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TROUBLED WATERS: CROATIAN SEASHORE AS *RES EXTRA COMMERCIUM IN COMMERCIO****

Summary: *This paper seeks to examine the special legal nature of the Croatian seashore as a common good and the challenges of its commercial use. It was Roman law that first recognized the seashore as a thing that was* res communes omnium *– common property of all men under natural law. Roman jurist Marcian defined it as all air, running water, sea, and the seashore as far as the high-water mark. In Croatia, based on this Roman doctrine, the seashore is considered a maritime domain, the welfare of which is of interest to and under special protection of the state. Although maritime domain should not be presumed as a subject of ownership or commerce* (extra commercium)*, due to numerous legal exemptions, its common good-character has become a point of contention.*

Contemporary legal solutions in Croatia (especially the Act on Ownership and Other Real Rights (Zakon o vlasništvu i drugim stvarnim pravima), the Maritime Domain and Seaports Act (Zakon o pomorskom dobru i morskim lukama), and the Concessions Act (Zakon o koncesijama)) grant exclusive rights to commercial exploitation of the maritime domain for up to 99 years, as well as provide for pledging or transferring of concession. In doing so, this paper reasons, the Croatian legal system has to a certain extent alienated the legal nature of the maritime domain and de facto created a new 'quasi-real right' on the common good.

Keywords: *common good, concession, maritime domain,* res extra commercium*, seashore*

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1. INTRODUCTORY REMARKS

A fundamental principle of the Croatian, as well as of comparative legal systems belonging to the continental European legal circle, is the existence of goods that due to their legal and/or physical nature cannot be the subject of ownership or any other real rights. Per the Roman legal doctrine, such goods are free for common use – *res communes omnium*,[1] and neither are, nor should they be the object of any legal transaction (*res extra commercium*), of which the seashore is a primary example.

Croatia, a Mediterranean country economically reliant on its maritime resources, is sustaining the negative human impact on the maritime domain, primarily the effects of uncontrolled and illegal construction on the seashore. Seashore devastation is in smaller part the result of regulatory deficiencies. In larger part, it is a consequence of inconsistency in implementation of regulation and lack of control. Taking the Roman principle as its starting point, this paper outlines the framework of contemporary regulation of the seashore as a maritime domain in Croatia and points to the current legislative and regulatory issues that are alienating the legal nature of the seashore as a common good. A review of the Draft Proposal Maritime Domain and Seaports Act (Draft Proposal MDSA) examines the future envisioned by it for this protected category.

2. SEASHORE AS *RES COMMUNES OMNIUM*

Under the traditional doctrine of *res communes omnium*, certain things cannot be subjected to the rights of a single person, given that by their very nature they are intended for the common use of all people and free exploitation of their resources. Behind 'common use' is not a dormant property right awaiting reactivation through the right set of circumstances, but the principle under which these things are intended for common use[2] and excluded from legal transactions (*res extra commercium*).[3] The principle is based on the last-generation Roman-classicist jurist Marcian's definition, as found in his Institutes. For its concise articulation, his definition was later adopted by Justinian's compilers.[4] The exact origin of the teaching is unclear. As the sources themselves refer directly to natural law (Marc. D. 1,8,2, pr. *Quaedam naturali iure communia sunt omnium*), so the prevailing view in scholarly literature is that Marcian's

1 Petar Klarić and Martin Vedriš, *Građansko pravo* [Civil Law] (Narodne novine, 2014) 75 and 246–247; Nikola Gavella, 'Stvarnopravni odnos' [Real-right relationship], in Nikola Gavella and others (eds), *Stvarno pravo*, *vol.* 1, (Narodne novine, 2007) 136.

2 Alfred Pernice, *Die sogenannten res communes omnium*, (HW Müller, 1900) 3.

3 Although Gaius' Institutes do not list the category of *res quarum commercium non est*, which is why it became a much-debated issue in the literature, the classification of goods into this category already gradually appeared in the thinking of classical jurists. The category's fluid boundaries continued to be debated in the *Principate* until Justinian finally stabilized them (*Inst.* 2,20,4). For more on the debate, including references to further literature, see: Antonino Milazzo, 'Res in Commercio and Res Extra Commercium: Reflections of Romans Jurists and Categories of Modern Law' [2015] 6 Journal of İnönü University Faculty of Law, 253.

4 *Marc.* D. 1,8,2, pr.: *Marcian. 3 inst. Quaedam naturali iure communia sunt omnium, quaedam universitatis, quaedam nullius, pleraque singulorum, quae variis ex causis cuique adquiruntur.* "Some things belong in common to all men by *ius naturale*, some to a community corporately, some to no one, but most belong to individuals severally, being ascribed to someone on one of various grounds." (translated by Alan Watson, *Digest of Justinian, vol.* 1 (University of Pennsylvania Press, 1998) 24–25.

theory was likely influenced by the Stoic doctrine.[5] Frier, however – insisting on the Stoics' *de facto* pro-private property and -owning convictions – argues a lack of evidence supporting even a remotely consequential Stoics' influence on the principle.[6] Before being a documented point of debate between Roman jurists, the concept was discussed in classical literature,[7] likely shaped by corresponding Greek sources.[8]

Res considered 'common' to all under natural law included air, running water, the sea, and – accordingly – the seashore,[9] which was *publicum* as far as the high-water mark (*hibernus fluctus maximus*).[10] What exactly was understood by 'common' was unfortunately not clearly delineated in legal sources. In designating it as *publicum*,[11] legal sources specify that the shore must be accessible to and usable by the general public (*omnibus vacare*), from both the sea and the land, explicitly underlining that it derives from *ius gentium*.[12] That there are no clear boundaries between the 'public' and 'common' tells of the inconsistencies even as late as in the classical terminology. On a list of things that were considered to belong to the Roman Republic (*res publicae*), Polybius included navigable rivers, harbors, gardens, mines, lands, but omitted the seashore and the sea.[13] Classical jurists, after all, may not have understood under *publicum* the state property, but a communal use of things recognized under the *ius gentium* that are themselves ownerless.

A subjective right to use the seashore under protection of an *actio* was not available even to Roman citizens.[14] Under the freedom of the shore, however, where occupied through construction, the shore would become the occupant's private property.[15] While the classicists undoubtedly considered that the right to the building and the land below it only lasted as long as the building stood[16] and did not hinder public access to the shore,[17] the rule was not immune

5 Pernice (n 2) 8; Martin Schermaier, 'Res Communes Omnium: The History of an Idea from Greek Philosophy to Grotian Jurisprudence' [2009] 30/1 Grotiana 20, 39; Max Kaser, *Das römische Privatrecht, I, Das altrömische, das vorklassische und klassische Recht*, (2. ed., C. H. Beck, 1971) 380; Jacques Dumont, 'Liberté des mers et territoire de pêche en droit grec' [1977] 55/1 Revue historique de droit français et étranger (1922-) Quatrième série, 53.

6 Bruce Frier, 'The Roman origins of the Public Trust Doctrine – Domenico Dursi, Res Communes Omnium. Dalle Necessità Economiche Alla Disciplina Giuridica (Jovene, Naples 2017)' [2019] 32 Journal of Roman Archaeology, 641, 643–644.

7 *E.g.* In the comedy *Rudens*, written by Plautus around 190 B.C., the fisherman Gripus, in arguing that the fish belongs to the person who caught it, reasons that "the sea is undoubtedly common to all" (*mare quidem commune certost omnibus*). See Plautus, *Rudens* 4,3,36-40. Later on, during Late Republic and Early Empire, the same concept was explored in: Cicero, *Pro Roscio Amerino* 72; Cicero, *De Officiis* 1,51-52; Ovidius, *Metamorphoses* 6,349-352; Seneca, *De Beneficiis* 4,28,3.

8 *E.g.* Sophocles, *Frag*. 612; Plato, *Nómoi* 7,824a; Aeschines, *Falsa Leges* 71; Phoenicides Athenaeus, *Deipnosophistae*, 8,345e ("the sea was common to all, but the fish in it belonged to those who paid the price").

9 Justinian adopted this list, including *litora maris*, from the classical tradition without making any significant changes. D. 1,8,2,1: *Marcian. 3 inst. Et quidem naturali iure omnium communia sunt illa: aer, aqua profluens, et mare, et per hoc litora maris.* "And indeed, by natural law the following belong in common to all men: air, flowing water, and the sea, and therewith the shores of the sea." (translated by Watson (n 4) 24–25) *Cf.* also *Iust. Inst.* 2,1,1.

10 *Cicero*, *Topica* 7,32; *Jav.* D. 50, 16, 112; *Celsus*, D. 50, 16, 96; *Iust. Inst.* 2,1,3.

11 *Cicero, Topica* 7,32; *Lab.* D. 41, 1,65,1; *Ner.* D. 41,1,14 pr.-1; *Pomp.* D. 1,8,10; 41,1,50.

12 Sources indicate that access to the seashore had a significant public purpose because it was required for navigation and fishing. *Cf. Gai.* D. 1,8,5; *Scaev.* D. 43,8,4.

13 *Polyb*. *Hist*. VI, 17,2 *Cf.* also *Ulp*. D. 43,8,2,3.

14 *Pomp.* D. 41,1,50.

15 *Pomp.* D. 1,8,10; *Pomp.* D. 41,1,30,4; *Pomp*. D. D. 41,1,50; *Ulp.* D. 39,1,1,18; *Marc.* D. 1,8,4 pr.

16 *Ner.* D. 41,1,14,1.

17 *Pomp.* D. 41,1,50.

to different interpretations.[18] Prevailingly, the rule was understood as giving the builder ownership of the land and the building. In a detailed elaboration, Neratius defined the shore not as a state domain, but rather as ownerless, akin to forest animals. In other words, the seashore belonged to those who took possession of it by building on it, but once the erected structure was removed, the seashore reverted to its former status.[19] Pomponius similarly extended the application of *occupatio* on structures built by driving piles into the seabed and on islands.[20] Celso, rather than referring to ownership, spoke of a 'use common to all' (*communem usum omnibus hominibus*), which was to not be approved where built structures would damage the shore or impair the future use of the sea.[21] Ulpian, much like Scaevola before him,[22] declared that, under *ius gentium*, anyone who built on the beach made the land his own.[23] Comparably, Paulus considered the shore as *nullius, sed iure gentium omnibus vacant*, viewing that the seashore was not taken into account in the land surveying when the land was sold.[24] By holding that parts of the seashore became private property as long as their built structures were permanently connected to the ground, the jurists seemingly abolished the fundamental principle of legal unity of real property (*superficies solo cedit*).

Reading from the ruins of ancient resorts and over 130 Roman upper class's maritime villas lining the 80-kilometer-long Bay of Naples, economic potential of building on the seashore was hardly undiscovered.[25] Given that such buildings were used by the upper class not only as summer vacation spots, but also for fish farming, public opinion (of jurists-contemporaries, fishermen, and others alike) understandably condemned this proto-gentrification of sorts.[26] As Marcian's Institutes document, in the second century, fishermen from Formia and Caieta appealed directly to emperor Antoninus Pius for protection.[27] They claimed that villa owners prevented them from throwing nets in front of their coastal properties, which, they argued, violated their basic right to access the sea. Per Marzano, in his rescript to the

18 See the discussion in Muzio Pampaloni, 'Sulla condizione giuridica delle rive del mare in diritto romano e odierno. Contributio alla teoria delle res communes ominium' [1891] 4 Bullettino dell'Istituto di Diritto romano 197, 203 sqq; Carlo Manenti, *Concetto della communio relativamente alle cose private: alle pubbliche ed alle communes omnium* (Dottor L. Vallardi, 1894) 61–78.

19 *Ner.* D. 41,1,14,1.

20 *Pomp.* D. 41,1,30,4; *Pomp.* D. 41,1,50.

21 *Celsus* D. 43,8,3.

22 *Scaev.* D. 43,8,4.

23 *Ulp*. D. 39,1,18.

24 *Paul*. D. 18,1,51: *Paulus libro 21 ad edictum. Litora, quae fundo vendito coniuncta sunt, in modum non computantur, quia nullius sunt, sed iure gentium omnibus vacant: nec viae publicae aut loca religiosa vel sacra. Itaque ut proficiant venditori, caveri solet, ut viae, item litora et loca publica in modum cedant.* "Shores which adjoin the land sold are not included in its area because they belong to no one, being open to all under the law of nations, so also with public roads and sacred or religious places. Hence, for the vendor's protection, a proviso should be made for the inclusion of shores and public places in the overall area." (translated by Alan Watson, *Digest of Justinian, vol.* 2 (University of Pennsylvania Press, 1998) 63).

25 Heather Pringle, 'How Ancient Rome's 1 % Hijacked the Beach' <https://hakaimagazine.com/features/how-ancient-romes-1-hijacked-beach/> accessed 10 September 2022.

26 *Horace*, *Carm*. 3,1,32-35.

27 *Marc*. D. 1,8,4 pr. :*Marcian. 3 inst. Nemo igitur ad litus maris accedere prohibetur piscandi causa, dum tamen villis et aedificiis et monumentis abstineatur, quia non sunt iuris gentium sicut et mare: idque et divus Pius piscatoribus Formianis et Capenatis rescripsit.* "No one, therefore, is prohibited from going on to the seashore to fish, provided he keeps clear of houses, buildings, or monuments, since these are not, as the sea certainly is, subject to the jus gentium. So, it was laid down by the deified Pius in a rescript to the fishermen of Formiae and Capena. But almost all rivers and harbors are public property." (translated by Watson (n 4) 24–25). Additional sources indicate that the restrictions fishermen encountered were a common issue. *Cf. Ulp*. D. 47,10,13,7; *Iust. Inst*. 2,1,2.

fishermen collegium, the emperor, after cautiously assessing conflicting interests, governed that fishermen cannot be refused access to the sea for fishing[28] so long as they stay away from the coastal buildings and monuments, thereby safeguarding the commercial exploitation of coastal property and their control over the fishponds.[29] Frier directly links the meaning of the rescript with what *res communes omnium* morphed into in the late classical period: from 'things in common use' into 'things in common ownership', which in turn lead to the creation of legal mechanisms for their protection.[30] Nevertheless, as Pomponius put it, while ownership was acquirable through construction on a public shore or in the sea, it first required a praetor' decree permitting it.[31] Thus, those building structures on the seashore were protected by an interdict,[32] but forbidden from hindering the common use and harming others.[33] Given the tendency of Roman jurists to pragmatically solve individual cases, it is hardly fathomable that they acted systematically in this regard. However, the late classicists eventually formed specific rules for distinct categories of things, which partly explains much of the apparent contradictions between later sources and the prior ones. What is omitted by the jurists is mention of any positive obligation of the Roman state itself to guard *res communes* from usurpation by individuals. Nevertheless, as the second half of Ulpian's fragment D. 47,10,13,7 suggests, by giving the individual the right to sue for *iniuria*, it was probably implicit in the creation of the 'common good' category of itself within the Justinian's compilation, which will form a foundation for future reception.[34]

After the fall of the Roman Empire, the feudal customary law changed the legal nature of *res communes omnium*. No longer considered common to all, they became a privilege of the emperor in his capacity as the sovereign, forming part of *regalia*.[35] In investigating the subsequent development of the *res communes* doctrine during the reception of Roman law, Perruso

28 *Cf. Ulp.* D. 43,8,2,9.

29 Annalisa Marzano, 'Fishing and Roman Law' in Annalisa Marzano (ed) *Harvesting the Sea: The Exploitation of Marine Resources in the Roman Mediterranean* (online edition, Oxford Studies on the Roman Economy, 2013), 277–283 <https://doi.org/10.1093/acprof:oso/9780199675623.003.0009> accessed 2 December 2022. *Cf.* also Georg Klingenberg, 'Maris proprium ius in D. 47, 10, 14' [2004] 72/1–2 Tijdschrift voor Rechtsgeschiedenis 37, 40sq; Laura D'Amati, 'Brevi riflessioni in tema di res communes omnium e litus maris' in Scritti per Alessandro Corbino, *vol.* 2 (Libellula Edizioni, 2016) 333, 339–41; Maria Casola, 'The Sea Is a Common Good: Universality of Its Use' [2017], 2 Ius Romanum 295, 305–10.

30 Frier (n 6) 646.

31 *Pomp.* D. 41,1,50.

32 "This interdict is available against anyone who builds a foundation in the sea, by a person who may be injured by it; but if no one sustains any damage, he who builds upon the shore, or constructs a foundation in the sea, should be protected." *Cf. Ulp*. D.43,8,2; *Ulp*. D. 43,9,1 pr; *Ulp*. D. 47,10,13,7.

33 For a more detailed overview of sources and potential interpolations, see: Aldo Dell'Oro, 'Le "res communes omnium" dell'elenco di Marciano' [1963] 31 Studi Urbinati 239, 263–73.

34 *Cf.* Frier (n 6) 647. Furthermore, Papinian (D. 41,3,45) did not allow prescription by long-term possession of things that fall into the category of *ius gentium*.

35 Incorporated into *Libri Feudorum*, *Constitutio de Regalibus*, which was issued as an imperial decree by Frederick I Barbarossa at the Diet of Roncaglia (1158) with the support of four Bolognese jurists (Bulgarus, Martinus, Jacobus, Hugo). Referring to Roman law as authority, they enumerated the economically exploitable rights that the emperor claimed for himself. See Heinrich Appelt (ed), *Monumenta Germaniae historica, Diplomata regum et imperatorum Germaniae,* X, II, (Hahnsche Buchhandlung, 1979) 27–29, <https://www.dmgh.de/mgh_dd_f_i_2/index.htm#page/27/mode/1up> accessed 9 January 2023; Percy Thomas Fenn Junior, 'Origins of the Theory of Territorial Waters' [1926] 20/3 The American Journal of International Law 465, 471; Heinz Koeppler, 'Frederick Barbarossa and the Schools of Bologna' [1939] 54/216 The English Historical Review 577; Warren Freedman, 'On the Beach: Ownership and Access to the Sea and the Sea-Shore in South Africa' 2006) 3, <https://www.researchgate.net/publication/42760909_On_the_Beach_Ownership_and_ Access_to_the_Sea_and_the_Sea-Shore_in_South_Africa> accessed 20 December 2022.

found that there was no consensus among medieval jurists as to why common property was established as a separate category under the Institutes. A theory would not appear until the 16th century, when the literary and philosophical ideas that led to Marcian's opinion were recurrently endorsed in the legal analyses based on principles of natural law[36] and ultimately incorporated into contemporary legal systems.[37]

3. CONTEMPORARY CROATIAN LAW

3.1. LEGAL STATUS

As a legacy of successive historical experiences that have contributed to the establishment of a dogmatic basis for the present-day conception of *res communes omnium*, the idea of protecting things that are common to all humanity, including the seashore, is also an essential concern of Croatian legislation. Croatian seashore's legal status as a maritime domain is defined by three distinctive legal sources: the Constitution of the Republic of Croatia (Constitution),[38] the Act on Ownership and other Real Rights (AORR),[39] and the Maritime Domain and Seaports Act (MDSA).[40]

On the highest order of Croatian legal hierarchy, the Constitution in its Article 52 defines, inter alia, the Croatian seashore a good of interest to the state. Additionally, it stipulates that the use and exploitation of such a good, and the compensation of owners of such a good for any restriction that may be imposed, shall be regulated by law.[41] (The regulation is in line with international law. Most notably, it follows the United Nations' 1966 International Covenant on Economic, Social and Cultural Rights, which stipulates that the Covenant impairs in no way the inherent right of all people to enjoy and utilize fully and freely their natural wealth

36 This especially applies to the work of Hugo Grotius, who established the first consistent doctrine of *res communes ominum* based on the achievements of Late Spanish Scholastics (esp. Vázquez), conciliating the Roman legal tradition with the contemporary practical needs of the time. Grotius classified things into four groups: (1) those belonging to all men in common (including the sea, on grounds of its immensity and common service), (2) to some great community of man, (3) to individuals or (4) no one (2,1,16-17). "The sea and the covered shore everyone may use by common right but without doing injury to others" (2,1,21-22). Hugo Grotius, *The jurisprudence of Holland* (Lee R. W. (ed), Clarendon Press, 1926) 67. See also Hugo Grotius, *The Freedom of the Seas, Or, The Right which Belongs to the Dutch to Take Part in the East Indian Trade*, in R. Magoffin and others (eds), *The Lawbook Exchange* (Ltd., New Yersey, 2001) 27–36; Schermaier (n 5) 21.

37 Richard Perruso, 'The Development of the Doctrine of Res Communes in Medieval and Early Modern Europe' (2002) 70 Tijdschrift voor Rechtsgeschiedenis, 69, 80.

38 Ustav Republike Hrvatske [The Constitution of the Republic of Croatia (consolidated text)] (Official Gazette, No. 56/1990, 135/1997, 8/1998, 113/2000, 124/2000, 28/2001, 41/2001, 55/2001, 76/2010, 85/2010, 5/1014). The official English version is available at the Croatian Parliament's website: <https://www.sabor.hr/en/constitution-republic-croatia-consolidated-textw.sabor.hr/en/constitution-republic-croatia-consolidated-text> accessed 18 October 2022.

39 Zakon o vlasništvu i drugim stvarnim pravima [Act on Ownership and other Real rights] (Official Gazette, 91/1996, 68/1998, 137/1999, 22/2000, 73/2000, 129/2000, 114/2001, 79/2006, 141/2006, 146/2008, 38/2009, 153/2009, 143/2012, 152/2014, 81/2015, 94/2017). The unofficial and outdated translation into English is available at the Croatian Judicial Academy's website: <https://pak.hr/cke/propisi,%20zakoni/en/OwnershipandOtherReal Rights/EN.pdf> accessed 19 October 2022.

40 Zakon o pomorskom dobru i morskim lukama [Maritime Domain and Seaports Act] (Official Gazette, 158/2003, 100/2004, 141/2006, 38/2009, 123/2011, 56/2016, 98/2019). Currently there is no official or informal publicly available English translation of this legal text.

41 Branko Smerdel and Smiljko Sokol, *Ustavno pravo* [Constitutional Law] (Narodne novine, 2009) 150–1.

and resources).[42] In other words, while the Croatian Constitution views the seashore as a natural resource belonging to all its citizens that, as such, falls under special protection of the state, it also follows from it that certain restrictions can be imposed on the seashore, provided that public access to it is maintained.[43] In this sense, underlining environmental vulnerability, Smerdel argues that the Constitution itself should contain a provision prohibiting privatization of public goods in a bid to prevent illegal construction on maritime domain (i.e., on the seashore).[44] Into the bargain, the rather broad term 'goods of interest of the Republic of Croatia', as used in the Constitution, encompasses goods in general use, public goods in public use, and a number of other goods that are under the ordinary regime of real law (such as ordinary land and forests).[45] What the Constitution does not establish is the specific form of exploitation allowed for this broad category. Instead, to reiterate, it only acknowledges the seashore as a valuable natural resource under special attention and protection of the state.

Lower on the legal hierarchical order, the AORR in its Article 3(2) stipulates Croatian seashore's most important characteristic: its status as a common good (*res communies omnium*), as shared with air, river and lake water, and the sea. However, in reality, as Jug views it, being that its boundaries are ultimately delimited through a separate regulation, the seashore may well fall into a separate common goods category – that with roads.[46] Intricacies of its legal categorization aside – does Article 3(2) of the AORR properly designate the Croatian seashore as a common good that cannot become private property? As Bravar notes, the syntagm *in the control* (Croatian: *u vlasti*) used in Article 3(2)[47] is not an accepted term for designating ownership, which was likely the intended meaning.[48] Indeed, 'control' does not imply the right of ownership, and is associated to a greater extent with the concept of possession. Apart from this oversight, the AORR is clear in stipulating that the seashore cannot be owned by anyone, thus distinguishing it from state-owned public goods in common use.[49] The status of the seashore (or any other part of nature defined as a common good) can be recorded in the Croatian Land Register, specifically property register (Sheet A), as prescribed by Article 17(4) of the

42 Article 25 of UN General Assembly, International Covenant on Economic, Social and Cultural Rights, 16 December 1966, United Nations, Treaty Series, *vol.* 993, 3, available at: <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-economic-social-and-cultural-rights> accessed 19 October 2022 See the comparison in: Jadranko Crnić, *Vladavina Ustava, Zaštita sloboda i prava* čovjeka *i građanina* [The rule of the Constitution, Protection of the freedom and rights of people and citizens] (Informator, 1994) 174–5.

43 Article 52, paragraph 2 of the Constitution.

44 Branko Smerdel, *Ustavno uređenje europske Hrvatske* [The Constitutional Order of the European Croatia] (Narodne novine, 2020) 370.

45 Tatjana Josipović, 'Stvari u vlasništvu države i drugih osoba javnog prava (javno vlasništvo)' [State ownership and ownership of other public legal entities (public property)] [2001] 22/1 Zbornik Pravnog fakulteta Sveučilišta u Rijeci, 95, 98–9.

46 Jadranko Jug, 'Pravni status općih dobra' [Legal status of common goods] in Nekretnine u pravnom prometu, (Inženjerski biro d.d., 2004) 5, available at: <https://www.vsrh.hr/CustomPages/Static/HRV/Files/JugJ_Pravni-status-opcih-dobara_2004-12.pdf> accessed 20 October 2022.

47 "Those parts of nature which in view of their characteristics cannot be in the control of any natural person or legal entity individually, but are used by all, such as the air and water in rivers, lakes and the sea, as well as the seashore (common things), do not have the capacity of being the subject matter of the right of ownership and other real rights."

48 Aleksandar Bravar, 'Neki aspekti stvarnih prava na pomorskom dobru' [Some Aspects of Iura and Re in the Maritime Domain] (1997) 47(6) Zbornik Pravnog fakulteta u Zagrebu, 705, 709.

49 Jug (n 45) 4. *Cf.* Popovski's elaboration of the absence of rules on the usage of both common and public goods in common use in Croatia. Aleksandra Popovski, 'Zaštita javnog interesa u raspolagnju javnim dobrom u općoj uporabi' [Protection of Public Interest in Disposal of Public Good] (2017) 38(1) Zbornik Pravnog fakulteta Sveučilišta u Rijeci, 275, 283, n. 27.

Land Registration Act.[50] As the seashore cannot be the subject of a right of ownership, no entry would be made into the proprietorship register (Sheet B), unlike with public goods in common use, where either the state or a local government unit is registered as the owner. It is worth adding that, while the seashore is ownerless, it is certainly no *res nullius*, for otherwise anyone could occupy it and make it their property.[51]

The third and final legislative piece regulating the Croatian seashore is the MDSA – a *lex specialis* for the maritime domain that came into force in 2003 and underwent six amendments. Aware of the need for substantial advancements, the Ministry of Maritime Affairs, Transport and Infrastructure proposed the Draft Proposal MDSA[52] that is currently in public consultation[53] and will be discussed in more detail in the following chapter. Article 3(2) of the MDSA in force defines the maritime domain as, inter alia, the part of land that by its nature is intended for general use or has been declared as such, as well as everything that is permanently connected to its surface or underground. While sufficiently evident from the definition that the seashore is a maritime domain, Article 3(3) additionally stipulates that maritime domain includes (inter alia) the seashore.[54] Its legal status is implicitly designated – in direct compatibility with the AORR – as a common good in Article 5 of the MDSA, which stipulates that the right of ownership or other real rights cannot be acquired on maritime domain on any basis. Thus, *de lege lata*, Croatian seashore cannot be owned and no real right can be placed on it.

3.2. LEGAL NATURE-RELATED ISSUES

As shown above, the Croatian seashore is regulated at all legislative levels as a maritime domain. Issues of practical nature, however, arise from the very definition of the seashore, or, more precisely, from where it begins and ends, or, more simply, where ownership is permitted and where it is not. Delimiting the seashore boundaries that separate it from other 'ordinary' immovable is a challenge in its own right. Under Article 4 of the MDSA, "the seashore extends from the middle high-water line of the sea and includes the part of land up to the line reached by largest storm waves, as well as the part of the land that by its nature or purpose serves maritime transport and sea fishing and other uses of the sea, which is at least six meters wide from the line that is horizontally distant from the higher high waters." Per Kundih, such a definition of the seashore, as taken from the repealed 1994 Maritime Code, is neither precise nor scientifically-based, and as such ultimately left to free interpretation upon delimiting sea-

50 Zakon o zemljišnim knjigama [Land Registration Act] (Official Gazette, 63/2019). Currently, no official or unofficial English translation of this legal text is publicly available.

51 Vanja Seršić, 'Integralno upravljanje pomorskim dobrom i decentralizacija' [Integral management of the maritime domain and decentralization] in Ljubica Javor and others (eds), *Nekretnine – 2015* (Novi informator, 2015) 113.

52 Plan normativne aktivnosti za 2022. godinu Vlade RH [Plan of normative activities for the year 2022 of the Government of the Republic of Croatia], Klasa: 022-03/21-07/498, Ur. br.: 50301-21/22-21-2.

53 Available at: <https://esavjetovanja.gov.hr/ECon/MainScreen?entityId=22504> accessed 21 October 2022.

54 See detailed elaboration in: Mario Jelušić, 'Javno vlasništvo u pravnom sustavu Republike Hrvatske' [Public Property in the Legal System of the Republic of Croatia] in Branko Smerdel and Đorđe Gardašević (eds), *Izgradnja demokratskih ustavnopravnih institucija Republike Hrvatske u razvojnoj perspektivi* (Hrvatska udruga za ustavno pravo, 2011) 494.

shore boundaries case-by-case.[55] Additionally, technical aspects of the process are prescribed by a separate regulation,[56] and not by a (parliament-adopted) legislative act. This only exacerbates the situation from a legal point of view, given that a regulation should only serve as a legal instrument for enforcing a (parliament-adopted) legislative act.[57] At any rate, under the said provisions, in Croatia, the seashore is the land lot adjacent to the sea at least six meters wide from the imagined line in the sea, which is determined by the Croatian Hydrographic Institute.

At issue there is the delimiting of the line separating the seashore as common good from an ordinary immovable. Even more problematic is the fact that a significant portion of the Croatian seashore has not been recorded in land register as a common good.[58] This is mainly caused by the absence of a specific provision so requiring.[59] According to the Land Register Act, a common good is to be recorded in the register only where so requested by a person with a legal interest therein.[60] Common goods should be registered in the cadaster, but it neither is a publicly available record, nor does it have the legal power that the Land Register does. Such circumstances certainly do not contribute to the protection of the seashore. Moreover, they clash with the rule of law as such, given the lack of certainty as to which part of land is considered seashore. Contemplating the above in tandem with the incoherence and inconsistency of the law regulating the maritime domain, Nakić proposes that maritime domain be a state-owned public good in common use.[61] Whether such regulation would truly contribute to its protection is moot. At its most, abandoning of the Roman legal tradition would modify its legal status, but would not necessarily contribute to its protection.

Another major issue is the use of the seashore as a maritime domain. Article 6 of the MDSA provides for a general, commercial and special use. General use understands the right of everyone to use the maritime domain (e.g., anyone can use the beach for their own leisure) in agreement with its nature and purpose. Commercial use implies economic activity, regardless of whether through using existing or constructing new buildings. Lastly, special use implies types of use beyond those listed.

A common-use maritime domain can be put to special use or be commercially exploited through concession. As a right to conducting commercial activity, concession is conditioned upon

55 Branko Kundih, *Hrvatsko pomorsko dobro u teoriji i praksi* [Croatian Maritime Doman in Theory and Practice] (Hrvatski hidrografski institut, 2005) 200.

56 Uredba o postupku utvrđivanja granice pomorskog dobra [Regulation on Process of Delimiting of Maritime Domain Boundaries] (Official Gazette, 8/2004). Currently, no official or unofficial English translation of this legal text is publicly available.

57 Kundih (n 53) 215 and 219. See more on the legal basis of such acts in: Nikola Gavella, *Privatno pravo* [Private law] (Narodne novine, 2019) 94–5.

58 Continuous efforts in establishing a maritime cadaster as an arm of the existing cadaster have been pursued but unfortunately not realized to date. Concerning the challenges in this regard, see Mirjana Kovačić et al., 'Determining the Maritime Domain Boundaries and Maritime Domain Cadastre-Issues and dilemmas' (2022) 62(1) Pomorski zbornik, 125.

59 Olga Jelčić, 'Evidencija pomorskog dobra u katastru i zemljišnim knjigama' [Registration of maritime domain in the cadaster and land registers] April 2016, available at: <http://www.pomorsko-dobro.com/fokus-jelcic-travanj-2016.html> accessed 20 October 2022.

60 Article 17(4) of the Land Registration Act.

61 Jakob Nakić, 'Pomorsko dobro – opće ili javno dobro?' [Maritime domain – common good or public property?] (2016) 53(3) Zbornik radova Pravnog fakulteta u Splitu, 797, 826.

special approval of a competent authority.[62] Importantly, a concession can be granted only where maritime domain boundaries have been delimited and as such recorded in the Land Register. However, although a prerequisite for a concession permit, such registration is not mandatory, as noted earlier. Apart from concession, Croatian law also provides for concessionary approval. While permitting commercial exploitation of the maritime domain, concession approvals (unlike concessions) do not exclude or limit its general use.[63] Since concession approvals are far more straightforward to obtain, with the help of some rule bending, they are frequently issued in lieu of concessions, even where a given economic activity excludes the general use of the seashore.[64] Procedure-wise, concession of maritime domain is prescribed by the MDSA and the Regulation on the Procedure Granting a Concession of Maritime Domain.[65] The latter is government-adopted, and thus yet another legal source of a rank lower than parliament-adopted acts.

The MDSA's provisions on concession of maritime domain oppose (or affect) to a certain degree the seashore's legal status as a common good. Under Article 20 of the MDSA, concession of maritime domain can be granted for a duration of 5 to 99 years. But should there even exist a possibility of granting a concession exceeding 50 years? After all, it is an excessively long time for a common good to be excluded from common use, even if most concessions do not last as long or completely exclude it from public use. Well worth considering in that regard is also the matter of a given concessionaire's death. Namely, were the successors to lawfully take place of a deceased concessionaire or if the concession lawfully transferred to a third party (via a sub-concession or otherwise), it would arguably (and, in effect, unlawfully) create on the maritime domain a right comparable to a real right. In other words, given that concession provides the right to exclude a maritime domain from the common good status, in practice it can mean that it can be inherited and/or continued. To blame are the discrepancies between relevant regulations that create a gap between theory and practice.

A further and perhaps the most problematic issue of maritime domain exploitation is the possibility of pledging a concession, which pledging is only possible where the maritime domain has been entered in the administrative body-managed concessions register. As such entry is constitutive, so the pledge creditor (where he meets the applicable requirements) is entitled to use the concession as if he himself were the concessionaire.[66] Moreover, the pledge creditor can transfer the concession to a third party (where the third party fulfills the prerequisites required from the original concessionaire), which the concessionaire cannot prevent. The MDSA prescribes in detail the rights of the pledge creditor, such as those in the

62 Zakon o koncesijama [Concessions Act] (Official Gazette 69/2017, 107/2020); Ivo Borković, *Upravno pravo* [Administrative law] (Official Gazette, 2002) 26; Frane Staničić, and Maja Bogović, 'Koncesije na pomorskom dobru – odnos zakona o koncesijama i zakona o pomorskom dobru i morskim lukama' [Concessions on the maritime domain – the relation of the Concessions act and the Maritime domain and seaport act] (2017) 33(1) Pravni vjesnik, 73, 77.

63 Silvio Čović, 'Sporni aspekti dodjele koncesijskih odobrenja na pomorskom dobru u upravnosudskoj praksi' [Disputable aspects of granting concessional permits in maritime demesne in administrative court practice] (2020) 57(1) Zbornik Pravnog fakulteta u Splitu, 211, 216.

64 Snježana Frković, 'Određivanje pomorskog dobra' [Determination of maritime domain], presentation from the 28th forum of real estate business, Croatian Chamber of Commerce, Zagreb, 2017, 78–9, available at: <https://www.hgk.hr/documents/predavanje-frkovic5a13ed4b58c94.pdf> accessed 20 October 2022.

65 Uredba o postupku davanja koncesije na pomorskom dobru [Regulation on the Procedure Granting a Concession of Maritime Domain] (Official Gazette, No. 23/2004).

66 Article 34 of the MDSA.

contract conclusion and debt settlement stage (i.e., debt maturity).[67] Arguing the concept as market-oriented, Seršić, listing several examples of real-life pledges on concessions, concludes that the process of their establishment should be simplified while preserving the maritime domain as a common good.[68] From the perspective of the exclusion from the common use of a maritime domain as a common good, in certain cases, a pledged concession can effect the concession being conducted by a third party that originally was not a party to the concession contract. Croatian regulations seem to neglect the fact that the common good under concession should not be the object of any real right for the simple reason that a concession as an exclusion from common use can be long-standing, transferred, inherited, and pledged, which has serious implications for its common good status.

3.3. ISSUES ARISING FROM 'NON-OWNABILITY'

Another dogmatic problem concerns the consequences of not registering the seashore as a maritime domain. Given that the seashore is accorded maritime domain status *ex lege,* it is considered a common good irrespective of any formal declaration. The procedure of its registration in the Land Register (or any other register) is therefore only of a declarative nature.[69] Even though such a regime formally excludes the possibility of acquiring ownership of a common good, it is susceptible to a maelstrom of issues, such as those arising from rights acquired prior to such registration (made possible by regulation and bureaucratic inertia). Such ambience is ultimately susceptible to abuse, as plenty of cases bear witness. In one case of deft exploitation of this loophole, a commercial building (accommodation rental) was legally constructed on land that classified – but was not formally registered – as maritime domain.[70] Similarly, tourist and resort complexes proudly advertise "private beaches" that cannot exist without preventing the common use of a maritime domain.[71]

Legalization of illegal buildings brings a practical issue. This administrative procedure, as regulated by the Act on Procedures Regarding Illegal Buildings,[72] provided for retrospective

67 Tatjana Josipović, 'Posebna pravna uređenja koncesija na nekretninama' [Special legal provisions of the concession of immovables] in Olga Jelčić and others (eds), *Nekretnine kao objekti imovinskih prava* (Narodne novine, 2004) 103.

68 Vanja Seršić, 'Založno pravo na koncesijama na pomorskom dobru' [The Pledge on the maritime domain concessions], in Tradicionalno XXXII. Savjetovanje aktualnosti hrvatskog zakonodavstva i pravne prakse. Godišnjak 24 (Organizator, 2017) 510–5.

69 Jadranko Jug, 'Posebno stvarnopravno uređenje za more, morsku obalu i otoke' [Special legal regulation of the sea, sea shore and islands], in Nikola Gavella and others (eds), *Stvarno pravo 3 – posebna pravna uređenja*, (Narodne novine, 2011) 257; Frković (n 62) 78.

70 Ivica Neveščanin, 'Dvokatnica 'posađena' na morsku crtu: Vjerovali ili ne, ova kuća ima baš sve dozvole' [Two-story house "planted" on the sea line: Believe it or not, this house has all permits], newspaper article from 2 August 2021, available at: <https://www.jutarnji.hr/vijesti/hrvatska/dvokatnica-posadena-na-morsku-crtu-vjerovali-ili-ne-ova-kuca-ima-bas-sve-dozvole-15092299> accessed 20 October 2022.

71 Večernji.hr, 'Devastacija obale: Uređuju privatnu plažu ispred vile na pet katova' [Coastal devastation: Privatizing beach in front of a five-story villa], newspaper article from 21 July 2020, available at: <https://www.vecernji.hr/vijesti/devastacija-obale-ureduju-privatnu-plazu-ispred-vile-na-pet-katova-1418731> accessed 20 October 2022.

72 Zakon o postupanju s nezakonito izgrađenim zgradama [Act on Procedures regarding Illegally Constructed Buildings], (Official Gazette, 86/2012, 143/2013, 65/2017, 14/2019). Currently, no official or unofficial English translation of this legal text is publicly available.

obtaining for illegal buildings a building permit until 30 June 2018. Where successful, it would result in legalizing and recording such built structures in the cadaster and the land register. Inter alia, it required that such buildings not be contrary to respective spatial plans and the public interest. This automatically excluded, e.g., illegal buildings that were built on maritime domain. However, a portion of the maritime domain was not registered in any register. In 2012, the Ministry of Physical Planning and Construction entrusted competent administrative bodies with assessing whether illegal buildings were located on a maritime domain and the possibility for its legalization.[73] In effect, the margin of error alone implied that illegal construction on a maritime domain could have been (erroneously) legalized, in direct opposition to the law. While it may have legalized illegal buildings, and did so without affecting ownership and other real rights, the administrative procedure nevertheless gave rise to the unwanted phenomena of illegal construction on the seashore as a maritime domain. It should, however, be noted that the Supreme Administrative Court of the Republic of Croatia took the view that such buildings cannot be legalized, regardless of whether the immovable is formally registered (in registers) as a maritime domain.[74]

The most complex issue relating to 'non-ownability' of maritime domain falls outside the scope of this paper, but is worth a tangential reference. Namely, on the surface, it concerns the buildings on maritime domain that were constructed contrary to the traditional principle of legal unity prior to the establishment of the Republic of Croatia.[75] Relevant for this research is the part in which such buildings created real rights on maritime domain. Specifics aside, it creates challenges that undermine the very concept of common goods and the concept of legal unity of real property (*superficies cedit solo*) (which challenges are deserving of separate research).[76] Can current Croatian legislation properly rise to the challenge of resolving the legal status of such buildings? The sheer brevity and generality of the transitional and final provisions of the MDSA suggest otherwise. Is the current legislation able to define the legal status of the later buildings on the Croatian seashore? Per Article 3(4) of the AORR, buildings constructed on a common good do not form part of a common good where they were built under a concession agreement, and thus represent a distinct immovable for the duration of the concession. However, under Article 5(1) of the MDSA, buildings on maritime domain permanently connected to it are considered part of it as its adjunct. Article 5(2) further stipulates that the right of ownership and other real rights cannot be acquired on a maritime domain on any basis. In brief, per the MDSA, whatever is built on a maritime domain is its integral

73 Mišljenje Ministarstva graditeljstva i prostornog uređenja [Opinion of Ministry of Physical Planning and Construction on legalization of building on maritime domain], Klasa: 360-01/12-02/411, Ur. br. 531-01312-2, Zagreb, 13 September 2012.

74 Presuda Visokog upravnog suda Republike Hrvatske [High Administrative Court of the Republic of Croatia sentence] Usž-372/16-2, 2 April 2016. See more in: Frković (n 62) 81.

75 The status of such buildings is regulated by the transitional and final provisions of the MDSA. In particular, under its Article 118, registry of ownership or other real rights on buildings on maritime domain is invalid where a legally valid proof of ownership cannot be presented. *Argumentum a contrario*, if a person could present such proof (e.g., a sales contract valid under the then regulations), he or she could legally hold a real right to the common good.

76 For comparison with other challenging situations arising from non-compliance with the principles of *superficies cedit solo*, see Nikol Žiha, 'Croatian Property Law Between Tradition And Transition: A Revival of the Roman Principle Superficies Solo Cedit' in *Željka* Primorac and others (eds), *Economic and Social Development.16th International Scientific Conference on Economic and Social Development – "The Legal Challenges of Modern World", Book of Proceedings* (Split, 2016) 73; Nikol Žiha and Marko Sukačić, 'Legal inconsistency of Baranja wine cellar 'gator' with the principle of superficies solo cedit', in Mirna Leko Šimić and Boris Crnković (eds), *8th International Scientific Symposium "Economy of eastern Croatia – vision and growth"* (J. J. Strossmayer University of Osijek, 2019) 1284.

part. Under the AORR, however, a concession creates a separate immovable on the maritime domain, i.e., buildings constructed on such a maritime domain under a concession agreement form part of a notional immovable that is notionally not connected to the ground, i.e., to the maritime domain. The two provisions, while seemingly complementary, produce very different legal effects. Which of them applies? Can such two provisions properly regulate any existing or future buildings, especially those predating the establishment of the Republic of Croatia?

Furthermore, as Article 9(4) of the AORR clarifies, buildings permanently connected to the immovable do not form part of the land if they are legally separate from it by way of a real right that authorizes its holder to have such buildings in their ownership on another person's immovable. This provision concerns the right to build (*superficies* in the Roman legal tradition)– a limited real right on another person's immovable authorizing its holder to have on or below the immovable their own building (which the owner of the immovable being built on cannot oppose).[77] Such a real right is equivalent to the immovable itself, meaning that it creates a separate (factually) non-existing immovable on another immovable. Pertinent the most to this research is the closing of the provision, since it prescribes that the same shall apply to permanent buildings and/or structures that are legally separate from the immovable or from the common good by way of a lawful concession that authorizes its holder to own such built or other structure on it. This provision creates serious implications for the legal status of a common good and its inability to be the subject of ownership or other real rights. If under a concession such special, fictional immovable can be built on the seashore as a common good (and the concession thus virtually becoming a right to build), it follows that there are certain real rights that can exist on the seashore as a common good. However, such right will not exist on the common good itself, but rather on the structures built on it under a concession. Attaching to this reasoning the fact that a concession is transferrable, semi-inheritable and pledgable, it follows that – contrary to the *res communes omnium* doctrine – real rights can in certain circumstances exist on a common good. In other words, owing to the various exemptions from its status as a non-ownable, Croatian seashore as a common good seemingly can be the object of certain quasi-real rights that compare to the limited real right to build on another's land.

4. IN ANTICIPATION OF NEW REGULATION

As of writing this paper, the rather comprehensive Draft Proposal MDSA is in public consultation.[78] Proposed by the Ministry of Sea, Transport and Infrastructure, the Draft Proposal MDSA aims to define more precisely and better regulate certain issues in the application of the current MDSA, with a view to modernizing the maritime domain management approach and harmonizing it with the Concessions Act and the Misdemeanors Act.[79] Importantly, the

77 As defined under Article 280 of the AORR. See more in: Nikola Gavella, 'Pravo građenja' [The right to build] in Nikola Gavella and others (eds), *Stvarno pravo 2* (Narodne novine, 2007) 80–81; Petar Simonetti, 'Pravo građenja – trajanje i prestanak' [The right to build – its duration and cessation] [2011] 32/1 Zbornik Pravnog fakulteta Sveučilišta u Rijeci, 1, 5–6; Petar Simonetti, 'Odlike prava građenja i superficijarnog prava' [The right to build and superficies in comparative law] [2013] 34/1 Zbornik Pravnog fakulteta Sveučilišta u Rijeci, 3, 6–7.

78 <https://esavjetovanja.gov.hr/ECon/MainScreen?entityId=22504> accessed 21 November 2022.

79 Prekršajni zakon [Misdemeanor Act] (Official Gazette, 107/2007, 39/2013 157/2013, 110/2015, 70/2017, 118/2018).

Draft Proposal MDSA is inclined (more than its current counterpart) toward annulling arbitrary exemption and limitation of the common use of maritime domain. While such values are already protected under the current law,[80] respective provisions are often violated in practice (for different reasons and frequent negligence). All hopes therefore lie with the Draft Proposal MDSA and a more consistent application in the future.

As expected, the fiercest debate surrounds the provisions on access to and commercial exploitation of beaches, which is currently outside the present MDSA's scope and marginally regulated by subordinate legislation. The Draft Proposal MDSA purportedly aims to reconcile the interests of the public with those of entrepreneurs, but without deviating from the legal status of the maritime domain as a common good. For instance, it would preclude resorts, hotels and campsites from closing off beaches that form part of their 'functional economic unit', but also grant them exclusive use of parts of the beaches for their commercial activity by means of an allocation system.[81] Considering tourism's great consequence for local communities and the state budget, such an allocation system would require near-microscopic monitoring and sanctioning. After numerous objections to defining beaches as a common good in relation to tourist facilities and, in effect, exempting beaches from the maritime domain and putting them in service of said facilities, the Ministry is considering changing the controversial syntagm "hotel, camp and resort beach". While such terminological maneuvers are more than welcome, they are marginal matter compared to the consequences of the potential "privatization" of beaches by influential concessionaires.

Legal security can only be secured by aligning the realities "in the field" with the land register data. This would require maximum transparency, one that could be provided by way of a central database of the maritime domain. Such a database would provide public access to data on maritime domain boundaries, concessions, special use, permits, temporary commercial use – provided that it is adequately maintained.

Furthermore, proper protection of maritime domain presupposes proper boundary delimitation and the registry of its status as such in the land register. Given that the maritime domain as *res communes omnium* exists *ipso iure*, the act of its status registry is merely declaratory.[82] Regardless of the act, however, under the AORR, a right of ownership cannot exist on maritime domain. Expropriation of an *extra commercium* immovable is therefore impossible, but the supposed owners of such real estate, who can prove a valid legal basis for its acquisition, have the right to compensation as if expropriation had been carried out. The above refers particularly to artificially created land that is not recorded as such in the cadaster or the land register, but instead as an artificial shoreline. Under the Draft Proposal MDSA, those maritime domain boundaries that were delimited before entry into force of the future MDSA by a competent body pursuant to the then applicable regulations would remain in force.[83]

80 *E.g.* A person who claims ownership or other real right, as well as rights deriving from a lease or a rental agreement on maritime domain, is not considered to be acting in good faith and cannot rely on the protection of legitimate expectation of veracity and integrity of the land registry (Article 4(3) and 4(4) of the Draft Proposal MDSA). Legal transactions concluded contrary to this provision are null and void.

81 Thus, per Article 86(2) and 86(3) of the Draft Proposal MDSA, beaches will remain available to the public as provided for under the proposed allocation system: concessionaires would thus be allowed to use 70% of the beach land and 50% of the beach sea in an uninhabited area, and 50% of the beach land and 30% of the beach sea in an inhabited area.

82 Article 8(2) of the Draft Proposal MDSA.

83 Article 220(1) Draft Proposal MDSA.

Conversely, where the status of an immovable within a maritime domain's boundaries was not clearly entered in the land register as a common good, the competent administrative department of the respective regional self-government unit would, through the competent state's attorney, initiate deletion of the existing registry and simultaneously have the maritime domain entered as such in the land register.[84] For unregistered maritime domain, a four year-window has been provided, to allow for geodesic surveying and registry.[85] Where land allotment or geodesic survey (with a delimited maritime domain boundary) would be drawn up to the entry into force of the future MDSA, the maritime domain would be entered in the land register accordingly and the former registered owners be entitled to compensation for expropriation.[86]

With a view to better protecting the maritime domain and complying with regulations, the Draft Proposal MDSA envisages a significant strengthening of maritime domain inspection, inter alia, through relaying it to local self-government units, i.e., municipal services and port inspectors. Additionally, the Draft Proposal MDSA introduces maritime domain inspectors in charge of supervising and ensuring compliance with the future MDSA over the entire Croatian maritime domain (both in general and special use) without restrictions. Where they establish a violation, maritime domain inspectors would be required to report it to the state's attorney and, pending action, prohibit maritime domain use with immediate effect. The Draft Proposal MDSA also increases violation penalties and fines. As the heavily-commented public consultation of the Draft Proposal MDSA indicate, local associations and residents are doubtful and distrustful of its successful implementation. Indeed, considering the indentedness of the Croatian coastline and the sheer number of islands, local self-governments likely lack the resources or knowledge required for proper implementation of the new legislation. While the planned training that would bridge such shortcomings is a commendable initiative, the scarcity of municipal services inspectors directs to exploring cooperation opportunities with other competent institutions.

With the aforementioned amendments to the law, the legislator aims to put an end to illegal construction on maritime domain (that is more often than not tacitly facilitated by the local self-government). The Draft Proposal MDSA seeks to create more potent mechanisms (e.g. for taking various legal action) geared towards protecting the maritime domain. As one such mechanism, Article 178(1) of the Draft Proposal MDSA provides for inspection and potential administrative order of full rehabilitation and restoration of a maritime domain. Supported by an evidentiary procedure and a participating court expert, the measure seems relatively straightforward in theory. The long history of maritime domain alteration will show that the determining of the original condition is not a simple undertaking.

Not to be disregarded is also the incredible level of tolerance that the legislator and the authorities traditionally have for illegal builders. Instead of stipulating removal of illegal buildings, Article 219 of the Draft Proposal MDSA (concerning legalization of illegal buildings) provides for their legalization by means of amending spatial plans. In reality, such a choice is cogent with the fact that the agents of maritime domain devastation are often the local authorities themselves or investors in cabal with them. The scale of coastal devastation and the number of such cases do not offer hope for resolution in the foreseeable future.

84 Article 220(2) Draft Proposal MDSA.

85 Article 221(2) Draft Proposal MDSA.

86 Article 222(1) Draft Proposal MDSA.

5. CONCLUSION

The originally Roman philosophical concept under which the seashore was for the common use of all was given the cloak of legal authority by a reference in an opinion attributed to Marcian. Through its incorporation in the *Corpus Iuris Civilis*, it took roots in continental legal systems. That the obligation to obtain a permit from competent magistrates was contemplated by Roman lawyers attests to the near-inherent interest in regulating private construction on the seashore. While the seashore could be used freely provided that the same right was not limited to the rest of the community, the available legal sources and archaeological remains witness that in practice the free use of the seashore was not guaranteed to everyone, but rather frequently reserved for the privileged. This Roman legal principle lives on in the current Croatian legislation, according to which everyone has the right, under equal conditions, to use the maritime domain in agreement with its nature and purpose, except where otherwise prescribed by the law. However, it is frequently "prescribed otherwise", creating a long list of exemptions that, in the long run, can lead to privatization of a common good.

De lege lata, despite the new interventions of the legislator in the form of the Draft Proposal MDSA, Croatian law (specifically, the Concessions Act) still permits a complete exclusion of maritime domain from common use by means of concession agreements exceeding 50 years. As a limited real right to the common good that creates a separate, notional real estate akin to the limited real right to build on another's land, a concession is inheritable in the event of the concession holder's death. Furthermore, given that concession as a right itself is pledgable, the rights deriving from the concession agreement may under certain circumstances transfer to the pledge creditor or be transferred by the pledge creditor to a third party, conditioned upon the consent of the concession grantor. The grantor can refuse to do so only where the person the concession is being transferred upon does not meet the prescribed requirements. Since these exceptions are in conflict with Article 3(2) of the AORR (which stipulates that common goods cannot be the subject of the right of ownership or other real rights), it may be argued that the exclusion of a common good from the concept of 'non-ownability' should be an exemption itself, with strict limitations and safeguards. Given that it provides for exclusions of maritime domain from the legal regime in place, the possibility of transferring a concession and establishing of a pledge on it as a right that creates a new notional real estate on a common good, it can be argued that the Croatian legal system has to a certain extent departed from the Roman legal tradition, alienated its legal nature and *de facto* created a new 'quasi-real right' on the common good, contrary to the original aim of the AORR. Neither the existing regulation nor the Draft Proposal MDSA obey the fact that the seashore is *res extra commercium*. Instead, existing and future regulation leave plenty of elbowroom for bypassing the traditional 'non-ownability' principle.

Although the Draft Proposal MDSA provides for control mechanisms and encourages active involvement of the local population in decision-making, especially in regard to spatial planning and the way tourism is developed in their communities, achieving it will certainly be a slow process requiring a change in the mentality, as well as giving preference to common interest before a fast profit. Croatia has long been under the curse of the gaping chasm between law in theory and law in practice. That one third of Croatian territory classifies as maritime domain in common use urges a raising of awareness in the population of the importance of their contribution – not only to their environment, but also to nature and the country as a whole.

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NEMIRNE VODE: HRVATSKA MORSKA OBALA KAO *RES EXTRA COMMERCIUM IN COMMERCIO*

Sažetak

Rad je usmjeren na analizu iznimne pravne naravi hrvatske morske obale kao općeg dobra te posljedičnih izazova njezine komercijalne uporabe. Od antičkog rimskog prava morska je obala smatrana stvarju u općoj uporabi svih ljudi prema načelima prirodnog prava (res communes omnium). Rimski pravnik Marcijan u navedenu je kategoriju ubrojio zrak, tekuću vodu, more te morsku obalu. Danas, sukladno doktrini rimskog prava, morska je obala definirana kao pomorsko dobro, odnosno opće dobro od interesa za Republiku Hrvatsku te uživa njezinu posebnu zaštitu. Iako pomorsko dobro ne može biti predmetom vlasništva ili drugih stvarnih prava, zbog postojanja brojnih pravnih iznimaka, njezina narav kao općeg dobra – dvojbena je.

Kroz raščlambu pozitivno-pravnog statusa morske obale, posebice regulirane Zakonom o vlasništvu i drugim stvarnim pravima, Zakonom o pomorskom dobru i morskim lukama te Zakonom o koncesijama, ovaj će rad ukazati kako hrvatski pravni sustav omogućava ekskluzivna prava na ekonomsko iskorištavanje pomorskog dobra, odnosno njegovo isključenje iz opće uporabe na razdoblje do 99 godina te pruža mogućnost zalaganja ili prijenosa koncesije na pomorskom dobru na pravnog sljednika. Slijedom navedenog, u radu se utvrđuje je li se hrvatski pravni sustav udaljio od rimske pravne tradicije vezano za pristup prema pomorskom dobru kao općem dobru te je li stvorio novo kvazistvarno pravo na pomorskom dobru.

Ključne riječi: *opće dobro, koncesija, pomorsko dobro,* res extra commercium*, morska obala*

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