Bartosz Zalewski

From Private Ownership to Public Jurisdiction: Creative Use of Roman Law in Chapter V of *Mare liberum* by Hugo Grotius

Bartosz Zalewski

(born 1990, PhD 2020) Attorney-at-law, Assistant Professor, Department of Political and Legal Doctrines and Roman Law, Faculty of Law and Administration, Maria Curie-Sklodowska University, Lublin, Poland.

✉ bartosz.zalewski@mail.umcs.pl

https://orcid.org/0000-0001-7508-354X

The article examines arguments based on Roman law in Chapter V of Hugo Grotius' Mare liberum, sive de iure quod Batavis competit ad indicana commercia dissertatio. *This short treatise, constituting in fact an extract from a larger work known as* De iure praedae commentarius, *not published during Grotius' lifetime, is an excellent example of how new normative solutions can be developed on the basis of existing legal institutions. Some of these institutions, despite having been developed as part of the ancient Roman law, were treated by Grotius as having their origins in natural law* (ius naturale)*, or the law of nations* (ius gentium)*. The reference to natural law certainly facilitated the transposition of institutions that had historically fitted into the framework of private law* (ius privatum) *into the realm of public law* (ius publicum)*. This tendency was one of the key factors in the development of the early modern concept of* ius gentium. *Hence, the analysis covers the institutions and concepts invoked by Grotius, such as, in particular,* occupatio, res publicae, *and* res omnium communes. *Their use is a proof of the realism of Grotius, who creatively applied the institutions of Roman private law to public jurisdiction over the seas.*

Key words: Roman law, Hugo Grotius, international law, *Mare liberum*

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1. Introductory remarks

In the legal reality that preceded the period of great codifications, the very concept of law – including in particular natural law and *ius gentium*, as well as the content of various legal rules – had been discussed and debated.[1] Despite its flaws, addressed mainly

1 P. Koschaker, *L'Europa e il diritto romano*, A. Biscardi transl. (Sansoni 1962), 287 uses in this context the term *Juristenrecht* (translated into Italian as *diritto giurisprudenziale*), pointing out that this concept covers both the ancient Roman law and the *ius commune*. See also P. Vinogradoff, *Roman Law in Medieval Europe* (Oxford University Press, 1961), 144.

by the Enlightenment authors, the debate was indisputably valuable. It is significant that the peak of the development of Roman law is considered to be the time when the jurisprudence was the most vital, and when the most prominent jurists could be equipped with *ius publicae respondendi ex auctoritate principis*.[2] A similar situation can be observed in the 16th and 17th centuries with regard to the formation of the foundations of modern European public international law. In this case, too, a crucial element was the activity of legal scholars who, relying on the legal tradition, were able to build new institutions adapted to the changing reality.[3] This required enormous erudition, excellent education and a high intellectual culture, difficult to imagine in our technocratic reality. For centuries, the intellectual discussion and scientific thought exerted a decisive influence on the pace of the development of private law in particular, while the activities of the legislative public authority were much less important.

An excellent example of the creative activity of early modern jurisprudence is that of the work of Hugo Grotius (1583–1645). Although it is sometimes claimed that Grotius was above all a skilful compiler who made excellent use of the work of his predecessors, ranging from Roman jurists, through glossators and commentators to the late Spanish scholastics and other 16th-century jurists, this cannot depreciate his contribution to the development of early modern European international law.[4] In this article I would like to analyse the weight of arguments based on Roman law in Chapter V of an early work by Hugo Grotius, titled *Mare liberum, sive de iure quod Batavis competit ad indicana commercia dissertatio*.[5] This short treatise, constituting in fact an extract from a larger work known as *De iure praedae commentarius*,[6] not pub-

Grotius invoked the authority of natural law as a universal determinant of human conduct which is binding regardless of one's social position or confessional affiliation.

2 See M. Brutti, *Potere imperiale e giurisprudenza*, in *Lineamenti di storia del diritto romano*, M. Talamanca ed. (Giuffrè Editore, 1979), 473.

3 See for example the comments on the work of Alberico Gentili by A. Wagner, "Lessons of Imperialism and of the Law of Nations: Alberico Gentili's Early Modern Appeal to Roman Law", *European Journal of International Law* 23 (2012) No. 3, 873 *et seq.*

4 See J.B. Scott, *Law, the State and the International Community*, vol. 1 (Columbia University Press, 1939), 522; P. Haggenmacher, "Genèse et Signification du Concept de Ius Gentium chez Grotius", *Grotiana* 1 (1981), 90–91. A detailed analysis of the influence of the European legal scholars chronologically closest to Grotius on the views presented in *Mare liberum* was made by F. Ito, "The Thought of Hugo Grotius in the Mare Liberum", *Japanese Annual of International Law* 18 (1974), 2 *et seq.*

5 H. Grotius, *Mare liberum, sive de iure quod Batavis competit ad indicana commercia dissertatio* (Officina Ludovici Elzevirii, 1609). It is the first, anonymous edition of *Mare liberum*. The most recent English-language editions: H. Grotius, *The Free Sea*, R. Hakluyt transl., D. Armitage ed. (Liberty Fund, 2004); H. Grotius, *Mare Liberum 1609–2009. Original Latin Text and English Translation*, R. Feenstra ed. (Brill, 2009).

6 Scott, *Law, the State*, 522; Ito, *The Thought of Hugo Grotius*, 1. On the circumstances behind the discovery of *De iure praedae commentarius*, as well as those related to the publication of this treatise, see e.g. M. Knight, *Life and Works of Hugo Grotius* (Sweet and Maxwell, 1925), 79 *et seq.*; Scott, *Law, the State*, 523–527; M. van Ittersum, "Mare Liberum Versus the Propriety of the Seas?", *Edinburgh Law Review* 10 (2006) No. 10, 243–244; M. van Ittersum, "Dat-

lished during Grotius' lifetime, is an excellent example of how new normative solutions can be developed on the basis of existing legal institutions.

It should be noted that some of these institutions, despite having been developed as part of the ancient Roman law, were treated by Grotius as having their origins in natural law (*ius naturale*), or the law of nations (*ius gentium*). This corresponded with the views formulated by Roman jurists.[7] In the introduction to *Mare liberum*, which was addressed by Grotius *ad Principes populusque liberos orbis christiani*, the Dutch jurist emphasized:

> *Lex illa, e cujus praescripto judicandum est, inventu est non difficilis, utpote eadem apud omnes; et facilis intellectu, utpote nata cum singulis, singulorum mentibus insita. Ius autem quod petimus tale est, quod nec rex subditis negare debeat, neque Christianus non Christianis. A natura enim oritur, quae ex aequo omnium parens est, in omnis munifica, cuius imperium in eos extenditur qui gentibus imperant, et apud eos sanctissimum est qui in pietate plurimum profecerunt.*
>
> That law by whose prescript from we are to judge is not hard to be found out, being the same with all and easy to be understood, which being bred with everyone is engrafted in the minds of all. But the right which we desire is such as the king himself ought not deny unto his subjects, nor a Christian to infidels, for it hath his original from nature, which is an indifferent and equal parent to all, bountiful towards all, whose royal authority extendeth itself over those who rule the nations and is most sacred amongst them who have profited most in piety.[8]

In the excerpt quoted above, Grotius invoked the authority of natural law as a universal determinant of human conduct which is binding regardless of one's social position or confessional affiliation. This was completely understandable, since despite all the changes that had taken place over the centuries, the very existence of natural law was not questioned at the beginning of the 17th century. Discussions concerned the content of *lex naturalis* rather than its binding force. Even monarchs were subject to it, as stated e.g. by Jean Bodin (1530–1596),[9] widely regarded as the most outstanding theorist of classical absolutism. Basing the argumentation on natural law had the advantage that, despite its undefined content, there was a consensus regarding the absolutely binding character of natural law norms. It was only in the middle of the 17th century that Thomas Hobbes (1588–1679) broke away from this consensus.[10]

It should also be stressed that Grotius in *Mare liberum* equated natural law with the so-called primary *ius gentium*.[11] The latter meant norms that were

ing the manuscript of De Jure Praedae (1604–1608): What watermarks, foliation and quire divisions can tell us about Hugo Grotius' development as a natural rights and natural law theorist", *History of European Ideas* 35 (2009) No. 2, 125 *et seq.*; G. van Nifterik, J. Nijman, "Introduction: Mare Liberum Revisited (1609–2009)", *Grotiana* 30 (2009), 3–4.

7 See especially J. Ziskind, "International Law and Ancient Sources: Grotius and Selden", *The Review of Politics* 35 (1973) No. 4, 537–559; B. Straumann, *Roman Law in the State of Nature. The Classical Foundations of Hugo Grotius Natural Law* (Cambridge University Press, 2015), 2.

8 Grotius, *The Free Sea*, 8.

9 J. Bodin, *Les six livres de la République* (Jacques du Puys, Libraire Iuré, à la Saamaritaine, 1577), lib. I, cap. IX, fol. 131.

10 See B. Straumann, "Ancient Caesarian Lawyers in a State of Nature: Roman Tradition and Natural Rights in Hugo Grotius's De Iure Praedae", *Political Theory* 34 (2006) No. 3, 329.

11 Grotius, *The Free Sea*, 21. See also Scott, *Law, the State*, 539; R. Lesaffer, *Roman Law and the Intellectual History of International Law*, in *The Oxford Handbook of the Theory of International Law*, A. Orford, F. Hoffmann eds. (Oxford University Press, 2016), 55. This theory was somehow based on classical sources, and was developed in line with the thought of St. Thomas Aquinas – see D. 1,1,9 (Gaius *libro primo institutionum*): […] *quod vero naturalis ratio inter omnes homines constituit, id apud omnes populos peraeque custoditur vocaturque ius gentium, quasi quo iure omnes gentes utuntur.* – "[…] that law which natural reason has established among all human beings is among all observed in equal measure and is called *jus gentium*, as being the law which all nations observe." *The Digest of Justinian*, vol. 1, A. Watson ed. (University of Pennsylvania Press, 1998), 2. S.Th. I–II q. 57 a. 3 arg. 3: *Ad tertium sic proceditur. Videtur quod ius gentium sit idem cum iure naturali. Non enim omnes homines conveniunt nisi in eo quod est eis naturale. Sed in iure gentium omnes homines*

mutually binding and universally applicable. This suggests that in the course of his reasoning Grotius would refer to those institutions of Roman law to which a legal-natural character was attributed. Since natural law was binding on "all living beings",[12] it also had to be respected by those in power, also in their relations with other actors of international society. As the *ratio scripta*, Roman law also had the advantage of constituting a set of norms, the content of which was more stable than was the case with, for example, customary law.[13] The reference to natural law certainly facilitated the transposition of institutions that had historically fitted into the framework of private law (*ius privatum*) into the realm of public law (*ius publicum*).[14] This tendency was one of the key factors in the development of the early modern concept of *ius gentium* and I would like to devote more attention to it.

In light of the above, the following observations will cover the institutions and concepts invoked by Grotius, such as, in particular, *occupatio* and the concepts of *res publicae* and *res omnium communes*, which were his main interest in the most extensive Chapter V of *Mare liberum*.[15] Due to the limited space herein, Grotius' references to the Roman concept of a two-stage transfer of ownership referring specifically to the use of *donatio* and *traditio rei* (Chapter VI of *Mare liberum*), as well as to *praescriptio longi temporis* (Chapter VII of *Mare liberum*) will be excluded.[16]

conveniunt, dicit enim iurisconsultus quod ius gentium est quo gentes humanae utuntur. Ergo ius gentium est ius naturale. – "Since justice implies equality, and since we cannot offer God an equal return, it follows that we cannot make Him a perfectly just repayment. For this reason the Divine law is not properly called *jus* but *fas*, because, to wit, God is satisfied if we accomplish what we can. Nevertheless justice tends to make man repay God as much as he can, by subjecting his mind to Him entirely." – *The "Summa Theologica" of Saint Thomas Aquinas*, vol. 10, pt. 2, Literally translated by Fathers of the English Dominican Province (Burns Oates & Washbourne Ltd., 1929), 106. This position was also adopted by the glossators: *glossa Quod natura* ad D. 1,1,1,3: *Id est Deus, et sic nominativi. 2. Vel dicquod sit ablativi casus. Item not. Ius naturale quatuor modis dici. Primo lex Mosaica* […]. *Secundo instinctus naturae* […]. *Tertio ius gentium* […]. As cited in *Corpus Iuris Civilis Iustinianei. Tomus hic Primus Digestum Vetus continet*, D. Gothofredus ed. (Ioannis Fehi Gaildorphensis IC, 1627). Translation: "In nominative it is God. Let's discuss this formulation in the ablative case. About natural law we speak in four modes. First is Mosaic law. Second is natural instinct. Third is law of nations."

12 D. 1,1,1,3 (Ulpianus *libro primo institutionum*): *Ius naturale est, quod natura omnia animalia docuit: nam ius istud non humani generis proprium, sed omnium animalium, quae in terra, quae in mari nascuntur, avium quoque commune est.* – "*Jus naturale* is that which nature has taught to all animals; for it is not a law specific to mankind but is common to all animals-land animals, sea animals, and the birds as well." *The Digest*, vol. 1,1.

13 See I. Detter, *Philosophy of Law of Nations* (Montesa Jagiellonica, 2018), 41.

14 In the late 19th century, Holland pointed out that international law was private law between states, T. Holland, *Studies in International Law* (Clarendon Press, 1898), 152. A monograph was written by H. Lauterpacht on the relationship between private law and public international law: *Private Law Analogies in International Law*, ([no publisher], 1926). Lauterpacht pointed to three fundamental possibilities for finding an analogy between private and international law: [1] the rules of exercise sovereignty by states as political entities are shaped according to the rules of private law (he gives the examples of *preascriptio* and easements), [2] economic relations between states (he gives the example of granting a loan by one state to another), [3] the issue of the rights of private entities in relations with foreign entities. At the same time, the author notes that the latter two cases refer to the choice of the applicable private law and therefore remain in the realm of private international law rather than public law (*ibidem*, 1–2). C. Schmitt, *Nomos of the Earth in the International Law of the Ius Publicum Europaeum*, G.L. Ulmen transl. (Telos Press Publishing, 2006), 175 criticized the use of private-law concepts in inter-state relations as he viewed it as applying old formulas of Roman law to completely new circumstances.

15 See Ziskind, "International Law", 541.

16 Naturally, these are not the only Roman law institutions referred to by Grotius in *Mare liberum*. For instance, he noted that the population of the Indies was free and *sui iuris*, which means that it was not subject to the authority of the Portuguese or other neighbouring peoples or nations, Grotius, *Mare liberum*, fol. 13.

2. Occupatio *and the legal status of the seas: An analysis of the use of Roman concepts in Chapter V of* Mare liberum

The question of the legal status of the seas is addressed by Grotius after citing a number of arguments denying the legal basis for the Portuguese sovereignty over the East Indies. The Dutch jurist emphasized that in light of the sources known to him, the sea was qualified in three ways:

[1] as an object that is nobody's property (*res nullius*);

[2] as an object which is the common property of all people (*res omnium communes*);

[3] as an object in the public domain (*res publicum*).

The decision on the correct legal classification of the sea was preceded by a comprehensive reasoning by Grotius on the genesis and nature of the right of ownership. The author relied mainly on literary sources, fragments of which were to illustrate the transition from the original state of human existence, in which private property was not known at all, through the emergence of collective property, to the formation of individual property. It was first of all supposed to apply to consumables, but over time it was also extended to real estate. Following the Roman jurists, Grotius considered *occupatio* as the oldest method of acquiring property:[17]

> *Repertae proprietati lex posita est, quae naturam imitaretur. Sicut enim initio per applicationem corporalem usus ille habebatur, unde proprietatem primum ortam diximus, ita simili applicatione res proprias cuiusque fieri placuit. Haec est quae dicitur occupatio, voce accommodatissima ad eas res quae ante in medio positae fuerant.*[18]
>
> Property being found out, there was a law set down which should imitate nature. For, as in the beginning that use was had by corporal application whence, we said before, property had his original, so by the like application it seemed good they should be made the proper goods of everyone. This is that which is called occupation by a word most aptly applied unto those things which before were indifferent.[19]

According to Grotius, *occupatio* was the original method of acquiring property also in the sense that it concerned nobody's items which did not have a previous owner.[20] As is widely known, the acquisition of ownership of nobody's property through occupation took place with the fulfilment of two conditions, namely the acquisition of possession and the will to acquire ownership.[21] The first condition became a special object of interest to Grotius, who argued:

> *Occupatio a. haec in his rebus quae possessioni reniuntur, ut sunt ferae bestiae, perpetua esse debet, in aliis sufficit, corpore coeptam possessionem animo retineri. Occupatio in mobilibus est apprehensio, in immobilibus instructio aut limitatio; unde Hermogenianus cum dominia distincta dicit, addit, agris terminos positos, aedificia collocata.*[22]
>
> But this occupation in those things which resist possession, as wild beasts, ought to be perpetual; in other things it sufficeth that a corporal possession begun be retained in the mind. Occupation or possession in movables is apprehension; in immovables, instruction and limitation. Whereupon when Hermogenianus saith they were distinct dominions he added that the fields were bounded and houses built.[23]

17 See 41,1,1 pr. (Gaius *libro secundo rerum cottidianarum sive aureorum*), as well as *glossa Omnia igitur ad* D. 41,1,1,1, which states that the law of nations is older than civil law (*ius civile*). See also P. Bonfante, *Diritto Romano* (Cammelli, 1900), 270-271.

18 Grotius, *Mare liberum*, fol. 16–17.

19 H. Grotius, *The Free Sea*, 22–23.

20 Grotius referred at this point to Cicero's *De officiis*, see Cic., *off.* 1,21. See also W.W. Buckland, *A Text-Book of Roman Law from Augustus to Justinian* (Cambridge University Press, 1921), 207 *et seq.*; C. Longo, *Corso di diritto Romano. Le cose – la proprietà e i suoi modi di acquisto*, (Giuffrè Editore, 1946), 88; P. Voci, *Modi di acquisto della proprietà (corso di diritto romano)* (Giuffrè Editore, 1953), 11; A. Berger, *Encyclopedic Dictionary of Roman Law*, (American Philosophical Society, 1953), *s.v. Occupatio*, 606.

21 See Longo, *Corso*, 88; Voci, *Modi di acquisto*, 11.

22 Grotius, *Mare liberum*, 17.

23 Grotius, *The Free Sea*, 23.

Grotius explains, therefore, that the acquisition of possession must take place *corpore et animo*,[24] while the objective element relating to the physical holding of the property must be continuous in relation to wild animals.[25] For other movable (inanimate) and immovable property, the physical occupation of the property is crucial,[26] but the existence of a subjective element, namely the possessor's will to hold the object (*animus rem sibi habendi*) is sufficient for the possession to continue. The occupation of immovable property, as Grotius points out, should involve carrying out activities which are a manifestation of the possessor's rights towards third parties, and thus the delimitation of boundaries and land development. The Dutch jurist refers here to the view formulated by Hermogenianus:

> D. 1,1,5 (Hermogenianus *libro primo iuris epitomarum*): *Ex hoc iure gentium introducta bella, discretae gentes, regna condita, dominia distincta, agris termini positi, aedificia collocata, commercium, emptiones venditiones, locationes, conductiones, obligationes institutae: exceptis quibus dam quae iure civili introductae sunt.*
> As a consequence of this jus gentium, wars were introduced, nations differentiated, kingdoms founded, properties individuated, estate boundaries settled, buildings put up, and commerce established, including contracts of buying and selling and letting and hiring (except for certain contractual elements established through *jus civile*).[27]

Grotius' selection of the ancient text positioned all the considerations concerning *occupatio*. Grotius did

The skilful use of the Hermogenianus' text allowed Grotius to emphasize the importance of physical holding of a property, that would be perceivable by third parties. The Roman jurist pointed not to *occupatio* but to the establishment of land boundaries and land development. Therefore, the *ius gentium* institutions made it possible to arrange a certain spatial order, which can only be established on land.

24 See D. 41,2,3,1 (Paulus *libro quinquagesimo quarto ad edictum*). It is not a coincidence that Grotius ignores this important passage from the work of Paulus. This was so because the jurist explained in that statement that in order to acquire ownership of an immovable property, it was sufficient for one to enter the land in question with the will to take over the land. However, this applies to a derivative acquisition, as Bartolus de Saxoferrato pointed out in a laconic statement repeated by *Glossa Ordinaria*: *Oculis et affectu adquiritur possessio rei ab alio traditae – Corpus Iuris Civilis Iustinianei. Tomus hic Tertius Digestum Novum continet*, (Ioannis Fehi Gaildorphensis IC, 1627), fol. 407. See also D. 41,2,8 (Paulus *libro sexagensimo quinto ad edictum*).

25 See D. 41,2,3,14 (Paulus *libro quinquagesimo quarto ad edictum*). Buckland, *A Text-Book of Roman Law*, 207–208.

26 Referred to by the glossators as *coporalis apprehensio*, equated with *possessio naturalis,* see gl. *Naturalis possessio* ad D. 41,2,3,3.

27 *The Digest of Justinian*, vol. 1, A. Watson ed. (University of Pennsylvania Press, 1998), 2.

not deny that the institution belonged to the domain of *ius gentium*. It would be difficult because the Roman jurists expressly stated that it was a method of acquisition under *ius gentium* (or *ius naturale*).[28] Also the famous definition of the law of nations coined by Isidor of Seville and adopted in *Decretum Gratiani* explicitly included *occupatio*.[29] This view was also adopted and used by Spanish scholastics. However, the skilful use of the Hermogenianus' text allowed Grotius to emphasize the importance of the physical holding of a property that would be perceivable by third parties. The Roman jurist pointed not to *occupatio* but to the establishment of land boundaries and land development.[30] Therefore, the *ius gentium* institutions made it possible to arrange a certain spatial order, which can only be established on land. This issue was pointed out by C. Schmitt in his interpretation of the historical development of international law, who correctly noted the difference in the status of the seas in this context.[31]

Grotius also notes that private property and public property developed concurrently. This was to take place just after the disintegration of the original community of using all things. Hence, the Dutch jurist argues that the appropriation of private and public property takes place in the same way. In support of this claim, he cites historical arguments based on the works of Thucydides,[32] Cicero[33] and Seneca.[34] This leads Grotius to the conclusion that there are objects that are not subjected to appropriation, and that cannot therefore constitute private property based on *occupatio*. Moreover, the author of *Mare liberum* states that "by very nature" there are items that can be used by everyone, since they are not expendable.[35] These include – following Ovid – water, sun and air.[36]

For obvious reasons, Grotius focuses on flowing waters. As regards their status, references are made both to Cicero[37] and Roman jurists. Therefore, Ulpian's view is quoted, according to which the sea is naturally open to all (*mari, quod natura omnibus patet*),[38] as well as that of Neratius, who claimed that sea coasts were so shaped by nature that they were nobody's property.[39] Probably due to the fact that the status of sea

28 See D. 41,1,1 and 3 (Gaius *libro secundo rerum cottidianarum sive aureorum*). See also D. 6,1,23 pr. (Paulus *libro uicensimo primo ad edictum*). Bonfante, *Diritto*, 270–271; Buckland, *A Text-Book of Roman Law*, 209; Longo, *Corso*, 87; Voci, *Modi di acquisto*, 1.

29 Isid., *Etym.* 5,6,1: *Ius gentium est sedium occupatio, aedificatio, munitio, bella, captivitates, servitutes, postliminia, foedera pacis, indutiae, legatorum non violandorum religio, connubia inter alienígenas prohibita; et inde ius gentium, Et inde ius gentium, quia eo iure omnes fere gentes utuntur.* – "The law of nations concerns the occupation of territory, building, fortification, wars, captivities, enslavements, the right of return, treaties of peace, truces, the pledge not to molest embassies, the prohibition of marriages between different races. And it is called the 'law of nations' (*ius gentium*) because nearly all nations (*gentes*) use it." – *The Etymologies of Isidore of Seville*, Stephen A. Barney et al. trans. (Cambridge University Press 2006), 118. See *Decretum Gratiani* dist. I cap. 9.

30 The jurist was referring to the acquisition of property, see M. Kaser, *Ius gentium*, (Böhlau Verlag, 1993), 50.

31 See Schmitt, *Nomos*, 42–43.

32 Thuc. 1,139,2.

33 Cic., *off.* 1, 21.

34 Sen., *ben.* 7,4,3; *Oct.* 419–420.

35 Cicero is cited here: *off.* 1, 51–52.

36 See Ovid., *Met.* 6, 349–351.

37 Cic., *off.* 1,52.

38 D. 8,4,13 pr. (Ulpianus *libro sexto opinionum*): *Venditor fundi Geroniani fundo Botriano, quem retinebat, legem dederat, ne contra eum piscatio thynnaria exerceatur. Quamvis mari, quod natura omnibus patet, servitus imponi privata lege non potest, quia tamen bona fides contractus legem, servari venditionis exposcit, personae possidentium aut in ius eorum succedentium per stipulationis vel venditionis legem obligantur.* – "The seller of the Geronian estate made it a term of the contract of sale in favor of the Botrian estate, which he retained, that no tunny fishing should be carried on off the latter. Now a servitude cannot be imposed by private agreement on the sea, as by nature it is open to all. However, because the good faith of the contract demands that the terms of a sale be honored, those persons who are in possession or those who succeed to their legal position are bound by the terms of the stipulation or the sale." See *The Digest*, vol. 1, 266.

39 D. 41,1,14 pr. (Neratius *libro quinto membranarum*): *Quod in litore quis aedificaverit, eius erit: nam litora publica non ita sunt, ut ea, quae in patrimonio sunt populi, sed ut ea, quae primum a natura prodita sunt et in nullius adhuc dominium pervenerunt: nec dissimilis condicio eorum est atque piscium et ferarum, quae simul atque adprehensae sunt, sine dubio*

coasts was a matter of debate among Roman jurists,[40] Grotius sought additional support here, also referring – in a footnote – to Donellus (Hugues Doneau, 1527–1591), who clearly juxtaposed the status of the coasts and seas by referring to Neratius.[41] Donellus was particularly useful here, as he believed that three categories could be distinguished among *res publicae*. Firstly, these were items that were in the public domain, though not in public use, like *res fisci*. Secondly, these were items in the public domain and at the same time intended for public use. Thirdly, in the broadest sense, Donellus included in the category of *res publicae* items that were in public use and at the same time served all people (*in usu publico, sive sit in usu omnium hominum*).[42] In the last category, the French jurist included both seas and coasts.

Grotius slightly modified Donellus's view, using only the broadest meaning of the concept of public property to support his main claim. This neat shift of emphasis and the rejection of the unwanted part of the theoretical premise developed by Donellus allowed Grotius to clarify the controversy over the legal status of the seas which, due to the discrepancies in ancient sources, had arisen in medieval literature.[43] Eventually, Grotius states:

eius, in cuius potestatem pervenerunt, dominii fiunt. – "What a man erects on the seashore belongs to him; for shores are public, not in the sense that they belong to the community as such but that they are initially provided by nature and have hitherto become no one's property. Their state is not dissimilar to that of fish and wild animals which, once caught, undoubtedly become the property of those into whose power they have come." See *The Digest*, vol. 4, 6. The aforementioned text of Neratius suggests that the sea is *res nullius*, and thus it is surprising that Grotius refers to Neratius. It probably resulted from the fact that the passage cited was also referred to by Donellus to justify the broad concept of public property.

40 The view that sea coasts were public domain prevailed. Marcianus took a different view and considered coasts as *res omnium communes* (D. 1,8,2,1 Marcianus *libro tertio institutionum*). Marcianus' view was repeated by the Institutes of Justinian (I. 2,1,1). On the other hand, Javolenus expressed a different view according to which coasts were public property (D. 50,16 and 112). The terminology used by jurisprudence is not clear though. Ulpian points out, for example, that the sea coasts are intended for "public common use" (*publicorum communis usus* – see D. 39,2,24 Ulpianus *libro octogensimo primo ad edictum*). Paulus accepts that the sea coasts are available to all, as are public roads and *loca religiosa* and *loca sacra* (D. 18,1,51 Paulus *libro uicensimo primo ad edictum*). As we know, these categories were not subject to occupation. Celsus enigmatically classified the coast as an object of the Roman *imperium*, and thus probably as public property (D. 43,8,3 Celsus *libro trigensimo nono digestorum*). Those views are therefore fundamentally different from that of Neratius, who equated the status of sea coasts with *res nullius*, providing an example of fish and wild game. Neratius consistently acknowledged that with the collapse of a building built on the sea coast, the land ceases to be private property and will "become public property again", although with the possibility of it being recaptured (D. 41,1,14,1 Neratius *libro quinto membranarum*), so it will be a situation similar, for example, to the escape of a previously captured wild animal. For further details see P. Bonfante, *Corso di diritto romano*, vol. 2. *La proprieta*, (Giuffrè Editore, 1966), 65 *et seq.*; Ziskind, "International", 542–543; R. Perruso, "The Development of the Doctrine of Res Communes in Medieval and Early Modern Europe", *Legal History Review* 1–2 (2002) No. 70, 70–75; M.J. Schermaier, "Res communes omnium. The History of an Idea from Greek Philosophy to Grotian Jurisprudence", *Grotiana* 30 (2009), 39–41.

41 Donellus, *Commentarii de iure civili*, vol. 2 (apud Bauer et Raspe, 1822), lib. IV, cap. 2, § 2, 295: *Hoc modo litora licet communia omnium, dicuntur publica, et quod maris est, seu et mari occupatum, publicum.* – "In this way, the coast can be called both common to all and public. Similarly, the occupied sea is called public."

42 Donellus, *Commentarii*, lib. IV, cap. 2, § 2, 295 and § 4, 297.

43 According to Marcianus, the sea – by virtue of natural law – was a thing belonging to all people (*res omnium communes* – D. 1,8,2,1 Marcianus *libro tertio institutionum*). A similar view was expressed by Celsus (D. 43, 8, 3 Celsus *libro trigensimo nono digestorum*). In the Institutes of Justinian, the status of the sea is presented in an inconsistent manner; first it is said to be *res omnium communes* (I. 2,1,1) and immediately afterwards it is defined as something for public use (I. 2,1,5). It seems that an additional interpretive problem for medieval jurists was to equate the status of the sea with the status of its coast. The medieval glossator Placentinus pointed out that "rivers and seas are said to be common to all living things, due to certain uses, namely

drinking and washing, and they are also public, due to other uses, namely those attributable only to man, such as sailing and fishing." (Placentinus, *Summa Institutionum*, Moguntiae 1535, lib. 2, tit. 1, fol. 18: *Communia dicuntur flumina et maria, omnium animantium, ratione quorundam usuum, id est bibendi, et abluendi, eadem sunt etiam publica, ratione aliorum usuum, id est tantum hominum ut navigandi et piscandi.* – "We call the sea and the river common to all creatures due to some ways of using them, i.e. drinking and washing, and at the same time they are public, because of other ways of use, i.e. only available to people, such as sailing or fishing"). For Placentinus, this was the starting point for a detailed analysis of the status of coasts and the buildings erected on them. Placentinus' view was further developed by Azon, who stated that "everything that is common is public and vice versa; but because of certain uses by which [certain categories of things] are public, they are not common and vice versa. And behold: the air, the sea, and the seashore, as well as all the rivers and their banks, are common to all creatures, because all creatures, both rational and irrational, make use of them and use them for washing, drinking, and existing in them [...]. They are also all called public because of those uses that are proper only to human beings, namely fishing, sailing, and casting nets [...]. Ports, however, as Placentinus states, are public, not common." Azo Portius, *Summa aurea*, (Excudebat Petrus Fradin, 1557) (reprint: MinervaGmbH, 1968), fol. 272, *in secundum librum Institutionum* § 7: *Ad hoc respondet Placentin. quod omnia communia sunt publica, et converso; sed ratione quorundam usuum, quae sunt publica, non sunt communia, et converso; ut ecce: aer, mare, et littora maris, flumina etiam omnia, et eorundem ripae communes sunt omnium animalium: quia omnia animalia rationabilia, et irrationabilia his vesecuntur, et utundurabluendo, bibendo et in eiscommorando, et similia, quae natura exigit faciendo. Eadem etiam ista omnia possunt dici publica, ratione quorundam usuum, qui solis hominibus competunt, puta piscandi, navigandi et retia siccandi, et involucrare ponendi. Portus tamen ait Placent. esse publicos, non communes.* – "Placentinus replies that everything common is public and vice versa. But because of some methods of use through which some categories of things are public, they are not common and vice versa. And here: the air, the sea and the coast of the sea, as well as all rivers and their banks are common to all creatures, because all creatures, both rational and unreasonable use them by washing, drinking and remaining in them. They are also all called public, due to these methods of use available only to people, namely fishing and sailing. Ports, however, states Placentinus, are public, not common." For more detail on this topic, see Perruso, "The Development", 69–93; Schermaier, "Res communes", 44 *et seq.*

> *Haec igitur sunt illa quae Romani vocant communia omnium iure naturali, aut quod idem esse diximus, publica iuris gentium, sic ut et usum eorum modo communem, modo publicum vocant. Quamquam vero etiam ea nullius esse, quod ad proprietatem attinet, recte dicantur, multum tamen differunt ab his quae nullius sunt, et communi usui attributa non sunt, ut ferae, pisces, aves; nam ista si quis occupet, in ius proprium transire possunt, illa vero totius humanitatis consensu proprietati in perpetuum excepta sunt propter usum, qui cum sit omnium, non magis omnibus ab uno eripi potest, quam a te mihi quod meum est.*[44]
>
> These things therefore are those which the Romans call common unto all by the laws of nature, or which are said to be the same publica *juris gentium*, as also they call the use of them sometimes common and sometimes public. But although even those things are rightly said to be no man's as touching the property, yet they differ much from those things which are no man's and are not attributed to common use, as wild beasts, fishes and birds. For if any man possess these they may become his proper right, but those things by the consent of all mankind are perpetually exempted from propriety for use which, seeing it belongeth to all, it can no more be taken away by one from all than you may take away that from me which is mine.[45]

This passage from *Mare liberum* is the quintessence of Grotius' views on the legal status of the seas. In it is apparent that the terms *res publicae* and *res omnium communes* are equated. This is despite the fact that, as Grotius admits, the classification of the seas as property common to all people is based on natural law (*ius naturale*) and as public property based on the law of nations (*ius gentium*). Looking at this issue from a broader perspective, we can see that there is a tendency to equate these concepts, which, as already noted, was associated with the distinction into primary

44 Grotius, *Mare liberum*, 20–21.

45 Grotius, *The Free Sea*, 26.

norms of the law of nations that had legal-natural legitimacy and were therefore unchangeable, and the time-varying secondary norms of *ius gentium*. Interestingly, Grotius points out at the same time that these things cannot become private property under the "consent of all mankind", which is to be interpreted in terms of Grotius' concept of social contract. This generates some confusion in the construction of the whole reasoning, although it is probably intended to reinforce Grotius' argument, which was based, in legal terms, essentially on the theory of natural law. More consistent in this regard were the earlier comments made by the Spanish scholastic Francisco de Vitoria (1483–1546), who drew a much clearer distinction between the institutions of the law of nations applicable by virtue of natural law and those whose application was linked to the common practice of the "most people" (*major pars hominum*).[46] Grotius knew de Vitoria's works, so we may be surprised by the somewhat chaotic reasoning in this regard.

3. From Private Ownership to Public Jurisdiction

The concept, adopted by Grotius, of the historical evolution of social relations and the development of the right of ownership translated into the assumption that things which are privately owned may at the same time be subject to public authority. It did not necessarily involve public *proprietas*, merely determining the possibility of exercising certain specific sovereign rights of a particular state over a certain maritime area.[47]

In the opinion of Grotius, appropriation by states had public-law effects, creating a kind of control over the area concerned other than ownership.

46 F. de Vitoria, *De Indis*, in F. de Vitoria, *Relectiones Theologicae* (Matriti 1765, en la oficina de Manuel Martin y a su costa), fol. 234: *Quia quae in nullis bonis sunt, jure gentio sunt occupantis. Instit. de Rerum divis. §. Ferae bestiae. Ergo si aurum in agro, vel margaritae in mari, aut aliud quod cumque in fluminibus non est appropriatum, jure gentium erit occupantis, sicut et pisces in mari. Et quidem multa videntur procedere ex jure gentium, quod quia derivatur sufficienter ex jure naturali, manifestam vim habet addandum jus, et obligandum. Et dato quod non semper derivetur ex jure naturali, satis videtur esse consensus majoris partis totius orbis, maxime pro bono communi omnium. Si enim post prima tempora creatiorbis, aut reparati post diluvium, major pars hominum constituerit, ut legati ubique essent inviolabiles, ut mare esset commune, ut bello capti essent servi, et hoc ita expediret, ut hospites non exigeruntur: certe hoc haberet vim, etiam aliis repugnantibus.* – "Secondly, inasmuch as things that belong to nobody are acquired by the first occupant according to the law of nations (Inst. 2,1,12), it follows that if there be in the earth gold or in the sea pearls or in a river anything else which is not appropriated by the law of nations those will vest in the first occupant, just as the fish in the sea do. And, indeed, there are many things in this connection which issue from the law of nations, which, because it has a sufficient derivation from natural law, is clearly capable of conferring rights and creating obligations. And even if we grant that it is not always derived from natural law, yet there exists clearly enough a consensus of the greater part of the whole world, especially in behalf of the common good of all. For if after the early days of the creation of the world or its recovery from the flood the majority of mankind decided that ambassadors should everywhere be reckoned inviolable and that the sea should be common and that prisoners of war should be made slaves, and if this, namely, that strangers should notbe driven out, weredeemed a desirable principle, it would certainly have the force of law, even though the rest of mankind objected thereto." See F. de Victoria, *De Indis et de iure belli relectiones*, ed. E. Nys, J.P. Bate trans. (Carnegie Institution of Washington 1917), 153.

47 Above all, it could have been about safeguarding freedom of navigation, trade and fishing by way of combating piracy, see

As regards the determination of the status of the sea as a certain type of object (*res*), there is again a reference to the views of Donellus.[48] As Grotius observes, the sea is one of non-marketable items (*res extra commercium*) and therefore not capable of being privately owned ones (*res extra patrimonium*). Grotius argues:

> *Est igitur Mare in numero earum rerum, quae in commercio non sunt, hoc est, quae proprii juris fieri non possunt: Unde sequitur si proprie loquamur, nullam Maris partem in territorio populi alicujus posse censeri.*[49]
>
> The sea therefore is in the number of those things which are not in merchandise and trading, that is to say, which cannot be made proper. Whence it followeth, if we speak properly, no part of the sea can be accompted in the territory of any people.[50]

To read the passage correctly, it is necessary to take into account the taxonomy of various categories of things proposed by Donellus, who distinguished between public property available for general use and public property in the strict sense, excluded from general use. Grotius expressly refers to this in his further argument when he discusses the difference in the legal status of a river, which, as part of the territory, can be appropriated, and the status of the open seas, which, due to their natural forms, are not subject to appropriation. A simple relationship is therefore evident: public property in the strict sense can only be an object which, due to natural (physical) conditions, could otherwise be private property as being subject to appropriation. Thus, Grotius accepted the admissibility of appropriation (*occupatio*) by both individuals and states. This argument was problematic for Selden, who accused Grotius of identifying private property with public jurisdiction.[51]

It was necessary for Grotius to determine what is characteristic of the appropriation carried out by the state and what are the consequences. Firstly, he referred to the view of Celsus preserved in Book XLIII of the Digest, which states that the coast is subject to Roman *imperium*, while the sea is a thing accessible to all.[52] Grotius emphasizes here that installations (stilts) placed in the sea should not hinder the use of either the sea or the very coast. It thus distinguishes between public-law control (*imperium*) and private control (*proprietas, dominium*). At the same time, quoting the opinion of Celsus made it possible to point to the special status of the sea as a thing available for general use.

In the opinion of Grotius, appropriation by states had public-law effects, creating a kind of control over the area concerned other than ownership. The passage from Celsus cited by Grotius could suggest that the latter at all ruled out the possibility of taking the seas not only as private property, but even under public sovereignty. However, this view would be too radical and completely detached from the factual circumstances. A number of historically early authors, ranging from medieval commentators to lawyers chronologically closer to Grotius, assumed that it was permissible to extend the state's jurisdiction over coastal waters.[53]

H. Grotius, *De iure belli et pacis libri tres*, vol. 1, W. Whewell ed. and trans. (J.W. Parker, 1853), lib. II, cap. III, § XIII, 265: *Ut autem solum imperium in maris partem sine alia proprietate occupetur, facilius potuit procedere: neque arbitrorius illud gentium, de quo diximus, obstare.* – "The empire of the sea, claimed over a portion of it without any other property (on which it depends) might easily proceed from such claims as we have spoken, would stand in the way." This view was popular among medieval and early-modern lawyers.

48 Specifically, there is a reference to the passage from *Commentarii de jure civili* that the sea is excluded from trade under *ius gentium* – Donellus, *Commentarii*, vol. 2, lib. 4, cap. 6 § 2.

49 Grotius, *Mare liberum*, 25.

50 Grotius, *The Free Sea*, 30.

51 See Ziskind, "International", 545.

52 D. 43,8,3 pr. (Celsus *libro trigensimo nono digestorum*): *Litora, in quae populus Romanus imperium habet, populi Romani esse arbitror.* 1. *Maris communem usum omnibus hominibus, ut aeris, iactasque in id pilas eius esse qui iecerit: sed id concedendum non esse, si deterior litoris marisve usus eo modo futurus sit.* – "The shores over which the Roman people has dominion I consider to belong to the Roman people. 1. The sea, like the air, is for the common use of all mankind. Piles sunk in the sea belong to him who sank them, but this is not to be allowed if the use of the shore or the sea will be impaired in consequence." See *The Digest*, vol. 4, 90.

53 This is also how the view of Celsus was interpreted by the glossators, who also identified the term *imperium* with the

Hence, Grotius acknowledges the existence of a public sovereignty exercised in accordance with the law of nations for the "protection and exercise of jurisdiction" (*protectionem et jurisdictionem*). In this context, it was particularly about the need to combat piracy. the importance of the real power projection capabilities by a given state. Here, he gave the example of Roman *imperium*, which had an adequate military potential to counteract piracy. This view was developed in *De iure belli et pacis*, where Grotius considered it pos-

The usage of Roman juridical structures in changed circumstances was the basis for the modern concept of the freedom of the seas. They have been successfully applied to horizontal relations between states, understood as entities having specific rights and obligations.

What was very controversial was the spatial extent to which such sovereignty could be extended. Most significant in this context was the view expressed by Bartolus de Saxoferrato, and later embraced by Alberico Gentili. These authors allowed state jurisdiction to be extended to the area of one hundred miles from the coastline.[54] In *Mare liberum*, Grotius first of all stressed sible to extend public sovereignty (*imperium*) *ratione personarum* and *ratione territorii* over the maritime area concerned. The fact of exercising sovereignty was

exercise of *iurisdictio* – see *glossa Arbitror ad* D. 43,8,3. However, the very shift of the focus of reflection on the legal status of the seas to issues related to public-law sovereignty (*iurisdictio, imperium*) took place only in the work of representatives of the school of commentators in connection with the competition for maritime domination between Italian city-states. Bartolus de Saxoferrato, *Super Institutionibus Iuris Civilis Commentaria*, Lugduni 1559, fol. 182; Baldus de Ubaldis, *In primam Digesti veteris partem commentaria* (Iuntas, 1577), *ad tit. De divisio rerum et qualitate*, l. I, § 3–5 and § 11. For a more detailed discussion of this topic, see E. Nys, *Les origines du droit international*, Bruxelles 1894, 380 *et seq.*; L.B. Hautefeuille, *Histoire des origines, des progrès et des variations du droit maritime international* (Guillaumine et C^ie^, 1869), 14.

54 A. Gentili, *Hispanicae advocationis*, Hanoviae 1613, lib. 1, cap. VIII, fol. 28: *At ego, quodo lim scripsi in libris bellicis, territorium et de terris dici, et de aquis. 'Et dicunt Doctores, quod domini Veneti, et Genuenses, et alii habentes portum, dicuntur habere iurisdictionem et imperium in toto maris ibi propinquo per centum miliaria, vel etiam ultra, si non propinquant alteri provinciae. Et sic possunt Domini Veneti anim advertere in piratas ibi deprehensos. Et ita dicit Bartolus, Suisse servatur Pisis, tempore suo, de consiliosuo, et Domini Francisci Tigrini'. Et sic quidem Bartolus de centum illis miliariis, licet dicatur, quod mare est commune.* – "But I urged in rebuttal what I once wrote in my books on war, i.e. that the word territory was applied equally to land and to water. »Now the doctors say it is maintained that the lordly Venetians, the Genoese, and others possessing a port have jurisdiction and sovereignty over all the sea adjoining them for a distance of one hundred miles, or even farther, if they are not near another state. And thus the lordly Venetians are able to inflict punishment upon the pirates captured there. And this Bartolus says was the practice of the Pisans in his time on his advice and on that of the famous Franciscus Tigrinus.« And this is the view of Bartolus regarding those one hundred miles, even though it be said that the sea is common." See A. Gentili, *Hispanicae advocationis libri duo*, F.F. Abbott trans. (Oxford University Press 1921), vol. 2, 35.

a consequence of the real military potential of the state – where the navy is located, *imperium* may cover also the open sea (*imperium ratione personarum*). However, due to the possibility of controlling the coastal strip using the artillery, *imperium ratione territorii* is determined by technological capabilities.[55]

Secondly, Grotius pointed out that under the law of nations all free states may exercise this kind of sovereignty on the basis of treaty provisions, which, however, bind only the parties to such agreements. In doing so, he referred to Ulpian's view regarding the impossibility of contractually establishing an easement for the exclusive right to fish at sea, which "by its very nature is open to all."[56] The contract, however, due to the requirements of good faith (*bona fides*), binds the interested parties without creating a right exercised *erga omnes*. Grotius notes that Ulpian's observations referred to private law, indicating at the same time that the same justification applies to the territories of states and whole nations, which from the point of view of the whole of humanity under *ius gentium* have a position analogous to individuals (*populi respectu totius generis humani privatorum locum obtinent*).

This statement is crucial for understanding the possibility of using the institutions of Roman private law in international relations. The usage of Roman juridical structures in changed circumstances was the basis for the modern concept of the freedom of the seas. They have been successfully applied to horizontal relations between states, understood as entities having specific rights and obligations. In the vertical dimension, they were used to provide legal guarantees for individuals who could use the benefits of free navigation for the development of commercial activities. In Grotius' view, *iurisdictio* (*imperium*) was associated with ensuring safety and order, without constituting a basis for arbitrary violations of the freedom of navigation. This kind of domination was structurally similar to property, but differed from it in its content. Like property, it was based on two-element *possession* containing *corpus* and *animus*. In this theory, *corpus* means real military potential needed to protect a specific sea area.[57]

In the further part of Chapter V of *Mare liberum*, Grotius addresses a less important question of the difference between the legal status of public rivers and seas. He also stipulates that his comments do not refer to closed or semi-open waters, such as maritime bays or even straits. He also employs a number of historical arguments against Portuguese claims. Concluding his remarks, Grotius pointed out that the action to restrict freedom of navigation in the open seas was unlawful. He referred again to Ulpian's view that the right to freedom of maritime navigation and fishery are protected through an *actio iniuriarum*, while excluding the application of interdictional protection.[58] However, Grotius argued, referring to medieval glossators, that the use of an *interdictum utile* prohibiting the harvesting of benefits was acceptable.[59]

55 See Grotius, *De iure belli et pacis*, lib. II, cap. III, § XIII, 265–267.

56 D. 8,4,13 pr. (Ulpianus *libro sexto opinionum*) – see annotation 38.

57 This view was adopted and clearly explained by Immanuel Kant (1724–1804): "So far as I have the mechanical capability from my own Site, as the place I occupy, to secure my Soil from the attack of others – and, therefore, as far as Cannon can carry from the shore – all is included in my possession, and the sea is thus far closed (*mare clausum*). But as there is no Site for Occupation upon the wide sea itself, possible possession cannot be extended so far, and the open sea is free (*mare liberum*)." – I. Kant, *The Philosophy of Law: An Exposition of the Fundamental Principles of Jurisprudence as the Science of Right*, W. Hastie trans. (Clark, 1887), 98.

58 D. 43,8,2,9 (Ulpianus *libro sexagensimo octavo ad edictum*): *Si quis in mari piscari aut navigare prohibeatur, non habebit interdictum, quemadmodum nec is, qui in campo publico ludere vel in publico balineo lavare aut in theatro spectare arceatur: sed in omnibus his casibus iniuriarum actione utendum est.* – "If anyone is prevented from fishing or navigating in the sea, the interdict will not serve him, any more than it will the person who is prevented from playing on the public sports ground, washing in the public baths, or being a spectator in the theater. In all these cases, an action for injury must be employed." See *The Digest*, vol. 4, 88. See also D. 47,10,13,7 (Ulpianus *libro* 57 *ad edictum*).

59 See *glossa Pretor ait* and *glossa Interdicam ad* D. 43,14,1. The glossators applied a broad interpretation here, as indicated also in note A to the gloss *Interdicam*: *Interdictum ut in flumine publico navigare liceat, utile datur ut in mari navigare liceat.* – "Interdict applicable in the case of navigation on

According to Grotius, the position of the Dutch was therefore justified on the basis of *ius commune*. This general statement confirms the claim that even at the beginning of the 17th century, the commonly applicable law was perceived as a whole, within which public international law was not clearly distinguished with an autonomous catalogue of sources. In this sense, even in the work of Grotius, there is a certain continuation of the approach that characterized medieval law schools.[60]

4. Conclusions

The analysis of selected fragments of Hugo Grotius' *Mare liberum* allows us to formulate several conclusions. First of all, the mere use of a conceptual gird known from Roman law should be regarded as a reasonable solution. Grotius fully understood that by "throwing down the gauntlet" to Spanish and Portuguese lawyers, and also the English ones as it later transpired, he had to use concepts and constructs familiar to all representatives of the then European jurisprudence. Therefore, there was no need or possibility of devising a completely new conceptual grid. This does not mean, however, that, like in the Middle Ages, the *Corpus Iuris Civilis* was regarded as an undisputed source of authority based on universal imperial power. As P. Koschaker rightly pointed out, for the glossators and their epigons, one empire required one law, i.e. Roman law (*unum imperium unum ius*).[61] However, this idea never materialized, and with the collapse of universalist imperial claims, the approach to Roman law itself had to change. It earned its gravity from the scientific character applicable to jurisprudential law. Thus, it was not based on political authority but on intellectual authority. Hence, Grotius refers to those institutions of Roman law, which, according to the ancient jurists themselves or their later interpreters, were rooted in natural law or the law of nations.[62] In this sense, the statements made by individual jurists were more authoritative for Grotius than the constitutions of Emperor Leo the Wise which he rejected.

A careful reading of *Mare liberum* also reveals a picture of Grotius the realist. This is evidenced by his stress on the importance of the physical control over a particular area for covering it by the sovereignty of a given state. Writing about the objective element of possession (*corpus*), Grotius means precisely the military potential of the state. This approach makes it understandable to use the institution of Roman private law in international relations. Emphasizing the natural origins of these institutions justified their binding force, but the latent reference to the argument of military strength is already proof of the realism of the Dutch jurist. Hugo Grotius is a continuator of the view that the seas constitute the common property of all humanity (*res omnium communes*). His innovation, however, was revealed in the assumption that such a situation results from both the ahistoric social agreement and the primary norms of *ius gentium*. In addition, by continuing the view about the possibility of stretching public jurisdiction to marine areas, he proposes leaving the contractual criterion of 100 miles in favour of the concept of connecting this sovereignty with the real military possibilities of the coastal states. In this sense, Grotius recognises the law-creating power of fact, treating the law of nations as one of the tools of imperialist and colonisation activity of the European powers of the time. The Netherlands, too, had its own aspirations in this respect, so Grotius' approach, with him being a sincere patriot, is not surprising. At the same time, it is worth noting that Grotius never denied the subjectivity of non-European peoples. On the contrary, he emphasised the sovereignty of the Indian peoples, using here the Roman concept of *personae sui iuris*. This is also a manifestation of the Dutch jurist's realism.

Certainly, *Mare liberum* is a study that has left its mark on the historical development of European public international law. It was a concise lecture laying

public rivers is also properly applicable to navigate on the sea."

60 A similar approach, although in a more general context, is adopted by Lesaffer, *Roman Law*, 55.

61 Koschaker, *L'Europa*, 198.

62 Thus, one must agree with the claim made by B. Straumann saying that: "Hugo Grotius developed his influential theory of natural law and natural rights on the basis of a Roman tradition of normative texts. Formally, Grotius' natural law was derived from universal reason; more often than not, reason's precepts happened to be found in the Roman law texts of the Digest." Straumann, *Roman Law in the State of Nature*, 3.

theoretical foundations for freedom of navigation and fishery. The multitude of references to the institutions of Roman private law shows its significant role in the evolution of public international law from the historically older and changeable idea of *ius gentium*. Roman law provided an appropriate conceptual grid and used to be a universally recognized authority. Certainly, its significance was no less than the development of international customs, the evolution of diplomatic practice or the political activity of individual states in relations with other subjects of international relations at the treaty level.

References

Azo Portius, *Summa aurea* (Excudebat Petrus Fradin, 1557) (reprint: MinervaGmbH, 1968).

Baldus de Ubaldis, *In primam Digesti veteris partem commentaria* (Iuntas, 1577).

Bartolus de Saxoferrato, *Super Institutionibus Iuris Civilis Commentaria* (Apud Sebastianum de Honoratis, 1559).

Berger, Adolf, *Encyclopedic Dictionary of Roman Law* (American Philosophical Society, 1953).

Bodin, Jean, *Les six livres de la République* (Jacques du Puys, Libraire Iuré, à la Saamaritaine, 1577).

Bonfante, Pietro, *Corso di diritto romano*, vol 2. *La proprieta* (Giuffrè Editore, 1966).

Bonfante, Pietro, *Diritto Romano* (Cammelli, 1900).

Brutti, Massimo, *Potere imperiale e giurisprudenza*, in *Lineamenti di storia del diritto romano*, Mario Talamanca ed. (Giuffrè Editore, 1979), 473–480.

Buckland, William Warwick, *A Text-Book of Roman Law from Augustus to Justinian*, (Cambridge University Press, 1921).

Corpus Iuris Civilis Iustinianei. Tomus hic Primus Digestum Vetus continet, Dionysius Gothofredus ed. (Ioannis Fehi Gaildorphensis IC, 1627).

Corpus Iuris Civilis Iustinianei. Tomus hic Tertius Digestum Novum continet, Dionysius Gothofredus ed. (Ioannis Fehi Gaildorphensis IC, 1627).

Detter, Ingrid, *Philosophy of Law of Nations* (Montes Jagiellonica, 2018).

Donellus, *Commentarii de iure civili*, vol. 2 (Apud Bauer et Raspe, 1822).

Gentili, Alberico, *Hispanicae advocationis*, (Apud haeredes Guilielmi Antonii, 1613).

Gentili, Alberico, *Hispanicae advocationis libri duo*, vol. 2, Frank F. Abbott trans. (Oxford University Press).

Grotius, Hugo, *De iure belli et pacis libri tres*, vol. 1, William Whewell ed. and trans. (John W. Parker, 1853).

Grotius, Hugo, *Mare Liberum 1609–2009. Original Latin Text and English Translation*, Robert Feenstra ed. (Brill, 2009).

Grotius, Hugo, *Mare liberum, sive de iure quod Batavis competit ad indicana commercia dissertatio* (Officina Ludovici Elzevirii, 1609).

Grotius, Hugo, *The Free Sea*, Richard Hakluyt transl., David Armitage ed. (Liberty Fund, 2004).

Haggenmacher, Peter, "Genèse et Signification du Concept de Ius Gentium chez Grotius", *Grotiana* 1 (1981), 44–102.

Hautefeuille, Laurent Basile, *Histoire des origines, des progres et des variations du droit maritime international* (Guillaumine et C^{ie}, 1869).

Ittersum, Martine van, "Dating the manuscript of De Jure Praedae (1604–1608): What watermarks, foliation and quire divisions can tell us about Hugo Grotius' development as a natural rights and natural law theorist", *History of European Ideas* 35 (2009) No. 2, 125–193.

Ittersum, Martine van, "Mare Liberum Versus the Propriety of the Seas?", *Edinburgh Law Review* 10 (2006) No. 2, 239–276.

Ito, Fujio, "The Thought of Hugo Grotius in the Mare Liberum", *Japanese Annual of International Law* 18 (1974), 1–15.

Kant, Immanuel, *The Philosophy of Law: An Exposition of the Fundamental Principles of Jurisprudence as the Science of Right*, William Hastie trans. (Clark, 1887).

Kaser, Max, *Ius gentium* (Böhlau Verlag, 1993).

Knight, William Stanley Macbean, *Life and Works of Hugo Grotius* (Sweet and Maxwell, 1925).

Koschaker, Paul, *L'Europa e il diritto romano*, Arnoldo Biscardi transl. (Sansoni, 1962).

Lauterpacht, Hersch, *Private Law Analogies in International Law* ([no publisher], 1926).

Lesaffer, Randall, *Roman Law and the Intellectual History of International Law*, in *The Oxford Handbook of the Theory of International Law*, Anne Orford, Florian Hoffmann eds. (Oxford University Press, 2016), 38–58.

Longo, Carlo, *Corso di diritto Romano. Le cose – la proprietà e i suoi modi di acquisto* (Giuffrè Editore, 1946).

Nifterik, Gustaaf van, Nijman, Janne, "Introduction: Mare Liberum Revisited (1609–2009)", *Grotiana* 30 (2009), 3–19.

Nys, Ernest, *Les origines du droit international* (Alfred Castaigne – Thorin & Fils, 1894).

Perruso, Richard, "The Development of the Doctrine of Res Communes in Medieval and Early Modern Europe", *Legal History Review* 70 (2002), 69–94.

Placentinus, *Summa Institutionum* (per Ivonem Schoeffer, 1535).

Schermaier, Martin, "Res communes omnium. The History of an Idea from Greek Philosophy to Grotian Jurisprudence", *Grotiana* 30 (2009), 20–48.

Schmitt, Carl, *Nomos of the Earth in the Interantional Law of the Ius Publicum Europaeum*, Gary L. Ulmen transl. (Teolos Press, 2003).

Scott, James Brown, *Law, the State and the International Community*, vol. 1 (Columbia University Press, 1939).

Straumann, Benjamin, "Ancient Caesarian Lawyers in a State of Nature: Roman Tradition and Natural Rights in Hugo Grotius's De Iure Praedae", *Political Theory* 34 (2006) No. 3, 328–350.

Straumann, Benjamin, *Roman Law in the State of Nature. The Classical Foundations of Hugo Grotius Natural Law* (Cambridge University Press, 2015).

The Digest of Justinian, vol. 1–4, Alan Watson ed. (University of Pennsylvania Press, 1998).

The Etymologies of Isidore of Seville, Stephen A. Barney, Walter J. Lewis, Jennifer A. Beach, Oliver Berghof trans. (Cambridge University Press, 2006).

The "Summa Theologica" of Saint Thomas Aquinas, vol. 10, pt. 2, Literally translated by Fathers of the English Dominican Province (Burns Oates & Washbourne Ltd., 1929).

Vinogradoff, Paul, *Roman Law in Medieval Europe* (Oxford University Press, 1961).

Victoria, Francisco de, *De Indis et de iure belli relectiones*, Ernest Nys ed., John P. Bate trans. (Carnegie Institution of Washington, 1917).

Vitoria, Francisco de, *RelectionesTheologicae* (en la oficina de Manuel Martin y a su costa, 1765).

Voci, Pasquale, *Modi di acquisto della proprietà (corso di diritto romano)* (Giuffrè Editore, 1953).

Wagner, Andreas, "Lessons of Imperialism and of the Law of Nations: Alberico Gentili's Early Modern Appeal to Roman Law", *European Journal of International Law* 23 (2012) No. 3, 873–886.

Ziskind, Jonathan, "International Law and Ancient Sources: Grotius and Selden", *The Review of Politics* 35 (1973) No. 4, 537–559.