim I shall first review the formula of this interdict.

¹ O. LENEL, *Das 'Edictum perpetuum'*, Leipzig 1927 (reprint Aalen 1956), pp. 458-461; J.M. ALBURQUERQUE, *Notas acerca de la 'utilitas publica'*, «RGDR» 5/2005, pp. 11-12.

² D. 43,1,1; D. 43,8,2,20; D. 43,11,1pr.; D. 43,12,1pr.; D. 43,13,1pr.; D. 43,15,1pr.; D. 43,23,1pr.; T. COREY BRENNAN, *The Praetorship in the Roman Republic*, vol. I, Oxford 2001, p. 62; J.M. ALBURQUERQUE, *Notas acerca...*, p. 12.

D. 43,8,2pr. (Ulp. 68 *ad ed.*): *Praetor ait: "Ne quid in loco publico facias inve eum locum immittas, qua ex re quid illi damni detur, praeterquam quod lege senatus consulto edicto decretove principum tibi concessum est. De eo, quod factum erit, interdictum non dabo"*.

This means that the praetor prohibited private persons from doing or installing anything in a public place which could damage it, unless they had permission to do so issued on the grounds of an act of legislation, a resolution passed by the Senate, or an edict or decree issued by the emperor. The praetor also said that the interdict would not apply to what had been done already.

We may draw the following conclusions from the praetor's words. First of all, the individuals who had the right to resort to *ne quid in loco publico fiat* were private persons who considered other persons' activities harmful for a given public place.³ Secondly, the purpose and effect of this interdict was to stop a builder from continuing an activity he had started. Therefore *ne quid in loco publico fiat* was prohibitive, as may be deduced from the words of the praetor, who said that his interdict would not apply to work which had already been completed (*De eo, quod factum erit, interdictum non dabo*).⁴ Furthermore, we may surmise that it was a popular interdict.⁵ Presumably what made it a popular interdict was the specific nature of the goods it protected, the accessibility and

³ R. KAMIŃSKA, *Ochrona dróg i rzek publicznych w prawie rzymskim okresie republiki i pryncypatu*, Warszawa 2010, pp. 71-72; R. SCAEVOLA, 'Utilitas publica'. II: *Elaborazione della giurisprudenza severiana*, Padova 2012, p. 80.

⁴ This is how Ulpian classified it. See D. 43,8,2,1; A. BISCARDI *La tutela interdittale e il relativo processo. Corso di lezioni 1955-1956 a cura e con una «nota di lettura» Remo Martini*, «RDR» 2/2002, p. 37; N. DE MARCO, *I 'loci publici' dal I al III secolo. Le identificazioni dottrinali, il ruolo dell'usus, gli strumenti di tutela*, Napoli 2004, p. 4.

⁵ B. SITEK, 'Actiones populares' w prawie rzymskim na przełomie republiki i pryncypatu, Szczecin 1999, p. 34, 41; A. TRISCIUOGGIO, *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*, red. A. F. DE BUJÁN, G. GEREZ KRAEMER, B. MALAVE OSUNA, Madrid 2011, p. 154.

unimpeded use of which was in the interest of all the inhabitants and each of them individually.⁶

Finally the *ne quid in loco publico fiat* formula concerns the conditions under which it is inapplicable, in other words the situation where the praetor could not grant the interdict despite the fact that the activity in question posed a threat in a public place. The circumstances in which the praetor's interdict would be invalid were if the builder had obtained permission to build under an act of law, or on the grounds of a resolution passed by the Senate or an edict or decree issued by the Emperor.⁷ In other words, an act involving the making (*facere*) or installation (*inmittere*) of an object in a public place was legal if carried out on the grounds of any of the above permits, even if it entailed a danger of potential damage occurring. The basic question is who or what was in danger of the damage mentioned in the *ne quid in loco publico fiat* interdict. This issue was addressed by Ulpian, and I shall take his statement as the basis of my examination.

D. 43,8,2,2 (Ulp. 68 *ad ed.*): *Et tam publicis utilitatibus quam privatorum per hoc prospicitur. 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*

⁶ According to J. M. ALBURQUERQUE, *La protección o defensa de las cosas de dominio público: especial referencia los interdictos de publicis locis* ('*loci*', '*itinere*', '*viae*', '*flumina*', '*ripae*'), Madrid 2002, p. 18, 50 popular interdicts were introduced to protect the category of *res publicae* which jurists classified as *res in usu publico*. Thereby, as he is right to point out, an efficient system of interdicts was established for the protection of public facilities. See also G. I. LUZZATTO, *Il problema d'origine del processo 'extra ordinem'*, Bologna 1985, p. 164, 172; L. ZHIMIN, *Riflessioni sull'azione popolare da una prospettiva comparativa*, [in:] '*Fides humanitas ius*'. *Studii in onore di Luigi Labruna*, VIII, Napoli 2007, p. 60, 67.

⁷ U. ROBBE, *La differenza sostanziale fra 'res nullius' e 'res nullius in bonis'*. *La distinzione delle 'res' pseudo-marcianea*, I, Milano 1979, p. 744, 745; J.M. ALBURQUERQUE, *La protección o defensa...* p. 58; IDEM, *La interrelación de interés público, interés común e interés privado en la noción de utilitas publica*, [in:] *Hacia un Derecho Administrativo, Fiscal y Medioambiental Romano III*, red. A.F. DE BUJÁN, A. TRISCIUOGGIO, G. GEREZ KRAEMER, Madrid 2012, p. 149; IDEM, *Notas acerca...*, p. 14.

fiet, quod ad privati damnum redundet, prohibitorio interdicto potest conveniri, propter quam rem hoc interdictum propositum est.

Ulpian said that *ne quid in loco publico fiat* protected both the public and private interest. Public places were undoubtedly meant to be accessible to private individuals, who could lawfully use them provided they did so in compliance with the law of the state and not as if the public place in question were their private property. Every individual had the same right to use a given public place, and the same right to prevent another individual from using it. Hence if anyone set up an object *in loco publico* which involved a danger of potential damage to the interests of another person, *ne quid in loco publico fiat* would be applicable against him, since it had been adopted precisely to prohibit such matters.

In this passage Ulpian stressed that there was to be free access to public places for all, and they could be freely used by all within the bounds of the law of the state. *Loca publica* were neither the property of individual citizens (*cives*) nor of the municipality (*civitas*), as Ulpian emphasized, but they were designated for public use on the grounds of the *ius civitatis*.⁸ Thus every private person had the right to use them within the bounds of the law, which presumably means that public places served both the public and private interest.

2. UTILITAS PUBLICA AND UTILITAS PRIVATA

Ulpian wrote of the difference between *utilitas publica* and *utilitas privata* in his account of the division of law into public and private law.⁹ Public law was the law which related to the well-being of the Roman

⁸ R. ORESTANO, *Il problema delle persone giuridiche in diritto romano*, Torino 1968, p. 311; J.M. ALBURQUERQUE, *La protección o defensa...*, p. 70; R. DARSKA [KAMIŃSKA], *Zasady odpowiedzialności za szkody wyrządzone w miejscu publicznym w świetle interdyktu 'Ne quid in loco public fiat'*, [in:] 'Contra leges et bonos mores'. Przepęstwa obyczajowe w starożytnej Grecji i Rzymie, Lublin 2005, pp. 54-55.

⁹ D. 1,1,1,2 (Ulp. 1 Inst.): *Publicum ius est, quod ad statum rei Romanae spectat, privatum quod ad singulorum utilitatem: sunt enim quaedam publice utilia, quaedam privatim.*

State, while private law concerned the well-being of individuals. Some matters were useful for the State, while others concerned the welfare of private persons.¹⁰ Ulpian made a clear distinction between public and private interest.¹¹ However, *utilitas publica* did not just mean the advantage of the State perceived as an abstract entity. It also took the form of *utilitas omnium*, the interest or advantage of all the inhabitants of the State, which in this particular case meant the free use of public places. Hence A.F. de Buján¹² is right to observe that under the Republic the expressions *utilitas publica*, *utilitas omnium* and *utilitas universitatis* all meant the same thing, the general good, or the good of the State, in the broad sense of the term.¹³ It was not until the classical period, when the meaning of the concept of the interest of the State was modified as a result of the transformation of the political and constitutional system, that there was a distinct differentiation between the meaning of these terms.¹⁴ *Utilitas publica* started to be associated with the interest of the State and its revenues, such as taxes.¹⁵ One of the effects of this change was that individuals' private interest came to be subordinated to the interest of the State. However, this change does not seem to have applied to the use of public places which, as Ulpian wrote (D. 43,8,2,2), were used both in the interest of private individuals and in the public

¹⁰ A. TARWACKA, *O sprawiedliwości i prawie. 1 tytuł 1 księgi Digestów. Tekst-tłumaczenie-komentarz*, «Zeszyty Prawnicze» 3.2/2003, p. 359. More about the differences between *utilitas publica* and *privata* see G.A. ANSELMO, 'Ius publicum – ius privatum' in *Ulpiano, Gaio e Cicerone*, «Annali del seminario giuridico dell'Università di Palermo» 37/1983, pp. 459-463.

¹¹ J.M. ALBURQUERQUE, *La interrelación de interés...*, p. 134.

¹² A.F. DE BUJÁN, *Hacia un tratado de derecho Administrativo y fiscal Romano*, [w:] *Hacia un Derecho Administrativo y Fiscal Romano*, red. A.F. DE BUJÁN, G. GEREZ KRAEMER, B. MALAVÉ OSUNA, Madrid 2011, pp. 48-49.

¹³ G. JOSSA, L'*utilitas rei publicae*' nel pensiero imperiale dell'epoca classica, [w:] *Studi romani* 1963, p. 279; M. NAVARRA, 'Utilitas publica-utilitas singulorum' tra IV e V sec. D.C., «SDHI» 63/1997, p. 270.

¹⁴ However, this did not happen under Augustus, who kept the Republican order (though on the whole ostensibly and rather superficially) and made himself head of state but considered himself a magistrate, not a monarch. Presumably the change did not occur until the Severan dynasty. See G. JOSSA, *op. cit.*, p. 389.

¹⁵ M. NAVARRA, *op. cit.*, s. 272; A.F. DE BUJÁN, *op. cit.*, p. 49.

interest. The *ne quid in loco publico fiat* interdict, which was intended to protect both public and private interest, offers a perfect illustration of this situation. Incidentally Ulpian, who flourished as a jurist under the Late Principate, certainly did not ignore the pre-classical concept of *utilitas publica* and *utilitas privata*, as shown in the following passage, which is his commentary to the edict:

D. 43,8,2,4 (Ulp. 68 *ad ed.*): *Hoc interdictum ad ea loca, quae sunt in fisci patrimonio, non puto pertinere: in his enim neque facere quicquam neque prohibere privatus potest: res enim fiscales quasi propriae et privatae principis sunt. Igitur si quis in his aliquid faciat, nequaquam hoc interdictum locum habebit.*¹⁶

Ulpian's commentary is quite explicit and clear-cut on the scope of the interdict's applicability. He observes that it did not apply to places which were the property of the Imperial treasury. A private person could neither do anything nor prevent anything from being done there, as the property of the Imperial treasury was treated as if it was the private property of the Emperor. So if anyone did anything on a property owned by the State treasury, the *ne quid in loco publico fiat* would not apply to the case.

In this passage Ulpian refers to the concept of *utilitas* current in his times, according to which public interest was distinctly separate from the interest of the State.¹⁷ Perhaps he was looking back to the expression *utilitas publica*, which he had used earlier (D. 43,8,2,2), and which according to him did not cover the interest of the State as an abstract entity. So when he said that the *ne quid in loco publico fiat* interdict protected both the public and private interest, what he had in mind was the common interest of all, not the interest of the State in

¹⁶ Nonetheless he made a clear distinction between the right to the enjoyment and protection of public places from the origin of this right, the grounds for which was the *ius civitatis*.

¹⁷ As J.M. ALBURQUERQUE, *La protección o defensa ...*, p. 4, observes, in the pre-classical period the common interest was linked with the interest of the Republic. According to G. LONGO, *Utilitas publica*, «Labeo» 18/1972, p. 10 their separation occurred much later, not until the Severans. Until that time the *res publica* was associated with the people, which is why Ulpian considered *utilitas publica* equivalent to *utilitas omnium* for that period.

the strict sense of the expression. Thus in the writings of Ulpian *utilitas publica* means a circumstance on account of which a praetor declared he would grant the interdict, to allow all and sundry to benefit from the use of the given public place (this included drawing an economic benefit).¹⁸

M.G. Zoz has given a good description of the relations between private persons and public places.¹⁹ She writes that the fact that certain objects were designated for public use means that they were subject to legal relations which were public in nature, however, they could also be used by private individuals. Hence we may conclude that every member of the municipal community – the interdict applied only to the municipal area²⁰ – had exactly the same right to enjoy the city's public places, on the grounds of the same regulations under *ius civitatis*.²¹ It was only on the grounds of *ius publicum* that all the citizens enjoyed the same status as regards the enjoyment and protection of public places. The *ne quid in loco publico fiat* interdict guaranteed them the right to protect public places, which could be applied for by any private person whose right to free enjoyment of a public place had been infringed by another person using it on the same legal grounds.²²

3. THE CONCEPT OF DAMAGE

It has been established that the right to use public facilities could not be exercised at a cost of the common interest.²³ We may assume that

¹⁸ L. CAPOGROSSI COLOGNESI, *La struttura della proprietà e la formazione dei 'iura praediorum' nell'età repubblicana*, Milano 1969, p. 4, n. 3.

¹⁹ M.G. ZOZ, *Riflessioni in tema di 'res publicae'*, Torino 1999, p. 185, 187.

²⁰ *Ne quid in loco publico fiat* was one of the few interdicts applicable throughout the whole area of the city. See V. PONTE ARREBOLA, *La defensa de las vías públicas romanas. Interdictos especiales para la protección del disfrute de las 'viae publicae'*, «RGDR» 9/2007, p. 3

²¹ U. ROBBE, *op. cit.*, p. 902.

²² M.G. ZOZ, *op. cit.*, p. 185; J.M. ALBURQUERQUE, *La protección o defensa ...*, p. 70; R. SCAEVOLA, *op. cit.*, p. 86.

²³ Ulpian put emphasis on this by writing *tantum iuris habemus ad optinendum, quantum quilibet ex populo ad prohibendum habet*. See also U. ROBBE, *op. cit.*, s. 903,

what determined the essential aspect of the damage was the nature of the public place and the fact that every private person had the same right to its enjoyment on the same conditions. In the subsequent part of his commentary to the praetor's edict Ulpian embarked on the definition of damage:

D. 43,8,2,11 (Ulp. 68 *ad ed.*): *Damnum autem pati videtur, qui commodum amittit, quod ex publico consequeretur, quaequale sit.*

He observed that damage was sustained by the person who lost the benefit he had enjoyed from the use of the public place, whatever that benefit might have been.

The word *commodum* covers a fairly broad range of meanings.²⁴ It may be translated as benefit, convenience, or gain, especially one due to a privilege or thanks to the benefit of the law.²⁵ This is the meaning of damage in the context of individuals' enjoyment of public places. Individuals were the potential injured parties in outcome of the activities of third parties in such places. Hence in the meaning of this edict the party sustaining the damage was a private person who incurred *ammissio commodum*, viz. suffered the loss of his benefit by being prevented from continuing to enjoy the use of the public place in question in the same manner and to the same extent as before, owing to the activity of others

footnote 906, 907, in whose opinion the purpose public facilities were intended for had an influence on citizens' freedom to use them. He gives the example of the freedom to build on the sea coast as opposed to the need to obtain permission to build on other public sites, and the freedom to draw river water as opposed to the need to obtain a licence to draw water from the aqueducts.

²⁴ The broad range of meanings which the word *commodum* could take is analogous to that of *damnum*. A. UBBELOHDE, *Die Interdikte zum Schutze Gemeingebrauchs*, Erlagen 1893, p. 239, followed by J.M. ALBURQUERQUE, *La protección o defensa...*, p. 67, quite rightly pointed this out, comparing the meaning of *damnum* as used in *ne quid in loco publico fiat* with the meaning of the same word in *cautio damni infecti*. In his opinion, whereas in claims of the latter type only real damage (*el perjudicio positivo*) was considered, claims on the grounds of the interdict could also take loss of benefit (*la sustracción ventaja*) into account.

²⁵ J. SONDEL, s.v. '*commodum*', [w:] *Słownik łacińsko-polski dla prawników i historyków*, Kraków 2005, p. 177.

in the said public place. The loss of the injured party's benefit was self-evident, and Ulpian gave a number of examples of such situations:

D. 43,8,2,12 (Ulp. 68 *ad ed.*): *Proinde si cui prospectus, si cui aditus sit deterior aut angustior, interdicto opus est.*

In this passage Ulpian showed that the loss of the benefit could be connected with someone's view of or access to a public place being spoiled, obstructed or restricted. This could happen if a building were put up in the neighbourhood or a vertical extension built on top of an existing building, and this is probably what he had in mind in the following passage:

D. 43,8,2,14 (Ulp. 64 *ad ed.*): *Plane si aedificium hoc effecerit, ut minus luminis insula tua habeat, interdictum hoc competit.*

Ulpian appears to be in no doubt that if someone erected a building in a public place, thereby obstructing light to the injured party's property, the latter could claim a grant of the interdict. Incidentally, he referred to an obstruction of light case twice. In another part of his commentary he wrote:

D. 43,8,2,6 (Ulp. 64 *ad ed.*): *Cum quidam velum in maeniano immissum haberet, qui vicini luminibus officiebat, utile interdictum competit: "Ne quid in publico immittas, qua ex re luminibus Gaii Seii officias."*

If someone put up window shutters on his balcony, he explained, thereby obstructing the light reaching his neighbour's residence, the latter could avail himself of an analogous interdict, which said "Do not put up anything in a public place which could restrict the light reaching Gaius Seius." So even putting up a shutter on your balcony which cast a shadow on your neighbour's residence in the same house gave him sufficient grounds to sue under this interdict.²⁶

A. Ubbelohde devised an interesting theory on *ne quid in publico immittas, qua ex re luminibus Gaii Seii officias*.²⁷ In his opinion the

²⁶ J.M. ALBURQUERQUE, *La protección o defensa...*, p. 95; A. BISCARDI, *op. cit.*, p. 45.

²⁷ A. UBBELOHDE, *op. cit.*, p. 232.

interdict did not prohibit the installation of window shutters, but opening them out. In other words, it did not apply to mounting window shutters on a resident's balcony, but to his using them, especially opening them out. We may assume that the interdict applied only to the situation where his use of his window shutters entailed damage incurred by his neighbours, for instance if it cast a shadow on their residence. So it did not apply to the labour of installing the shutters, but to an imminent action, well-nigh certain to occur at some time in the future once they were installed. I think Ubbelohde was right. In itself the act of building or installing something, in this case having window shutters put up on someone's balcony, need not necessarily have involved loss or damage for other individuals. In many situations it was not until the object was used that it turned out to bring about loss or damage to others (fellow tenants). So perhaps it would be better to translate Ulpian's expression, *Cum quidam velum in maeniano immissum haberet, qui vicini luminibus officiebat*, as "if anyone opens out a shutter over his balcony, thereby obstructing the light to his neighbour's property."

As I have already said, *ne quid in loco publico fiat* applied not only to the building of new installations but also to the repair of extant ones, which could also bring about damage.

D. 43,8,2,7 (Ulp. 68 *ad ed.*): *Si quis quod in publico loco positum habuit, reficere voluit, hoc interdicto locum esse Aristo ait ad prohibendum eum reficere.*

Following the opinion of Aristo, Ulpian observed that someone who wanted to repair a structure already put up in a public place could be prevented from doing so on the grounds of *ne quid in loco publico fiat*.

He only made a general reference to the prohibition on private individuals carrying out repairs on buildings they had put up in public places. His remark does not say whether the prohibition applied to repairs entailing the risk of damage to others, or to all repairs regardless of their effects. If we are to go by the sense of *ne quid in loco publico fiat*,

it would seem to have applied only to repairs which could have been detrimental to third parties.²⁸

So, in the understanding of the interdict, the damage had to be specific and definable. In the opinion of some authors, such as L. Bove,²⁹ only a real danger to the public place itself, or to its lawful enjoyment by an individual, provided a premise for the grant of protection on the grounds of the interdict. The praetor applied the prohibitive *ne quid in loco publico fiat* to stop activities being conducted in public places if they were detrimental to third parties, viz. activities which prevented third parties from enjoying public amenities, or made it more difficult for them to continue as they had normally done before, to which they had a right as citizens.³⁰

²⁸ A review of D. 43,8,2,7 gives rise to a question referring to a structure built by a private individual in a public place. It is not clear whether this means a structure built in accordance with or in breach of the law. This problem has been observed by A. BISCARDI, *op.cit.*, p. 39 whose answer suggests that he thinks the latter alternative held, viz. that what Ulpian had in mind was the case when the given structure had been built unlawfully, even though the builder had not come up against any opposition from third parties. This is an important issue, yet in this particular case, viz. the repair of an extant private structure in a public place, it does not seem to be very relevant. Even if the structure had been lawfully installed but its repair would have carried a danger of damage to some other person, it could be stopped on the grounds of the interdict. The only exception would be the situation in which the repair was absolutely indispensable. It is very likely that in this case the owner of the structure in need of indispensable repair would still have been required to obtain a special licence, which the praetor mentioned in the formula of *ne quid in loco publico fiat*, authorising him to continue the work which could entail a loss or damage to third parties. See also J.M. ALBUQUERQUE, *La protección o defensa...*, p. 93.

²⁹ L. BOVE, s.v. *Interdicta de locis publicis*, «NNDI» 8/1962, p. 800. Some authors draw special attention to the specificity of *utilitas*, and even go as far as to call it a practical benefit. Between others J. GAUDEMET, '*Utilitas publica*', «RHD» 29/1951, p. 465; H. ANKUM, '*Utilitatis causa receptum*'. *Sur la méthode pragmatique des juristes romains classiques*, «RIDA» 15/1968, p. 119; G. LONGO, '*Utilitas publica*'..., p. 7; I. MASTINO, '*Utilitas valuit propter honestatem*': *Cicerone e il principio giuridico dell'utilitas*, http://www.dirittoestoria.it/11/D&Innovazione/Mastino-Cicerone-Principio-giuridico-utilitas.htm#_ftn16

³⁰ G. 4,139; I. 4,15; R. SCAEVOLA, *op. cit.*, p. 11, n. 43.

4. WAYS AND MEANS OF PROTECTION AGAINST DAMAGE IN THE LIGHT OF THE *NE QUID IN LOCO PUBLICO FIAT INTERDICT*

The formula of the *ne quid in loco publico fiat* interdict and the passages I have cited and discussed from the jurists' commentaries on the concept of damage lead on to an examination of the freedom to build in public places. It has been established that the Romans adhered to the principle that public places should be freely accessible for citizens' unencumbered enjoyment, including the right to put up private installations on them. However, it was not an unlimited right. One of the constraints was the damage builders could cause by installing an object in a public place, as the praetor made clear: *qua ex re quid illi damni detur*.³¹ Ulpian commented on this ruling:

D. 43,8,2,10 (Ulp. 68 *ad ed.*): *Merito ait praetor "qua ex re quid illi damni detur": nam quotiensque aliquid in publico fieri permittitur, ita oportet permitti, ut sine iniuria cuiusquam fiat. Et ita solet princeps, quotiens aliquid novi operis instituendum petitur, permittere.*

He observed that whenever anyone applied for permission to carry out anything in a public place, he should be granted permission only if no-one sustained any damage thereby. Hence the *princeps* granted permission for the erection of a new building only on condition that no-one would incur loss or damage.

Hence Ulpian made it quite clear that when the praetor promulgated the *ne quid in loco publico fiat* interdict he intended it to protect private interest as well. The last part of this passage suggests that before the emperor granted permission for the erection of a building *in loco publico* he ordered an inquiry into whether the project the private individual intended to carry out would be safe from the point of view of both the public and private interest, in other words whether it would be conducted *sine iniuria cuiusquam*. Ulpian elaborated on this point in the next part of his commentary to the edict:

³¹ U. ROBBE, *op. cit.*, p. 744.

D. 43,8,2,16 (Ulp. 68 *ad ed.*): *Si quis a principe simpliciter impetraverit, ut in publico loco aedificet, non est credendus sic aedificare, ut cum incommodo alicuius id fiat, neque sic conceditur: nisi forte quis hoc impetraverit.*

Here Ulpian said that anyone who had been granted permission by the *princeps* to build in a public place should not consider himself free to do anything that would be to the detriment of anyone else. Licences of this kind were practically never granted, except in cases which specified the scope of the permission. Hence we may treat the *princeps*' permission as the indispensable condition to build in a public place. This was undoubtedly an arrangement designed to provide protection against unauthorised building.

However, on reading Ulpian's comments we come up against a question which raises misgivings. If a private person who intended to build in a public place had to obtain permission from the *princeps* for the project, would that not mean that the *ne quid in loco publico fiat* injunction could apply only to buildings which were constructed without this permission? The right to claim the interdict appears to have been independent of whether or not permission had been granted. Ulpian's comments in D. 43,8,2,10 and 16 suggest that a private person who built anything in a public place without the *princeps*' permission did so illegally. Anyone could apply for the issue of the interdict, regardless of whether permission to build the structure which entailed a danger of damage had been granted or not. The right to claim and apply the *ne quid in loco publico fiat* interdict was based on its *sine iniuria cuiusquam* clause. That is why even for a structure permitted by the *princeps*, if it later turned that it was being built *cum incommodo alicuius*, the party sustaining loss or damage could apply for its construction to be discontinued on the grounds of the interdict.³²

The admissibility of such a regulation is a direct consequence of the specific nature of public places, which were nobody's property but

³² U. ROBBE, *op. cit.*, p. 745 concurs on this point. In his opinion a person whose interest was likely to be impaired could apply to the praetor for the interdict regardless of whether the builder had obtained permission to build or not.

everyone had the same right to their enjoyment, as Ulpian stressed in his commentary to the praetor's edict: *loca 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* (D. 43,8,2,2).³³ Hence it was regarded as self-evident that every individual had the right to stop another individual with the same right from continuing his activities in a public place if those activities entailed a risk of damage occurring in the said public place.

We may also draw a further conclusion from this passage, which will be useful for our discussion. Perhaps Ulpian wanted to show that activities carried out in a public place need not always have infringed the rights of any unspecified individual (*quilibet ex populo*), but those of specific, identifiable persons. The concept adopted in *ne quid in loco publico fiat* to afford protection covered both situations, viz. when the potential damage which could ensue in a public place would affect each and every individual, as well as when only certain individuals would be affected.³⁴

The passages I have referred to from Ulpian, especially the last one, verify the hypothesis I started with, that *ne quid in loco publico fiat*, which had been promulgated for the protection of public places, also offered protection for the private interest of individuals using such places.³⁵ Yet another principle I mentioned earlier is confirmed by this regulation, which laid down that anyone who pursued an activity in a public place which could cause damage or loss to the place itself and/or to other private individuals using the place, could be stopped from continuing his activity there. This second principle is the principle of balance between the citizens' right to the free enjoyment of public places,

³³ See G. 2,11; D. 1,8,1 pr.; G. BRANCA, *Le cose 'extra patrimonium humani iuris'*, «Annali Triestini di diritto, economia e politica della Università di Trieste», 12/1941, pp. 233-234 who emphasises that a private person could not own public land, which was accessible to all.

³⁴ L. BOVE, *op. cit.*, p. 800 shares the view that private individuals whose interest was likely to suffer could seek assistance from the praetor. Also G.A. ANSELMO, *op. cit.*, p. 489 and R. SCAEVOLA, *op. cit.*, p. 88 share this opinion.

³⁵ U. ROBBE, *op. cit.*, p. 902.

and their right to restrict the same right of other citizens whose activities in a given public place involved a risk of damage or loss to the interest of the former individual citizen or group of citizens. Hence, even if the activities in question had appeared to be safe and the *princeps* had issued permission for them to be carried out in a public place but had turned out to involve a risk of damage or loss for a private individual while they were being conducted, that individual could apply to the praetor for a grant of the interdict to have those activities stopped.³⁶

5. CLOSING REMARKS

Public places were given a considerable amount of legal protection. Interdicts were one of the means by which this protection was effected, and they included the prohibitive *ne quid in loco publico fiat*. A large number of comments by jurists, especially Ulpian, are extant on this interdict in Title 43 of the *Digest of Justinian*. Ulpian's remarks, which I have quoted, and the formula of the interdict itself, may be used to adduce several arguments to verify and prove the hypothesis I made at the beginning of this paper, namely that *ne quid in loco publico fiat* was applied to protect both the public and private interest.

In the first place, the need for protection of this kind is indicated by the very category itself of the things to which it referred. These things were *res usui destinatae*, which on the grounds of law were accessible to all.³⁷ This interdict was to ensure all users of their uninterrupted enjoyment, and, as Ulpian put it, to prevent private persons' loss of the enjoyment of these places.³⁸

The second argument is connected with the nature of the damage which this interdict was to prevent. Ulpian wrote of the essential features

³⁶ A. PALMA, 'Iura vicinitatis'. *Solidarietà e limitazioni nel rapporto di vicinato in diritto romano dell'età classica*, Torino 1988, p. 116.

³⁷ M.G. ZOZ, *op. cit.*, pp. 72-73, 74.

³⁸ V. PONTE ARREBOLA, *op. cit.*, p. 4; A. DI PORTO, *La tutela della 'salubritas' fra editto e giurisprudenza. Il ruolo di Labeone*, Milano 1990, pp. 296-297; L. BOVE, *op. cit.*, p. 800.

of this damage, defining it as the loss of a benefit of whatsoever kind a private individual had from the enjoyment of a public place.

Although *ne quid in loco publico fiat* has many of the features typical of interdicts for the protection of private interest, its basic character is determined by the category of things to which it applied. And since this meant *res in usu publico*, the right to have this interdict applied could be claimed by anyone who drew any kind of benefit whatsoever, be it merely the right to light or a view, from the enjoyment of the public place in question. Hence every private person had the same right to the enjoyment of public places, as well as to the protection of this right offered by the *ne quid in loco publico fiat* interdict. Ulpian put this in the following words: *tantum iuris habemus ad optinendum, quantum quilibet ex populo ad prohibendum habet* (D. 43,8,2,2). Interdicts relating to public places, including *ne quid in loco publico fiat*, all served a common purpose – to protect and maintain the *res publicae* in a condition good enough to let any citizen enjoy them at any time.³⁹ Hence, in the words of Pomponius (... *ideo quolibet postulante de his interdicatur*, D. 43,7,1) and Ulpian, the *ne quid in loco publico fiat* interdict afforded protection both for the public and private interest (*Et tam publicis utilitatibus quam privatorum per hoc prospicitur*, D. 43,8,2,2). Individuals who claimed the right to use the interdict to protect their own interest were at the same time protecting the public place and the right of all to its enjoyment.⁴⁰

INTERES PRYWATNY A INTERES PUBLICZNY
W ‘INTERDICTUM NE QUID IN LOCO PUBLICO FIAT’

Streszczenie

W prawie rzymskim miejsca publiczne miały zapewnioną szeroką ochronę. Zapewniali ją edylowie kurulni i plebejscy, cenzorzy oraz pretorzy. Ci ostatni chronili je za pomocą ogłaszanych przez siebie interdyktów. Na ich tle wyróżnia się interdykt *ne quid in loco publico fiat*

³⁹ G. LONGO, s.v. ‘*Interdicta de itineribus publicis*’, «NNDI», 8/1962, p. 800.

⁴⁰ G.G. KRAEMER, *La protección interdictal del dominio público hidráulico. Una primera aproximación*, «RGDR» 7/2006, p. 2; R. SCAEVOLA, *op. cit.*, p. 116.

zabraniający dokonywania bądź wprowadzania w miejsca publiczne czegokolwiek, co mogło spowodować tam szkodę. Wyjątkowość *ne quid in loco publico fiat* polegała na tym, że znajdował on zastosowanie zarówno wtedy, gdy owa szkoda naruszała interes publiczny (*utilitas publica*), jak i wtedy, gdy mogła spowodować utratę korzyści przez osobę prywatną, a więc, jeśli naruszała *utilitas privata*. Szkodę (*damnum*) zdefiniowano bowiem jako utratę korzyści, którą jednostka czerpała z miejsca publicznego, jakakolwiek by ona była.

PRIVATE AND PUBLIC INTEREST
IN THE 'INTERDICTUM NE QUID IN LOCO PUBLICO FIAT'

Summary

Roman law accorded a broad scope of protection for public places. The magistrates responsible for securing it were the curule and plebeian aediles, the censors, and the praetors. Praetors conducted this duty by promulgating interdicts. *Ne quid in loco publico fiat*, which prohibited any activity or installation in a public place which could cause damage, stands out among the other praetorian interdicts. What made it special was that it could be applied both when the potential damage concerned the public interest (*utilitas publica*), and/or the interest of a private individual (*utilitas privata*). The damage (*damnum*) was defined as the loss of a benefit of whatsoever kind the private individual drew from his enjoyment of the public place in question.

Słowa kluczowe: miejsce publiczne; interdykt; *utilitas publica*; *utilitas privata*; szkoda.

Keywords: public place; interdict; *utilitas publica*; *utilitas privata*; damage.

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