

Zuzanna Benincasa (University of Warsaw, Poland)

<https://orcid.org/0000-0002-1811-6234>

z.sluzewska@wpia.uw.edu.pl

“ITAQUE TAM ISTUD VITANDUM HABEBIT QUAM HERCULE
FUGIENDUM VENANDI AUT AUCUPANDI STUDIUM,
QUIBUS REBUS PLURIMAE OPERAE AVOCANTUR”¹

Abstract: The object of the study consists in legal issues related to hunting wild birds, discussed by Roman classical jurists. The analysis of the sources reveals that the main problem they had to deal with was finding a right balance between the traditional, originating from the *ius gentium* freedom of hunting with the increasing economic importance of breeding wild birds and, accordingly, the economic interests of rich landowners who tended to reserve the exclusive right for catching wild birds on their lands for themselves. As the consequence of this increasing contrast between the principle of law and the economic reality, wild birds kept in aviaries were deemed to be the property of the owner, as well as those who once tamed were subjected to their control. The jurists also created a concept of *animus revertendi* which applied to such animals as pigeons and peacocks, whose large-scale breeding involved allowing them to fly away temporarily from the owner. One of the remedies was also *ius prohibendi* which allowed the owner of the land to prevent entering his land by birders.

Keywords: hunting, birds, hunting of birds, *aucupium*, Roman law

<https://doi.org/10.14746/sho.2024.42.1.004>

INTRODUCTION

As suggested by this passage from the work of the first century AD Roman agronomist Columella, bird hunting (*aucupium*) in ancient Rome was not an activity that enjoyed much social prestige: it was regarded as a pointless waste of time, which the manager of a country estate could have used

¹ Colum., *de re rust.* 11.1.24.

in a much more fruitful and beneficial way, namely to the farm. This view seems also to be shared by modern scholars dealing with the issue of *aucupium* in ancient Rome, at least since the publication of Jacques Aymard's famous monograph *La chasse romaine. Essai sur les chasses romaines des origines à la fin du siècle des Antonins (Cynegetica)* in the middle of the last century. Thus, according to *communis opinio*, Romans, contrary to the Greeks, were traditionally not hunting enthusiasts and practised venatic activity only out of necessity, for the protection of their crops and herds or to obtain meat. It was not until the second half of the second century BC, with the spread of Greek culture and growing fascination with the Hellenistic lifestyle among Roman elites, that the attitudes of the *cives Romani* to *venatio* began to change. Roman nobles, inspired by Hellenistic models and Eastern cultures, began to practice hunting for leisure. (cf. Anderson, 1985; Galloni, 2000: 71–72; Casanova and Memoli, 2000: 340–341; Raga, 2011; contrary Green (1996), who believed that, no differently from other ancient civilisations, hunting as a sport and pastime had already been practised by the archaic *Quirites* in the royal period).

Still, however, another late Republican agronomist, Varro, asks, *Currere, vigilare, esurire – ecquando haec facere oportet? Quam ad finem?* (Varro. *Sat. Men.* 294) and with these rhetorical questions echoes the old *topos* of chasing wild animals through the forests as a waste of time. Similarly, Cicero was not much keen on hunting, although he appreciated certain benefits of *venatio* as an opportunity to exercise healthy physical activity and training in the art of war (Cic., *de nat. deor.* 2.64(161), *Tusc. disp.* 2.40; *de senect.* 16.56). However, as Christoph Vendries (2009) rightly pointed out, since Columella advised the landowner against practicing venatic activity and bird hunting, which he regarded to be a waste of time and energy, this may also indirectly speak to the increasing popularity of such phenomenon among Roman latifundists (*Pecuniam domini neque in pecore nec in aliis rebus promercalibus occupet. Haec enim res avocat vilici curam et eum negotiatorem potius facit quam agricolam nec umquam sinit eum cum rationibus domini paria facere, sed ubi nummum est numeratio, res pro nummis ostenditur. Itaque tam istud vitandum habebit quam hercule fugiendum venandi aut aucupandi studium, quibus rebus plurimae operae avocantur;* Colum. *de re rust.* 11.1.24). Still, however, while big game hunting could be considered an activity bringing glory to a hunter as proof of his physical skills and a demonstration of his strength and courage, *aucupium*, an activity not associated with the risk of bloodshed and not requiring the same skills, force and bravery as bear or wild boar hunting, did not enjoy the same social prestige. In the pre-

served treatises of ancient authors dealing with technical issues related to hunting, *aucupium* is not a special subject of interest, being only mentioned as one of the venatic activities alongside *venatio* and *piscatio*. Perhaps for this reason, also modern scholars dealing with the issue of hunting in ancient Rome do not devote much attention to bird hunting: the classic monograph of Aymard devotes little attention to it and Anderson in his work *Hunting in the Ancient World* deals primarily with *venatio* as big game hunting (cf. Vendries, 2009: 119–120).

The most common technique used by bird-hunters, enabling the capture a bird that sat on a tree branch, was to use a cane coated with an adhesive substance (birdlime). This technique is well documented in the sources and through iconographic representations. It was most often used in autumn (October, November), when birds were fattening up in preparation for migration, and during the spring months. The *auceps* also set traps and nets with which wild birds were caught alive. The hunting of birds could involve the use of other birds, which with their colourful plumage or singing could summon other representatives of their species, as well as predators such as owls and falcons to paralyse potential prey with fear, thus making them easier to capture. Sometimes the *auceps* himself imitated bird sounds using various instruments to attract a bird to a specific location, where he could attempt to capture it with birdlime (on *aucupium* and bird hunting techniques in ancient Rome see Vendries, 2009: 120–131). It is commonly believed, however, that falconry was not practised in the Roman world until late antiquity, although Martial in the late first century AD mentions the falcon as the *auceps*' assistant (*Praedo fuit volucrum: famulus nunc aucupis idem Decipit et captas non sibi maeret aves.* (Mart. ep. 14.217); cf. Epstein, 1943: 504–505; Vendries, 2009: 123; Espí, 2020).

Nevertheless, it is the *ars aucupii* that became an extremely popular motif in various artistic representations, such as paintings, frescoes and mosaics, and the *auceps* grasping birds even became an iconographic *topos*, and obligatory element of the rural landscape in the imperial period. According to Christoph Vendries, such representations contradict the *communis opinio* that downplays this type of venatic activity in the Roman world. As he argues, the idea that bird hunting could not compete in terms of social esteem with big game hunting, never formed part of the public *venationes* staged in the circus, and constituted an activity of a little importance that was treated with social disdain, does not fully reflect the complex nature of *aucupium* in Roman society.

Direct evidence supporting this view, in his opinion, are the widespread depictions of bird-hunting scenes occupying a prominent place in paintings, frescoes and mosaics in the homes of wealthy aristocrats, and the fact that birds and bird hunters are common elements of tomb decorations on the sarcophagi of prominent Roman citizens. Roman aristocrats are sometimes also depicted on their tombstones as *piscatio* and *aucupium* amateurs (e.g. CIL II 2335). It should however be noted that this motif primarily appeared on the tombstones of young men and children, so it could be deemed as a decorative element recalling bucolic scenes from childhood and youth or have an allegorical meaning as a reference to the youthful period of life or some other symbolic meaning (see Montero, 2008; Vendries, 2009: 132–134).

Indirect evidence of the importance of *aucupium* in the Roman world may also be the fact that certain species of birds were particularly prized among wealthy aristocrats because of their rarity, colourful plumage, singing or special skills (e.g., imitating human speech), and their prices on the market reached almost astronomical values. The demand for such luxury specimens must, according to Vendries, have influenced the social prestige not only of the *auceps* but also of a person specialised in bird training.

THE ECONOMIC IMPORTANCE OF AVIARIES AND WILDLIFE PRESERVES AT THE END OF THE REPUBLIC

Hunting birds was undoubtedly of considerable economic importance to the ancient Romans. From archaic times different species of birds constituted a valuable source of food, being a popular component of the daily diet. By the end of the Republic, they became one of the most desirable ingredients of refined dishes served by eccentric Roman *nobiles*, along with rare exotic fish.

The decline of the Republic and the subsequent political and social changes modify the Romans' approach to the breeding of wild animals, birds, and fish, resulting in a transformation of small backyard *vivaria* that once served to satisfy the immediate needs of the rural family, into extensive and specialised game preserves constituting the main source of income for the landowners and a symbol of their prominent social standing. The growing prevalence of such preserves was also influenced by the increasing popularity and frequency of spectacles and parades (*venationes* and *spectacula*), which were accompanied by sumptuous feasts organised

by the state or private individuals on the occasion of festivals, feasts and triumphs. Thanks to the growing demand for wild animals, fowl and fish for such spectacles, parades and the accompanying feasts and banquets, the Roman *vivaria* became a source of stable and conspicuous income, far exceeding the profits that could once be obtained from agriculture and livestock breeding.

Precious information about late republican aviaries and their economic importance is to be found in the works of Roman agronomists, especially of Varro and Columella (on *vivaria* at the end of the Republic see Benincasa, 2013; 2020a). According to Merula, one of the protagonists of Varro's treatise *Rerum rusticarum libri III*, archaic *Quirites* kept only chickens and doves on their farm (the former in pens on the ground, the latter in rooms in the attic of the *villa*), whereas their descendants constructed dovecotes (*ornithon*) the size of the former *villas* (Varro, *rer. rust.* 3.3.6–7). Profits made from the breeding of thrushes (*turdi*) made the *ornithon* synonymous with *lucrum*, i.e., profit. (Varro, *rer. rust.* 3.4.1). The breeding of thrushes, blackbirds and quail therefore took place on a large scale in enclosures capable of accommodating several thousand birds, to which fresh water was supplied and which enabled the owner to continuously control the population of birds (Varro, *rer. rust.* 3.5.1–8). Varro's aunt is said to have had an aviary (Varro, *rer. rust.* 3.2.15) from which five thousand *turdi* were sold at three denarii apiece and the entire annual profit from such *aviarium* was estimated at sixty thousand sesterces (see Berger, 1968: s.v. *sestertius*), which was twice the annual income of an agricultural estate of two hundred *iugera* (see Berger, 1968: s.v. *iugerum*).

Peacock farms were equally profitable. The originator of the practice of serving of peacocks at feasts is said to be the augur Quintus Hortensius, and although his culinary taste was initially only appreciated by a few, he set a new trend that subsequently led to an increased demand for peacocks. As a result, the price of the birds and their eggs rose considerably: a single bird could fetch fifty denarii and one peacock egg five denarii. A farm with a hundred peacocks could earn up to sixty thousand sesterces (Varro, *rer. rust.* 3.6.1). Peacocks were best bred in flocks, leaving them free to wonder. Ideal for peacocks breeding, according to Columella were small, wooded islands off the coast of Italy, where the birds could live in their natural environment freely and got most of their food on their own. At the same time, they were protected against predators' attacks and theft, and as not being capable to fly away on long distances, could not escape on their own without risk of escape or theft (Colum. *de re rust.*

8.11.1). Varro mentions the overseas breeding of these birds on the island of Samos and a peacock farm on the small island of Planasia near Elba belonging to Marcus Piso (Varro, *rer. rust.* 3.6.2). Pigeon breeding also provided a considerable income, and single specimens could reach up to several hundred sesterces. Professional breeders of doves had a stock valued at over a hundred thousand sesterces (Varro, *rer. rust.* 3.7.10).

Particularly prized were bird species able to sing beautifully and imitate human speech, with individual specimens reaching exorbitant prices and some becoming pets of their owners. It is said that the tragic actor Clodius Aesopus paid 100,000 sesterces for a dish composed of birds that could sing and imitate human speech whereas a single bird was worth six thousand sesterces (Plin. *Nat. Hist.* 10.141–142). Agrippina was supposed to pay a similar price for a nightingale captured in a nest (Plin. *Nat. Hist.* 10.84); the latter was also said to be the owner of a thrush that could imitate human speech. Young emperors were known from their inclination to breed thrushes and nightingales able to speak Latin and Greek (Plin. *Nat. Hist.* 10.120). Worth mentioning is an anecdote cited by Macrobius, whose protagonists were supposed to be Octavian, and a raven imitating human speech. After the battle of Actium, the future princeps paid dearly for a raven, which greeted him with the words *Ave Caesar Victor Imperator*. As it later turned out, the enterprising bird trainer also owned a second raven, which was taught to greet Anthony with similar greeting, and that bird too was subsequently acquired by victorious princeps (Macr. *Sat.* 2.4.29–30).

In addition to economic aspects, an important function of aviaries at the end of the Republic was to provide their owners with the pleasure of contemplating wildlife and listening to birdsong. Thus, the *vivaria* established by Roman aristocrats served not only a profit-making purpose, but also for *delectatio*, satisfying the tastes and aesthetic preferences of wealthy Roman nobles (*Merula, Duo genera sunt, inquit, ornithonis: unum delectationis causa, ut Varro hic fecit noster sub Casino, quod amatores invenit multos; alterum fructus causa, quo genere macellarii et in urbe quidam habent loca clausa et rure, maxime conducta in Sabinis, quod ibi propter agri naturam frequentes apparent turdi.* (Varro, *rer. rust.* 3.4.2). The picturesque *aviarium* near Casinum, owned by Varro, was an example of an aviary established purely *delectandi causa*. As an attempt to combine the concepts of *fructus* and *delectatio* could be deemed the aviary owned by Lucius Lucullus, where guests could feast and admire the birds flying above their heads at the same time. That experiment, however, did not win recognition due to the unpleasant smell emitted by the birds and wafting into the room where

the guests dined (cf. also Varro, *rer. rust.* 3.6.1 on breeding peacocks for either profit or pleasure).

Thus, at the end of the Republic hunting served not only to provide food or to protect crops and herds, but also to provide the pleasure of practising physical activity and contact with the world of nature, as well as being a source of rare and valuable specimens for private collections and to satisfy the sublime culinary tastes of mannered Roman aristocrats. The multiplicity of aspects related to *aucupium* may indeed suggest that the traditional view about the low importance and prestige of this type of venatic activity in the Roman world should be subject to revision.

ROMAN JURISTS ON OWNERSHIP OF *FERAE* AND THE CONCEPT OF *ANIMALIA QUAE EX CONSUETUDINE ABIRE ET REDIRE SOLENT*

The increased economic importance of *vivaria* and the popularity of hunting among wealthy Romans was also reflected in the legal sphere. From the end of the Republic, legal issues related to *venatio*, *aucupium* and *piscatio* began to be treated and analysed by Roman jurists. In their works, they discussed not only the issue of the acquisition of ownership of wild animals, birds, and fish, but also tried to elaborate solutions that would have considered the new socio-economic context and the increased economic importance of wild animal husbandry. An analysis of the preserved texts included by the Justinian' compilers in the Digests suggests that the main challenge faced by the Roman *iurisprudentes* arose from confronting the new economic and social reality with the principle of *ius gentium*, according to which wild animals living in a state of *naturalis libertas* could be appropriated by any person as a thing belonging to no one (*res nullius*). As Gaius reported, the institution of ownership went back to the beginning of the human species and had its roots in *the ius gentium* and *the naturalis ratio*, by virtue of which certain things are acquired through the mere acquisition of their possession (G. 2. 65–66; D. 41.1.1pr.). Similarly, Nerva derived the institution of ownership from the mere possession of things and, as a residuum of the pre-legal identification of ownership and possession with each other, points precisely to *occupatio* as a means of acquiring ownership based on *naturalis ratio*, in which the mere taking of possession of a thing accompanied by *animus rem sibi habendi* meant the acquisition of owner-

ship of a thing of no one's own (D. 41.2.1.1; D. 41.2.3.13). Wild animals and fish, thus *omnia quae terra, mari, caelo capiuntur*, as things previously not belonging to anyone were subject to appropriation by the virtue of *naturalis ratio*: *Nec tamen ea tantum, quae traditione nostra fiunt, naturali nobis ratione acquiruntur, sed etiam, quae occupando ideo adepti erimus, quia antea nullius essent, qualia sunt omnia, quae terra, mari, caelo capiuntur*. (G. 2.66); *Omnia igitur animalia, quae terra mari caelo capiuntur, id est ferae bestiae et volucres pisces, capientium fiunt ...* (D. 41.1.1: Gaius). As long, as the appropriator could control the wild animal (*custodia*), it was considered to remain his property. As soon as the animal liberated itself from this control (*custodiam evadere*), i.e. when the owner lost sight of the animal or, although he could see it, could no longer easily recapture it, such an animal was considered to be a creature that had returned to a state of *naturalis libertas*, in which it was a non-separated element of nature under private law considered to be a *res nullius*: *Itaque si feram bestiam aut volucrem aut pisces ceperimus, simul atque captum fuerit hoc animal, statim nostrum fit, et eo usque nostrum esse intellegitur, donec nostra custodia coerceatur, cum vero custodiam nostram evaserit et in naturalem se libertatem receperit, rursus occupantis fit, quia nostrum esse desinit. Naturalem autem libertatem recipere videtur, cum aut oculos nostros evaserit, aut licet in conspectu sit nostro, difficilis tamen eius persecutio sit*. (G. 2.67; cf. Lombardi, 1948; García Garrido, 1956; Polara, 1983: 39, 49, 64–71; Donahue, 1986; Manfredini, 2006: 13–25; Polojac, 2014; Benincasa, 2014; 2017). This rule, sometimes defined as the principle of freedom of hunting that allowed any person who captured a wild animal, bird, or fish to acquire ownership of it, regardless of where the animal was captured, clearly threatened the interests of owners of extensive reserves, who wished to guarantee for themselves exclusive rights to hunt and catch wild animals, birds, and fish on their land (Lombardi, 1948; García Garrido, 1956; Polara, 1983: 9–17; Amirante, 1983; Martini, 1986; Longo, 1987; Manfredini, 2006: 32–37; 2008; Benincasa, 2016).

The economic attractiveness of *vivaria* and extensive game preserves, which had become a conspicuous source of profits, equally recognised as a previous income from cultivation of the land and breeding of domestic livestock, resulted, on the one hand, in the need to guarantee to the owners of *vivaria* the exclusive right to hunt and thus gain profits from game, and, on the other hand, to recognise this type of profit as *fructus fundi* i.e. profits gained from landed property. To meet these needs the Roman *iurisprudentes* recognised the *ferae* bred in *vivaria*, the birds kept in the *aviaria* and the fish in artificial reservoirs as property of the owner of the *vi-*

varium, which consequently prevented third parties from acquiring their property as *res nullius*. In this way, although apparently, they did not derogate the *ius gentium* principle according to which wild animals living in a state of *naturalis libertas* constituted *res nullius* being subjected to appropriation, in practice they significantly restricted the possibility of acquiring its ownership through *occupatio* by recognising as belonging to the owner of the estate those wild animals, birds and fish kept in organised breedings (cf. Benincasa, 2016). A further consequence of the increased economic importance of breeding wild animals, birds and fish was the extension of the traditional concept of *fructus fundi* to include wild animals kept in *vivaria* as well as a revenue from their sale and rental accompanied by the recognition of personnel and tools used for hunting and fishing as *instrumentum fundi* (cf. D. 33.7. 12–13; D. 33.7.22 pr.; P.S. 3.6.41; 3.6.45).

Precious evidence of such confrontation of rights as well the approach of Roman jurists to the ownership of wild animals, birds and fish bred in the *vivaria*, is the excerpt from the 54th book of Paulus' commentary *ad edictum*: *Item feras bestias, quas vivariis incluserimus, et pisces, quos in piscinas coiecerimus a nobis possideri. Sed eos pisces, qui in stagno sint aut feras, quae in silvis circumseptis vagantur, a nobis non possideri, quoniam relictæ sint in libertate naturali: alioquin etiam si quis silvam emerit, videri eum omnes feras possidere, quod falsum est* (D. 41.2.3.14: Paulus); *Aves autem possidemus, quas inclusas habemus, aut si quae mansuetæ factæ custodiae nostræ subiectæ sunt* (D. 41.2.3.15: Paulus); *Quidam recte putant columbas quoque, quae ab aedificiis nostris volant, item apes, quae ex alveis nostris evolant et secundum consuetudinem redeunt, a nobis possideri* (D. 41.2.3.16: Paulus) The first fragment of D. 41.2.3.14 deals with the issue of ownership of wild animals bred in organised preserves (*vivaria*) and fish kept in artificial reservoirs of water (*piscinae*). Paulus considers such animals to be in the possession of the owner of the preserve and thus his property, in contrast to animals living in fenced forests and in natural reservoirs of water. The latter he still considers to be *relictæ in libertate naturali*, and thus remaining in a state of natural freedom in which they as *res nullius* were subject to appropriation.

The excerpt, in my view, probably constitutes a *residuum* of the discussion concerning the legal status of wild animals living in their natural habitat on enclosed area. From the end of the Republic onwards, it became popular to organise big reserves by enclosing forested and mountainous areas with walls or other types of fencing, in which different species of wild animals lived in their natural habitat. According to literary tradition, the first to establish such reserve was Fulvius Lippinus, who

quickly found imitators among wealthy Roman aristocrats such as Lucius Licinius Lucullus and Quintus Hortensius Hortalus, known for their inclination to luxurious lifestyles and splendour. Also, Varro is said to have acquired from Marcus Puppius Piso an extensive *leporarium*, which contained many wild boars. As Columella reports that those who wished to make serious profits from the breeding of wild animals did not restrain themselves to modest backyard farms but homesteaded vast areas in the surrounding of the villa, establishing game preserves where wild animals lived in their natural habitat (Varro, *rer. rust.* 3.3.8; Plin. *Nat. hist.* 8.211; Colum. *de re. rust.* 9.1.6). In a dispute regarding the legal status of wild animals living in such large preserves, there may have been voices postulating recognition of such animals as belonging to the landowner on analogy to wild animals, birds and fish kept in organised preserves. Such a concept of appropriation *sensu largo* would have made it possible to recognize the economic interests of owners of extensive latifundia, who to maximise profits from the breeding of wild animals, organised *sui generis* hunting parks, where boars, deer and other wild animals lived in their natural environment in enclosed forested areas, being fed only in winter months. At the same time, it would not derogate the principle of freedom of hunting originating in the *ius gentium* since it would have excluded from the category of *omnia quae terra mari caelo capiuntur* animals living freely in fenced forest area. However, this solution was recognised as too extensive an interpretation of the concept of *occupatio*, leading, as Paulus suggested in the last sentence of the quoted text, to manifestly absurd conclusions (Giaro, 2007: 354).

After discussing the possession of wild animals, Paulus passed to wild birds, considering as possessed only those that were kept enclosed and previously tamed (*mansuetae*). Later in his commentary, he cites the views of unspecified jurists (*quidam putant*), who also considered doves and bees, which had the habit of returning to the place where they were bred, to be possessed, even at the time when they moved away from a hive or a dovecote. Such a view Paulus also considered to be correct.

The meaning of the term *mansuetus* used in text of D. 41.2.3.15 is worth analysing, as such a term could refer to both domesticated species of birds (regarding fowl breeding cf. Malossini, 2011: 188–199) and to wild animals whose interactions with man led to tameness. In my view, it should rather be assumed that since this part of Paulus' commentary generally deals with the issue of possession of animals considered to be wild (*ferae*), the term *mansuetus* here refers to birds which had been tamed or trained and

were thus subject to control (*custodia*), even though they belonged to wild species. As objective sign of taming a wild animal was probably considered its habit of returning to a man (*nisi si mansuefacta emitti et reverti solita sunt* (D. 41.1.4: Florentinus). Nevertheless, it should be noted that the distinction between wild and tame animals was not obvious for Roman jurists (G. 2.16; 3.217; D. 9.2.2.2; D. 9.1.1.10, see Modrzejewski, 1976; García Garrido, 1956: 274–288; Frier, 1982–1983: 105–107; McLeod, 1989; Polojac, 2003: 20–24; Mantovani, 2007).

When referring to the possibility of exercising control over a wild bird, Paulus employs the technical term *custodia*, generally used by jurists in relation to wild animals that have been appropriated and remained the property of the appropriator if he could control them. The opposite of such a situation was when a wild animal *evaderit custodiam*, i.e., it had liberated itself from such control returning to a state of nature and becoming again *res nullius*. That occurred when a wild animal disappeared or, although it remained in sight, it was not possible to recapture it and regain control over it. This second variant of the situation reflecting *evadere custodiam* undoubtedly applied to wild birds and fish which, although they might still be in sight, were so high in the air or deep in the water that there was no possibility for the owner to regain possession of the animal (on the concept of *custodia* cf. Benincasa, 2014: 22–34).

Not only these wild birds which were kept enclosed, but also those which, as the result of the taming process, was subjected to owner's control, were therefore considered to be possessed.

The last text, D. 41.2.3.16, deals with the possession and ownership of doves and bees, both of which were treated in a special manner by Roman jurists. Indeed Gaius, who lived in the second century AD, in his textbook *Institutiones*, defined them as *animalia quae ex consuetudine abire et redire solent*, i.e., animals which were accustomed to go away and return: *In iis autem animalibus, quae ex consuetudine abire et redire solent, veluti columbis et apibus, item cervois, qui in silvas ire et redire solent, talem habemus regulam traditam, ut, si revertendi animum habere desierint, etiam nostra esse desinant et fiant occupantium. Revertendi autem animum videntur desinere habere, cum revertendi consuetudinem deseruerint* (G. 2.68). In respect to the animals indicated by the jurist, such as doves, bees and tame deer, the principle (*regula*) was to apply, according to which ownership of those animals was to be lost only when their will to return (*animus revertendi*) disappeared. The loss of the *animus revertendi* by the animal, manifested by its abandonment of the *revertendi consuetudo*, resulted in such animal being deemed to have returned to

a state of *naturalis libertas*, in which as a thing belonging to no one was subject to appropriation (on animals *quae ex consuetudine abire et redire solent* cf. Daube, 1959; Frier, 1982–1983; 1994; Polara, 1983: 132–153; Hausmaninger, 1991; Mantovani, 2007; Polojac, 2014: 740–742; Benincasa, 2019).

In another work, *Res cottidianae*, attributed to Gaius, peacocks were also included in the above-mentioned category of *animalia quae ex consuetudine abire et redire solent*: *Pavonum et columbarum fera natura est nec ad rem pertinet, quod ex consuetudine avolare et revolare solent: nam et apes idem faciunt, quarum constat feram esse naturam: cervos quoque ita quidam mansuetos habent, ut in silvas eant et redeant, quorum et ipsorum feram esse naturam nemo negat. in his autem animalibus, quae consuetudine abire et redire solent, talis regula comprobata est, ut eo usque nostra esse intellegantur, donec revertendi animum habeant, quod si desierint revertendi animum habere, desinant nostra esse et fiant occupantium. intelleguntur autem desisse revertendi animum habere tunc, cum revertendi consuetudinem deseruerint* (D. 41.1.5.5: Gaius). Gaius considers peacocks and doves to be wild by nature, despite their habit of flying away and return. As an argument supporting his view, the jurist invoked the case of bees and tamed deer behaving in the same way and still considered to be wild. Further on, the jurist refers to the above-mentioned *regula* applicable to animals that *ex consuetudine abire et redire solent*, according to which the ownership of those animals was lost only when they abandoned the previous habit to return (*consuetudo revertendi*). The same view was shared by the Justinian's compilers (I. 2.1.15).

Another text on the ownership of birds that manifested the *consuetudo revertendi* is a passage from the nineteenth book of Ulpianus' commentary on the praetorian edict: *Idem Pomponius ait columbas, quae emitti solent de columbario, venire in familiae herciscundae iudicium, cum nostrae sint tamdiu, quamdiu consuetudinem habeant ad nos revertendi: quare si quis eas apprehendisset, furti nobis competit actio. idem et in apibus dicitur, quia in patrimonio nostro computantur* (D. 10.2.8: Ulpianus.). Ulpianus, citing the view of the jurist Pomponius, who lived in the second century AD, also considers doves to be the property of the breeder, as long, as they maintained the habit of periodically returning to the dovecot, i.e., *consuetudo revertendi*, to be included within the claim for the division of the inheritance (*actio familiae herciscundae*). Consequently, the Severan jurist was willing to grant a claim for theft, against any person who would take them away. Bees, considered to remain the property of the breeder if they maintained the habit of flying out of the hive and returning to it, according to him, should also be treated in a similar way.

From the analysis of the texts cited above results that the ownership of wild birds was an issue to which jurists devoted considerable attention. While the recognition of caged birds as the property of the breeder does not seem to be controversial, the question of ownership of species such as doves, which, due to their natural lifestyle or tameness, tended to leave and return, was much more disputable. In the latter case, to guarantee their owner's protection also during the period when doves were not under his direct control, jurists developed the concept of *animus revertendi*. They assumed that as long as such birds manifested *animus revertendi*, evidenced by the habit of returning (*consuetudo revertendi*), it was his property and could not be appropriated by third parties as a wild animal under the principle of *res nullius*.

It's worth noting that Gaius was the only jurist who used the term *animus revertendi*, and thus referred to the subjective element of the will to return on the part of the animal (which is nevertheless manifested through the objective element *revertendi consuetudo*, that is, the habit of returning). Later jurists referred only to this objective element when talking about the habit of returning sometimes also used the descriptive form '*reveniri solent*' (D. 10.2.8.1; D. 41.2.3.16; Coll. 12.7.10).

There are diverging opinions among Roman law scholars in the matter of the origin of the *regula* mentioned by Gaius. According to Daube, it originally applied only to doves and peacocks, which were not treated as wild but rather as domesticated animals, while bees were regarded to be *animalia fera natura*. It was not until the time of Celsus (Coll. 12.7.10; D. 9.2.27.12) that the application of this rule was extended to bees as well based on their habit of moving away from the hives and returning (*cum reveniri solent*) and the fact that they constituted a source of profit (*fructui mihi sint*). As a consequence, jurists recognized that doves and peacocks were also of a wild nature, but as a result of taming, they might manifest *animus revertendi* (Daube, 1959; Zamorani, 1977: 18-19, 10; Polara, 1983: 137, 29). Frier maintains that it was Celsus who created a special subcategory of wild animals for bees and doves, thus contesting on the grounds of its inadequacy to economic reality the position of Proculus, who regarded bees away from the hive as *res nullius*. Later the jurist Gaius, recognizing such a category as no longer disputable, ignored the economic argument completely and referred only to *revertendi consuetudo* as a common feature of bees, doves, peacocks, and deer (Frier, 1994). Polara, on the other hand, suggests that the concept of *consuetudo revertendi* was originally created to justify the view of the continuation of the ownership of bees away

from the hive, since beekeeping had been considered a valuable source of food since ancient times. Later such a *regula* also found analogous application in relation to animals such as peacocks and deer (Polara, 1983: 132–133). Filip-Fröschl, considers doves, which were traditionally not deemed to be wild animals and whose presence in the *villa*, alongside domestic livestock, was considered normal, as a starting point for discussion. At the same time however, doves could not be considered completely domesticated, as sometimes instinct led them back to their wild nature. Bees, on the other hand, unlike doves, did not have the nature of tame animals, but could be bred by man, who, by creating optimum living conditions for them, could, thanks to their innate instinct to return to the hive, accustom them to return to the hive to gain profits from the bees' activity. Finally, deer, which were wild animals by nature, could be tamed and manifest a *consuetudo revertendi* to a certain place. Filip-Fröschl considers that in the category of *animalia quae ex consuetudine abire et redire solent*, deer were the only animals whose *consuetudo revertendi* did not result from their instinctive behavior to return to the nest but was the result of human influence on their wild nature (Filip-Fröschl, 2002: 204–209).

It cannot be excluded that the rule mentioned by Gaius in respect to animals classified as *animalia quae ex consuetudine abire et redire solent* originally applied primarily to bees (on beekeeping in antiquity cf. Fraser, 1951; Crane, 1999) and doves, bred by the Romans from archaic times, whose natural way of life necessitated a modification of the general rules on the acquisition and loss of ownership of wild animals (doves; cfr. Colum., *de re rust.* 8.8.1–12; 9.2–16; Varro, *rer. rust.*, 3.7.1–11; 3.16.1–38). Towards the end of the Republic, as the breeding of other wild animals became more widespread, it was also applied to wild doves and deer, whose large-scale breeding required them to be allowed to move freely in their natural habitat. In this way, the broadening interpretation of the concept of *consuetudo revertendi* became a kind of remedy for the increasingly evident contrast between the traditional principle of *ius gentium*, according to which wild animals in the state of nature constituted no-one's property and were subject to appropriation, and the need to guarantee the Roman landowners the exclusive right to hunt on their property (Benincasa, 2019; cfr. Daube, 1959; Zamorani, 1977: 18–19; Polara, 1983: 137, 29; 132–133).

WILD ANIMALS AS *FRUCTUS FUNDI*

Another consequence of the growing importance of wild game, birds and fish reserves was the recognition of the income from their breeding as *fructus fundi* and therefore a benefit regularly and systematically procured by the land. The texts preserved in the Digests indicate that the issue of recognising wild animals, birds and fish as *fructus fundi* was being considered by jurists as early as the first century AD, probably as a direct response to the growing economic importance of *vivaria* and the need to resolve practical problems arising from the confrontation between the traditional freedom of hunting and the need to protect the economic interests of the owners of large preserves.

One of the earliest pieces of evidence of such recognition may be a text from the work of a jurist of the late 1st/early 2nd century AD, Iulianus, which is believed to report the view of one of Sabinus' disciples – Minicius (cf. Cardilli, 2000: 217; Manfredini, 2006: 13–25, 38): *Venationem fructu[s]m fundi negavit esse, nisi fructus fundi ex venatione constat* (D. 22.1.26: Iulianus). From this text clearly results the principle that a wild animal living in the state of nature cannot be considered a profit of the land. The recognition that wild animals living in a state of *naturalis libertas* as a part of nature did not constitute *fructus fundi* was a logical consequence of considering as *fructus* only the profit directly and regularly obtained from the land as a mother thing. However, an exception is made for the case in which *fructus fundi ex venatione constat*, i.e., the benefit from the land, constituted the hunted game, which was undoubtedly the case of an estate organised to breed wild animals, birds and fish (*vivarium*). A sceptical position regarding the authenticity of this text was taken by Lombardi (1948: 294–298), and Polara (1983: 246–247). However, the text is considered authentic by Cardilli (2000: 217–218).

Similarly, the jurist Cassius postulated the recognition of *aucupiorum et venationum redditus* as income from land to which the usufructuary was entitled based on his right to *uti frui*: *Aucupiorum quoque et venationum redditum Cassius ait libro octavo iuris civilis ad fructuarium pertinere: ergo et piscationum* (D. 7.1.9.5: Ulpianus). This text from the commentary *ad Sabinum* constitutes a part of a longer elaboration of the Severan jurist Ulpianus. It begins with the declaration that whatever is born on the land, whatever can be obtained from the land, constitutes a profit of the land (*fructus fundi*), provided that the exploitation of such land is exercised in accordance with an abstract criterion of *arbitrium boni viri*. After such a general state-

ment, the jurist proceeds with the analysis of the particular profit which a usufructuary could potentially gain, being a benefit not directly derived from the land, but from nature itself, i.e., the increase of the land due to the phenomenon of *alluvium* or the discovery of mineral deposits subsequent to the constitution of the servitude of usufruct. In my opinion, interpreting the opinion of Cassius in the context of the further cases analysed by Ulpianus in the seventeenth book of the commentary *ad Sabinum* with regard to the general principle *quidquid in fundo nascitur, quidquid inde percipi potest, ipsius fructus est*, the term *aucupiorum et venationum et piscationum redditus* can be interpreted as any kind of revenue which a usufructuary could obtain from hunting, fishing or catching birds on the land, whether it would be provided systematically and permanently from *vivaria* organised by him on the property given in the usufruct, or irregularly and occasionally from hunting and selling game (Benincasa, 2015; 2020b). An alternative interpretation was proposed by Cardilli, according to whom, the issue considered by Cassius concerned the possibility of treating as *fructus fundi* also the profits that could be occasionally and incidentally obtained by the usufructuary from hunting animals and birds and fishing on land not destined for breeding game and hunting. According to Cardilli Cassius' opinion constitutes an evident proof of passage from the concept of *fructus* as a benefit regularly and systematically obtained from the land to a concept of profit including benefits of an occasional and uncertain nature, derived from renting the land available to third parties for hunting purposes against payment (Cardilli, 2000: 203–205).

The recognition of the birds and the profits from *aucupium* as *fructus fundi* also resulted in the recognition of the personnel and tools used for hunting as *instrumentum fundi*: *Si in agro venationes sint, puto venatores quoque et vestigatores et canes et cetera quae et venationes sunt necessaria instrumento contineri, maxime si ager et hoc redditum habuit* (D. 33.7.12.12: Ulpianus). *Et si ab aucupio redditus fuit, auceps et plagae et huius rei instrumentum agri instrumento continebitur: nec mirum, cum et aves instrumento exemplo apium contineri Sabinus et Cassius putaverunt* (Ulpianus D. 33.7.12.13). Ulpianus, in the twenty-second book of his commentary *ad Sabinum*, also considered as equipment of the land the utilities necessary for hunting, together with qualified hunters and huntresses, provided that the land was used for hunting purposes and the game constituted the source of profit obtained from the property. In the second part of the text, he referred to the opinions of earlier jurists, Cassius and Sabinus, who had considered birds and bees as *instrumentum fundi*. The same view was shared by Ulpianus

in the twentieth book of his commentary on the works of Sabinus (*Si reditus etiam ex melle constat, alvei apesque continentur* D. 33.7.10: Ulpianus). The Severan jurist recognised bees and beehives as *instrumentum fundi*, in the case where *reditus etiam ex melle constat* and thus honey constituted profit obtained from real estate. Also, Iavolenus, in his treatise *libri ex Cassio*, in relation to birds reared on islands in the sea, stated that they constituted *instrumentum fundi* (*eadem ratio est in avibus, quae in insulis maritimis aluntur*. (D. 33.7.10–11: Iavolenus; cf. Kehoe, 1997: 115). It is likely that Cassius had in mind precisely the preserves of peacocks, established by wealthy Romans on islands, which, according to Columella, was the most efficient way of breeding *pavones*. Based on these texts, it is possible to conclude that at the end of the Republic jurists considered wild birds to be *instrumentum fundi* as well, if hunting or breeding them was the primary source of income derived from the land.

Similarly, each time *aucupium* was the main means of economic exploitation of the land, the *auceps'* equipment for capturing fowl and sometimes also the *auceps* himself in case he was not a free man was deemed to constitute *instrumentum fundi* (cf. P.S. 3.6.41; 3.6.45; on *instrumentum venationis* see Lombardi, 1948: 277–290; Polara, 1983: 211–222; Ligios, 1996: 135–138; 2013: 123–126; Cardilli, 2000: 351; Manfredini, 2006: 37–40; Giomaro, 2011: 135–136, 145–146).

IMPERIAL RESCRIPTS ON FREEDOM OF FISHING AND BIRD CATCHING

The famous rescript attributed by Callistratus to Antoninus Pius, which was addressed to bird hunters (*aucupes*), can be seen as a direct manifestation of the confrontation between the freedom of hunting in Roman law and the economic interests of landowners: *Divus Pius aucupibus ita rescripsit: οὐκ ἔστιν εὐλόγον ἀκόντων τῶν δεσποτῶν ὑμᾶς ἐν ἀλλοτρίοις χωρίοις ἰξεύειν* [*id est: non habet rationem vos in alienis locis invitis dominis aucupari*] (D. 8.3.16: Callistratus). This excerpt from Callistratus' treatise on judicial proceedings constitutes the only text in the Digests that explicitly deals with the confrontation between the freedom of hunting *omnia quae terra mari caelo capiuntur* and the absolute nature of ownership rights. It contains a resolution of the dispute between two parties (one of them being an *aucupes*). Since emanation of such rescripts was one of ways in which the emperors acted as legislator, his decision was binding for the judge in

the particular case, as well as in analogous cases. However, the text is very difficult to interpret unequivocally, due to the lack of context, as well as the ambiguous nature of the decision itself.

Firstly, it is not possible to determine with certainty with what specific issue the bird hunter petitioned to the emperor. Nevertheless, it can be presumed that they demanded to be allowed to hunt birds on someone else's land in a situation in which the landowner had either forbidden them to enter his property or prohibited *aucupium* itself.

Secondly, it is not entirely clear what exactly it means to declare such behaviour contrary to the λόγος. Was the action of the *aucupes* to be considered an unlawful act or merely as behaviour incompatible with broadly understood *ratio*, i.e., rationality, something deemed as unreasonable and absurd but nevertheless legally permissible and not resulting in legal responsibility for the bird hunters.

Gabrio Lombardi expressed the opinion that this rescript was not a typical address to private individuals, in which the emperor usually expressed his decision on a disputed case submitted to his judgment. Rather, it sounded to him more like a verdict, a decision of the emperor declaring hunting birds against the will of the landowner to be not εὐλογον. Due to the use of Greek in a redaction of such a rescript, Lombardi maintained that the disputed case was submitted to the emperor by persons originated in the eastern provinces of the Roman empire. This author, however, believed that originally the rescript, due to the use of the technical verb ἰξεῖν, had concerned only hunting birds with a birdlime-coated cane, a technique he considered more troublesome for the landowner than others. According to Lombardi's reconstruction, it was only Callistratus who, by using the term *aucupari* in the Latin redaction of the rescript, gave it a more universal character. As an argument to support his interpretation Lombardi cited another rescript of Antoninus Pius in which the emperor allowed fishermen to enter an area immediately adjacent to the sea on someone else's land to fish (D. 1.8.4 pr.). In his view, it was improbable that the same emperor could have produced completely different decisions, both of a general nature, in such analogous cases (Lombardi, 1948: 307–314, 330).

In my view, however, there is no basis for considering Antoninus Pius' rescript addressed to the *aucupes* as concerning exclusively bird-hunters using a birdlime-coated cane. Firstly, the verb ἰξεῖν was used to describe the most widespread technique used by birders to capture a live bird, best documented in source texts and iconographic representations, with the

consequence that the terminology associated with this hunting technique is beginning to derogate the Latin terms *auceps* and *aucupium* and be commonly used as a synonym of bird hunting in general.

Similarly, the invocation of a rescript concerning fishermen, to whom the owner of a coastal area could not prohibit *piscatio*, in order to narrow the application of the emperor's decision only to a specific technique of *aucupium* is, in my opinion, highly doubtful. It should be noted that although *prima facie* it might indeed appear that the decisions of Antoninus Pius should be coherent about *aucupium* and *piscatio* practised on someone else's land, nevertheless, from a legal point of view, the situation was completely different, because of the legal status of the sea and *litora maris*. For both the sea and the seashore were considered to be one of the *res omnium communes*, i.e., things belonging to all (*Et quidem naturali iure omnium communia sunt illa: aer, aqua profluens, et mare, et per hoc litora maris* (D. 1.8.2.1: Marcianus); on *res omnium communes*, cf. Miele, 1998; Sini, 2008; Schermaier, 2009; 2012; Terrazas Ponce, 2012; Dursi, 2017; Lambrini, 2017; Purpura, 2019), which allowed any person to use the sea to practise *piscatio*, whether from the open sea or from the shore (cf. D. 41.1.14; D. 43.8.1; D. 47.10.13.7). This meant that the owner of coastal land could not prohibit third parties from fishing at his shore or using the resources of the sea vis-à-vis his villa; at most he could prohibit third parties from entering the *villa* itself or other buildings located on the sea adjacent land (on legal status of the seashore cf. Charbonnel and Morabito, 1987; Gutierrez-Masson, 1993; Fiorentini, 1996: 164–175; 2003: 427–474; Ankum, 1998; Castàn Pérez-Gómez, 2000; Purpura, 2004: 165–206; Spanu, 2012; Masi, 2014). As far as the practice of *aucupium* was concerned, the situation was different because, although the air (*aer*), like the sea, constituted *res omnium communis*, this did not mean that everyone had the right to enter property belonging to another person to gain access to the air above the ground. Such a solution would result indeed in a negation of any right of the landowner to prohibit third parties from entering the property and would consequently constitute a negation of the absolute nature of the property right as such (cf. Fiorentini, 2003: 416).

Another text of Ulpianus' commentary *ad edictum* shows that the question of the freedom of hunting wild birds living in a state of *naturalis libertas* was continuously the subject of rescripts emanated by Roman emperors. Although the fundamental issue examined in this text by the Severan jurist was the question of the legal protection available to a person prohibited from fishing in the sea, in the further part of the text he invoked the

analogy existing between *piscatio* and *aucupium* and commented on the *ius prohibendi* given to a landowner to prohibit access to his property: *Si quis me prohibeat in mari piscari vel everriculum σαγήνην ducere, an iniuriarum iudicio possim eum convenire? sunt qui putent iniuriarum me posse agere: et ita Pomponius et plerique esse huic similem eum, qui in publicum lavare vel in cavea publica sedere vel in quo alio loco agere sedere conversari non patiat, aut si quis re mea uti me non permittat: nam et hic iniuriarum conveniri potest. conductori autem veteres interdictum dederunt, si forte publice hoc conduxit: nam vis ei prohibenda est, quo minus conductione sua fruatur. si quem tamen ante aedes meas vel ante praetorium meum piscari prohibeam, quid dicendum est? me iniuriarum iudicio teneri an non? et quidem mare commune omnium est et litora, sicuti aer, et est saepissime rescriptum non posse quem piscari prohiberi: sed nec aucupari, nisi quod ingredi quis agrum alienum prohiberi potest. usurpatum tamen et hoc est, tametsi nullo iure, ut quis prohiberi possit ante aedes meas vel praetorium meum piscari: quare si quis prohibeatur, adhuc iniuriarum agi potest. in lacu tamen, qui mei domini est, utique piscari aliquem prohibere possum* (D. 47.10.13.7: Ulpianus). In deciding whether a person who has been prohibited from fishing and throwing nets in the sea by someone (possibly a coastal landowner) is entitled to make a legal claim against the latter, the Severan jurist referred to the opinion of other *iurisprudentes*, among them Pomponius, according to whom granting an *actio iniuriarum* in such a case was possible. Further, he related that many jurists believed that a person who was forbidden to fish in the sea was in the analogous position as a person who was not allowed to use accessible public places, such as a theatre or a public bath, or even an owner of the thing who was not allowed to use his property.

In Ulpianus' view, since the sea was a thing belonging to all (*res omnium communis*), like the air and the seashore, it was not possible to prohibit another person from fishing in the sea or hunting birds, except the right to prohibit someone from trespassing on someone else's land, as confirmed in many imperial rescripts. Nonetheless, the jurist continues his argument, it was a common practice (*usurpatum est*) of those whose properties were adjacent to the sea to deny fishermen access to the sea, which prohibition he describes as *nullo iure*, and therefore lawfully unjustified. *A contrario* Ulpianus confirmed that a landowner had the right to prohibit fishing in natural reservoirs of water, such as lakes or ponds, located on someone's property.

It can be deduced from Ulpianus' reasoning that, due to the special nature of the sea and the seashore, the owner of a property adjacent to the

sea did not have the right to prohibit a fisherman from fishing in the sea or even from accessing the seashore. Nevertheless, it was common practice among coastal landowners to try avoiding fishing on their properties by forcing the entrance prohibition, being nevertheless such prohibition void under the law. It can be suggested, therefore, that the rescript from which the passage cited by Callistratus in his work *de cognitionibus* was taken, constituted one of such rescripts which declared invalid the prohibition of *aucupium* by the landowner but granted the landowner the right to deny access to his land to third parties.

An analogy is affirmed by Ulpianus regarding the possibility of practising *aucupium*, suggesting that a landowner could not prohibit the capture of birds flying above his land. As he stated the legal status of the air (*aer*) was the same as that of the sea: it was *res omnium communis*, therefore, everyone can use it, which right also implies the possibility of appropriating wild birds.

The question of the prohibition of fishing in the sea or of bird hunting must have been so controversial that, as Ulpianus reported, it was a frequent subject of rescripts produced by the emperors, in which the unlawfulness of the prohibition of *piscatio* or *aucupium* was confirmed. One such rescript was that of Antoninus Pius addressed to *piscatores Formiani et Capenati* referred by Marcianus, in the third book of the *Institutiones*. After declaring that no one can be prohibited from access to the sea *piscandi causa*, Marcianus refers to a rescript of Antoninus Pius in which the emperor had confirmed the right of fishermen of Formia and Capua to have a free access to the sea, excluding their entrance to houses, buildings and other structures erected on coastal land (*villae, aedificia et monumenta*) as the property of latter object, differently from the sea itself, was not subject to the rules of *ius gentium*: *Nemo igitur ad litus maris accidere prohibetur piscandi causa, dum tamen villis et aedificiis et monumentis abstineatur, quia non sunt iuris gentium sicut et mare: idque divus Pius piscatoribus Formianis et Capenatis rescripsit* (D. 1.8.4 pr. [Marcianus]).

From the analysis of the cited passages regarding the approach of the imperial chancellery to the question of prohibiting third parties from fishing in the sea or hunting birds, it can be deduced that the emperors, underlining the special legal status of the sea seashore and air according to the *ius gentium*, denied the landowners the possibility of prohibiting others from exercising *piscatio* or *aucupium* on their property. The impossibility to produce such a prohibition did not, however, imply the impossibility of prohibiting third parties from entering the part of land that was not

considered to belong to everyone, i.e., the part of the sea-adjacent property not constituting the littoral area (*litora maris*) in the case of *piscatio* and the whole land in the case of *aucupium*.

In this context, the text of the rescript οὐκ ἔστιν εὐλόγον ἀκόντων τῶν δεσποτῶν ὑμᾶς ἐν ἀλλοτρίοις χωρίοις ἰξεύειν can be interpreted as deciding that since the owner of the property has issued a prohibition on entering the land, the demand of the *aucupes* to enable them to hunt birds on such land subject to prohibition is without legal basis. In the absence of such a prohibition, they may hunt on someone else's land and appropriate wild birds, because of the general principle of freedom of hunting, but they cannot claim to be allowed to practise *aucupium* on someone else's land in the face of the owner's express prohibition to enter his property.

CONCLUSIONS

An analysis of the preserved texts from the works of classical jurists shows that *aucupium* as one of the hunting activities was prevalently discussed in the context of the contrast between the principle of freedom to hunt *omnia quae terra mari caelo capiuntur* and the need to protect owners of *vivaria* (and generally landowners), who were interested in reserving to themselves the exclusive right to hunt and to fish on their property. Given the completely new approach to wild animals, birds, and fish, which had become economically important since the end of the Republic, jurists had to elaborate legal solutions to reconcile the *ius gentium*-derived principle of freedom of hunting with the economic interests of landowners. Consequently, they considered wild birds kept in enclosed spaces as belonging to the owner of the enclosure, as well as those birds which were tamed and controlled by a man, even though they were not kept in cages or another confined spaces. And for those species which, like peacocks and doves required free moment, they employed the concept of *consuetudo revertendi*, which allowed the continuation of ownership even when the bird was outside the direct control of the owner, which would otherwise imply a return of the animal to a state of *naturalis libertas* and thus a loss of ownership. Another way for Roman jurists to limit the freedom of hunting was the concept of *ius prohibendi*, i.e., the right of the landowner to issue a prohibition against third parties entering the land. In fact, such a prohibition could significantly limit the possibility to practice *aucupio* on someone else's land. In such a way, the property owner who as a rule could not

prohibit the capture of wild birds in the air and acquiring their property through *occupatio*, could prevent unauthorised persons from entering his property and thus significantly restrict the freedom of bird hunting.

Zuzanna Benincasa is an associate professor at the University of Warsaw. Her research interests focus on Roman law and the European legal tradition. She is the author of numerous publications dedicated to the issues of legal and economic aspect of risk related to navigation in antiquity, the occupation as an original method of acquiring ownership as well as economic and legal aspects of hunting in the Roman world.

REFERENCES

Sources

CIL – *Corpus Inscriptionum Latinarum*.

Coll. – ‘Collatio legum Mosaicarum et Romanarum’, in Riccobono, S., Baviera, J., Ferrini, C., Furlani, J. and Arangio-Ruiz, V. (1940–1943), *Fontes iuris romani anteiustiniani in usum scholarum ediderunt*, vol. I–III. Florentiae: Barbèra.

D. – *Digesta. Corpus Iuris civilis*, vol. I. Mommsen, Th. and Krüger, P. (eds).

G. – *Gai Institutiones*. Krüger, P. and Studemund G. (eds).

I. – *Institutiones Iustiniani. Corpus Iuris civilis*, vol. I. Mommsen, Th. and Krüger, P. (eds).

P.S. – *Pauli Sententiae*, in Riccobono, S., Baviera, J., Ferrini, C., Furlani, J. and Arangio-Ruiz, V. (1940) *Fontes iuris romani anteiustiniani in usum scholarum ediderunt*, vol. II. Florentiae.

Literary sources

Cic., *de nat deor.* – Marcus Tullius Cicero, *de natura deorum*.

Cic., *Tusc. Disp.* – Marcus Tullius Cicero, *Tusculanae disputationes*.

Cic., *de senect.* – Marcus Tullius Cicero, *de senectute*.

Colum., *de re rust.* – Lucius Iunius Moderatus Columella, *De re rustica*.

Mart., *ep.* – Marcus Valerius Martialis, *Epigrammata*.

Plin., *Nat. hist.* – Gaius Plinius Secundus, *Naturalis historia*.

Varro, *rer. rust.* – Marcus Terentius Varro, *Rerum rusticarum libri tres*.

Varro, *Sat. Men.* – Marcus Terentius Varro, *Saturae Menippeae*.

Literature

Amirante, L. (1983) ‘Review: G. Polara, *Le venationes*. Fenomeno economico e costruzione giuridica’, *Rivista internazionale di diritto romano e antico*, 34, pp. 255–262.

Anderson, J.K. (1985) *Hunting in the Ancient World*. Berkeley–Los Angeles–London: University of California Press.

Ankum, H. (1998) ‘*Litora maris et longi temporis praescriptio*’, *Index*, 26, pp. 357–376.

Benincasa, Z. (2013) ‘*Si vivariis inclusae ferae*. Status prawny dzikich zwierząt żyjących w vivaria i parkach myśliwskich w prawie rzymskim’, *Zeszyty Prawnicze*, 13(4), pp. 5–41.

Benincasa, Z. (2014) ‘*Occupatio* jako sposób nabycia własności dziko żyjących zwierząt w prawie rzymskim’, *Studia Iuridica*, 59, pp. 9–39.

Benincasa, Z. (2015) ‘*Accessio ab alluvione i redivis venationis et aucupii* jako *fructus fundi*’ (‘*Accessio ab alluvione and redivis venationis et aucupii as fructus fundi*’), *Zeszyty Prawnicze*, 15(2), pp. 135–159.

- Benincasa, Z. (2016) 'Alcune riflessioni sulla libertà di caccia nel diritto romano: vivai e riserve di caccia', in Benincasa, Z. and Urbanik, J. (eds) *Mater familias. Scritti romanistici per Maria Zabłocka*. Warszawa: Faculty of Law and Administration of the University of Warsaw, pp. 39–62.
- Benincasa, Z. (2017) 'Illud quaesitum est, an fera bestia, quae ita vulnerata sit, ut capi possit, statim nostra esse intellegatur. Zagadnienie ustalenia momentu zawłaszczenia dzikiego zwierzęcia w rozważaniach rzymskich jurystów u schyłku republiki', in Malec, D., Marzec, Ł. and Palmirski, T. (eds) *Semper fidelis. Prace dedykowane pamięci Profesora Janusza Sondla legendzie krakowskiego fakultetu prawniczego*. Kraków: Poligrafia Salezjańska, pp. 43–58.
- Benincasa, Z. (2019) '„Co się tyczy stworzeń, które z nawyku zwykły oddalać się i powracać... – koncepcja *animus revertendi* a wolność polowania na dzikie zwierzęta w prawie rzymskim', *Studia i materiały Ośrodka Kultury Leśnej*, 18, pp. 33–52.
- Benincasa, Z. (2020a) 'Między *'fructus'* a *'delectatio'*. Kilka uwag o rzymskich *vivaria* u schyłku republiki', in Korporowicz, Ł. and Skrzywanek-Jaworska, D. (eds) *Cui bono? Księga jubileuszowa dedykowana Profesor Annie Pikulskiej-Radomskiej*. Łódź: Wydawnictwo Uniwersytetu Łódzkiego, pp. 55–72.
- Benincasa, Z. (2020b) 'Od *'res nullius'* do *'fructus fundi'*. Upolowana zwierzyna oraz zyski z polowania i polowu jako pożytek z gruntu w rozważaniach rzymskich jurystów', *Zeszyty Prawnicze*, 20(4), pp. 23–51.
- Berger, A. (1968) *Encyclopedic Dictionary of Roman Law*. Philadelphia: American Philosophical Society.
- Cardilli, R. (2000) *La nozione giuridica di fructus*. Napoli: Edizioni Scientifiche Italiane.
- Casanova, P. and Memoli, A. (2000) 'La caccia: dal diritto popolare al diritto venatorio', *L'Italia forestale e montana* V 55.5, pp. 340–341.
- Castàn Pèrez-Gómez, A. (2000) 'Nuevas observaciones sobre la condición jurídica del mar y sus litorales en el derecho romano', in Villar, A.M. (ed.) *Estudios de derecho Romano en memoria de Benito M^a Raimundo Yanes, I*. Burgos: Universidad de Burgos, pp. 101–121.
- Charbonnel, N. and Morabito, M. (1987) 'Les rivages de la mer: droit Romain et glossateurs', *Revue Historique de Droit Français et Étranger*, 65, pp. 23–32.
- Crane, E. (1999) *The World History of Beekeeping and Honey Hunting*. New York: Routledge, pp. 203–209.
- Daube, D. (1959) 'Doves and Bees', in Arangio-Ruiz, V. (ed.) *Droits de l'antiquité et sociologie juridique. Mélanges Henri Lévy-Bruhl*, Paris: Sirey, pp. 63–75.
- Donahue Jr., C. (1986) '*Animalia ferae naturae*: Rome, Bologna, Leyden, Oxford and Queens County N.Y.', in Schiller, A., Bagnall, R.S. and Harris, W.V. (eds) *Studies in Roman Law in Memory of A. Arthur Schiller*. Leiden: Brill, pp. 39–63.
- Dursi, D. (2017) '*Res communes omnium*'. *Dalle necessità economiche alla disciplina giuridica*. Napoli: Jovene.
- Epstein, H.J. (1943) 'The Origin and the Earliest History of Falconry', *Isis*, 34(6), pp. 497–509.
- Espí Forcén, C. (2020) 'The Hound of the Falconer. Roman and Byzantine Hawking in the Venetian Cyngetica', *Estudios Byzantinos*, 8, pp. 157–158.
- Filip-Fröschl, J. (2002) '*Cervi, qui in silvas ire et redire solent*. Anmerkungen zu einem exemplum iuris', in Schermaier, M.J., and Mayer-Maly, T. (eds) *Iurisprudencia universalis. Festschrift für Theo Mayer-Maly zum 70. Geburtstag*. Weimar: Köln, pp. 191–213.
- Florentini, M. (1996) 'Sulla rilevanza economica e giuridica delle ville marittime durante la Repubblica e l'Impero', *Index*, 24, pp. 143–198.

- Fiorentini, M. (2003) *Fiumi e mari nell'esperienza giuridica romana. Profili di tutela processuale e di inquadramento sistematico*. Milano: Giuffrè.
- Fraser, H.M. (1951) *Beekeeping in Antiquity*. London: University of London Press.
- Frier, B.W. (1982-1983) 'Bees and Lawyers', *Classical Journal*, 78(2), pp. 105-114.
- Frier, B.W. (1994) 'Why did the Jurists change Roman Law? Bees and Lawyers revisited', *Index*, 22, pp. 135-149.
- Galloni, P. (2000) *Storia e cultura della caccia*. Roma: Laterza.
- García Garrido, M.J. (1956) 'Derecho à la caza y ius prohibendi en Roma', *Anuario de Historia del Derecho Español*, 26, pp. 269-336.
- Giaro, T. (2007) 'Römische Rechtswahrheiten. Ein Gedenkenexperiment', *Studien zur europäischen Rechtsgeschichte*, 219, Frankfurt am Main.
- Giomo, A.M. (2011) 'Dall'instruere all'instrumentum e vice versa nell'economia della Roma antica', *Studi Urbinati*, 62(1), pp. 105-165.
- Green, C.M.C. (1996) 'Did the Romans hunt?', *Classical Antiquity*, 15(2), pp. 222-260.
- Gutierrez-Masson, L. (1993) 'Mare nostrum: imperium' ou 'dominium', *Revue internationale des droits de l'antiquité*, 40, pp. 293-315.
- Hausmaninger, H. (1991) 'Celsus gegen Proculus', in Slapnicar, K. (ed.) *Tradition und Fortentwicklung im Recht. Festschrift zum 90. Geburtstag von Ulrich von Lübtow am 21. August 1990*. Rheinfelden-Berlin: Schäuble Verlag, pp. 53-62.
- Kehoe, D. (1997) *Investment, Profit and Tenancy. The Jurists and the Roman Agrarian Economy*. Ann Arbor: University of Michigan Press.
- Lambrini, P. (2017) 'Alle origini dei beni comuni', *Iura*, 65, pp. 394-418.
- Ligios, M.A. (1996) *Interpretazione giuridica e realtà economica. dell'instrumentum fundi tra il I sec. a. C. e il III sec. d.C.* Napoli: Jovene.
- Ligios, M.A. (2013) *Nomen negotiationis. Profili di continuità e di autonomia della negotiatio nell'esperienza giuridica romana*. Torino: Giappichelli.
- Lombardi, G. (1948) 'Libertà di caccia e proprietà privata in diritto romano', *Bullettino dell'istituto di diritto romano*, 12-13, pp. 272-343.
- Longo, O. (1987) 'Le regole della caccia nel mondo greco-Romano', *Aufidus*, 1, pp. 59-91.
- Malossini, F. (2011) 'Gli allevamenti animali nel fondo rustico dell'antica Roma', *Atti Acc. Rov. Agiati*, 9(1), pp. 145-215.
- Manfredini, A.D. (2006) *Chi caccia e chi è cacciato... Cacciatore e preda nella storia del diritto*. Torino: Giappichelli.
- Manfredini, A.D. (2008) 'Un'iniuria che non c'è', in Vacca, L. (ed.) *Diritto romano, tradizione romanistica e formazione del diritto europeo*. Milano: Wolters Kluwer Italia, pp. 181-202.
- Mantovani, D. (2007) 'I giuristi, il retore e le api. *Ius controversum* e natura nella *Declamatio Maior XIII*', in Mantovani, D. and Schiavone, A. (eds) *Testi e problemi del giusnaturalismo romano*. Pavia: Pavia University Press, pp. 323-385.
- Martini, R. (1986) 'Sui frutti delle *venationes*', *Labeo*, 32, pp. 215-218.
- Masi, D.C. (2014) "'Litus maris': définition et controverses", in Hermon E. and Watelet A. (eds) *Riparia, un patrimoine culturel. La gestion intégrée des bords de l'eau. Proceedings of the Sudbury Workshop, April 12-14*. Oxford: BAR, pp. 233-242.
- McLeod, G. (1989) 'Wild and Tame Animals and Birds in Roman Law', in Birks, P. and Nicholas, B. (eds) *New Perspectives in the Roman Law of Property: Essays for Barry Nicholas*. Oxford: Clarendon Press, pp. 169-176.
- Miele, A. (1998) 'Res publica, res communis omnium, res nullius: Grozio e le fonti romane sul diritto del mare', *Index*, 26, pp. 383-387.

- Modrzejewski, J. (1976) 'Ulpian et la nature des animaux', in *La filosofia greca e il diritto romano, Atti del Colloquio italo-francese, Roma 14-17 aprile 1973*, Roma: Accademia Nazionale dei Lincei, 221, pp. 177-199.
- Montero, S. (2008) 'Los jóvenes e la práctica del *aucupium* (CIL II 2335)', in Hernández Guerra, L. (ed.) *El mundo religioso hispano bajo el imperio romano. Pervivencias y cambios*. Valladolid: Ediciones Universidad de Valladolid, pp. 284-291.
- Polojac, M. (2003) *Actio de pauperie and Liability for Damage Caused by Animals in Roman Law*. Belgrade: Dosije.
- Polojac, M. (2014) 'Gaius, Hadzic and *occupatio* of wild animals - classical Roman law in the Serbian Civil Code', *Fundamina. A Journal of Legal History*, 20(2), pp. 738-747.
- Polara, G. (1983) *Le venationes. Fenomeno economico e struttura giuridica*. Milano: Giuffrè.
- Purpura, G. (2004) "'Liberum mare', acque territoriali e riserve di pesca nel mondo antico", *Annali del Seminario Giuridico della Università di Palermo*, 49, pp. 165-206.
- Purpura, G. (2019) 'Varia de iure maris', in D'Angelo, G., Varvaro, M., and di Simone, M. (eds) *Scritti per il novantesimo compleanno di Matteo Marrone*. Torino: Giappichelli, pp. 219-239.
- Raga, E. (2011) 'Réflexions sur le rapport ville/campagne dans l'Antiquité tardive au travers de quelques discours sur la chasse', *Revue Belge de Philologie et d'Histoire*, 89(2), pp. 659-668.
- Schermaier, M.J. (2009) "'Res Communes Omnium': The History of an Idea from Greek Philosophy to Grotian Jurisprudence", *Grotiana*, 30(1), pp. 20-48.
- Schermaier, M.J. (2012) 'Private Rechte an "res communes"?' in Chevreau, E., Kremer, D. and Laquerrière-Lacroix, A. (eds) 'Carmina iuris'. *Mélanges en l'honneur de M. Humbert*. Paris: De Boccard, pp. 773-792.
- Sini, F. (2008) 'Persone e cose: "res communes omnium". Prospettive sistematiche tra diritto romano e tradizione romanistica', *Diritto @ Storia*, 7. <https://dirittoestoria.it/Tradizione-Romana/Sini-Persone-cose-res-communes-omnium.htm>. Accessed 10 April 2024.
- Spanu, C. (2012) 'Mare et per hoc litora maris'. I. 2.1.1: Gestione e tutela del litorale marittimo in diritto romano. https://www.academia.edu/2780343/_Mare_et_per_hoc_litora_maris_I_2.1.1_gestione_e_tutela_del_litorale_marittimo_nel_diritto_romano. Accessed 10 April 2024.
- Terrazas Ponce, J.D. (2012) 'El concepto de "res" en los juristas romanos', in Las 'res communes omnium', *Revista de Estudios Histórico-Jurídica*, 34, pp. 127-163.
- Vendries, Ch. (2009) 'L'auceps, les gluaux et l'appeau. A propos de la ruse et de l'habileté du chasseur d'oiseaux', in Trinquier, J. and Vendries, Ch. (eds) *Chasses antiques. Pratiques et représentations dans le monde gréco-romain (IIIe siècle av. - IVe siècle apr. J.-C.)*. Rennes: Presses Universitaires de Rennes, pp. 119-140.
- Zamorani, P. (1977) *Possessio e animus*. Milano: Giuffrè.