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Éditorial

Jean-François Gerkens

Voici déjà le troisième volume de la RIDA dans son nouvel emballage… auquel nous espérons que les lecteurs se sont désormais habitués. Après un numéro 62 (en hommage à Jacques Henri Michel) finalement paru en janvier 2017, cette année pourrait bien devenir l'année des trois RIDA, dès lors que d'après nos prévisions (faut-il écrire espoirs ?), le numéro 64 devrait encore paraître avant la fin de l'année 2017.

Le présent numéro comporte les rubriques habituelles, avec un retour d'une chronique de la SIHDA plus complète que dans le numéro précédent, incluant à nouveau les résumés de la plupart des conférences prononcées. Comme le lecteur peut l'imaginer, la différence vient ici en partie de la discipline des conférenciers et des organisateurs de la SIHDA. J'ai dès lors fourni une traduction en français de tous les résumés dont je disposais.

Rendez-vous est maintenant donné pour la 71e session de la SIHDA à Bologne et Ravenne, dont le thème central sera : La liberté et les interdictions dans les droits de l'Antiquité. Elle se tiendra du 12 au 16 septembre 2017. Dans l'espoir de vous y rencontrer nombreux, je souhaite à chacun une bonne lecture !

Chaudfontaine, le 15 juin 2017
Jean-François Gerkens

Precautions against interventions creating environmental effects in Roman Law and its reflection of Turkish Law*

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Université de Kadir Has

1. Concept of "*immissio*" under Roman Law

It is estimated that intervention creating an environmental impact (immission), which is one of the current issues nowadays, will be also considered in the future as one of the important environmental problems.

Immission is the impact on living creatures of foreign matter entering the ecosystem's atmosphere or the body of the living creatures through the air. It is the pollution of the air and water in the ecosystem. Another meaning of immission used in the literature is the impact on human beings, animals, plants and structures of an odor, heat, radiation and the like, with the pollution of the air, the water and the soil. Emission is a term used to define gas and particles released in the air or emitted from various sources[1].

The term "Immission" is sometimes used by researchers in the meaning of "environmental pollution" or "environmental impact", and sometimes as "environmental exposure". The term, immission, is used in German as: *immissionen, immission, immissionsschutz* (immission protection); in English as: immission; in Italian as: *immissione*; in French as: *immission*. Interventions creating an environmental impact have been studied under French Law by certain authors as "*troubles de voisinage*" (neighborhood disputes), and by other authors as "*les obligations de voisinage*" (neighborhood obligations)[2]. Under German Law, interventions creating an environmental impact are dealt with in regulations under private law as well as public law. Within the rule of Private Law, they are dealt with in German Civil

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* This paper was presented at the *Société internationale Fernand de Visscher pour l'Histoire des Droits de l'Antiquité, 67e Session (SIHDA) (Le droit romain comme base des droits modernes)* on 10–15 Sept. 2013 in Salzburg.

1. N. Çepel, *Çevre Koruma ve Ekoloji Terimleri Sözlüğü*, İstanbul, 1995, p. 77, 102.

2. J. Carbonnier, *Droit civil, t. II. Les Biens et les obligations*, Paris, 1962, p. 188.

Code (*BGB*), Article 906; and under Public Law in *Bundes-Immissionsschutzgesetz*, (*BlmSchG*), Federal Immission Control Act[3].

Immission is derived from the word "*immittere*" in Latin. Its meaning within the framework of the neighborhood relationship is the intervention leading to harmful effects on neighboring premises, and formed perforce during the exploitation or use of premises and which is intangible and invisible[4].

Although the term immission is an environmental term nowadays, it is frequently used in Latin texts as *immissio*, *immittō, immittere*, or *immisi.* (I shall use the term "immission" for environmental impact or interventions creating an environmental impact and the term "emission" for matters polluting the environment. As in the *Digesta* texts, no distinction is made technically between the terms emission and immission. I shall use the terms "emission" and/or "emit" corresponding in English to the concepts of *immissum*, or *immittere* in Latin texts).

Ancient Romans attached importance to interventions creating an environmental impact (*immissio)* and included rules related to this issue in legal means not only on neighborhood relationships but also on sewerage[5], rivers[6] and sacred places. These legal means aim to protect sacred places, health and rivers. Although there are a few rules related to the limitation of property rights in the Law of the Twelve Tables, interventions leading to an environmental impact were not among the neighborhood law issues at that time. This situation is considered as ordinary when that period's lifestyle and social structure are taken into account[7].

In the Roman period, the term *immissio* was used in a broader sense than that of today. The word "*immittere*" refers to the diffusion of something into another thing; namely, a structure in premises owned by someone, must have an impact on a neighboring premises. The situation is this in which a matter that is solid or not, exceeds the limits. With respect to the subject, *mittere* was used in the meaning of a thing to be sent, or dispatched. Thus, the terms *immittere* or *immissio* are used with respect to smoke and running water that will interfuse a public area, the neighbor's private property, sacred places, or rivers. When it is used in the sense of disperse

3. İ,S. Çörtoğlu, *Komşuluk Hukukunda Taşınmaz Mülkiyetinin Kullanılmasının Çevreye Etki ve Sonuçları*, Ankara, 1982, p. 40–50; http://www.bmub.bund.de/fileadmin/bmu-import/files/english/pdf/application/pdf/bimschg_en_bf.pdf (22.11.2015).

4. İ. Ulusan, *Medeni Hukukta Fedakarlığın Denkleştirilmesi İlkesi ve Uygulama Alanı*, İstanbul, 2012, p. 153, fn. 1; H. Wiethaup, *Schutz vor Luftverunreinigungen, Geräuschen und Erschüttenrungen*, Berlin, 1970, p. 25.

5. *Interdictum de cloacis privatis*, see: D.43.23.1 *pr*; D.43.23.1.1–2; D.43.23.1.4–5; D 43.23.1.10–14; D.43.23.1.7; D.43.23.1.9; D.43.23.2.

6. *Interdictum de fluminibus ne quid in flumine publico ripave eius fiat, quo peius navigetur*, D.43.12.

7. S.S. Ruiz, *Die rechtlichen Regelungen der Immissionenim römischen Recht und in ausgewählten europäischen Rechtsordnungen*, Göttingen, 2000, p. 13; Çörtoğlu, *o.c.* (n. 3), p. 31; B. Erdoğmuş, *Roma Eşya Hukuku*, İstanbul, 2015, p. 53.

or spread, it refers to physical objects or matter spreading from one place to the other[8]. And also the term *immissio* is sometimes used as *inmissio*[9].

For interventions creating an environmental impact (*immissio)*, which the Roman law tries to resolve with concrete cases, attempts were also made under common law to determine some general principles. According to the doctrine called the "*inmissio* approach" and represented by Spagenberg, a person living in a real estate could use the property appropriately, if it was not to expose harm or effect to its neighbor. Protection against interventions creating an environmental impact, to be provided under private law, could be realized only in material and direct interventions such as smoke, dust, or soot. However, in this approach, the content of the damage, or rather the meaning of the term *inmissio*, was limited to the enumerated physical conditions and events. It was argued that for interventions creating discomfort to people, such as noise and similar interventions, the protection will be necessary under public law[10].

In the "*Eingriff* approach" put forth by Jhering, the *inmissio* concept was interpreted as covering the other troubles, so as to cover *eingriff* (influx). In order to decide whether the intervention is tolerable or not, not only the nature of the intervention, but its perceivable impact on the premises and the person must be considered. Jhering, who follows the classical distinction of direct and indirect exposure, wanted to prohibit all direct interventions and troubles, disturbances/discomforts arising from neighboring premises. According to this approach, with respect to indirect effects starting in the neighboring property and spreading around, effects causing damage to goods and effects causing harm to persons regarding general use, were definitely distinguished from one another. In conclusion, indirect effects arising from cases other than the usual use of the property should also be prohibited. Because such cases caused harm to the property or were detrimental to health, contrary to the tolerance under ordinary conditions. With the effect of this view, the concept of immission, accepting only interventions based on physical foundations, started covering interventions such as noise, odor, and vibration[11].

According to the "social necessity approach" put forth by Bonfante, the theory of indirect effects as much as direct effects was developed, and it was argued that effects arising from the extraordinary use of the land and all kinds of usage exceeding

8. P. Bonfante, *Criterio Fondamentale dei rapporti di vicinanza*, *Scritti Giuridici Varii II*, Torino, 1918, p. 807; R. Fischer, *Umweltschützende Bestimmungen im Römischen Recht*, Augsburg, 1996, p. 118.

9. D.47.10.44; D.47.7.6.2; D.39.1.5.10; D.17.2.52.13; D.8.5.8.1.

10. E. Spangenberg, "Einige Bemerkungen über das Nachbarrecht", *Archiv für die Civilistische Praxis* (1826), p. 266. A. Masferrer, "Relations Between Neighbours in Spanish Law (1850–2000)", in J. Gordley (ed.), *The Development of Liability between Neighbours*, *Comparative Studies in the Development on the Law of Torts in Europe*, Cambridge, 2010, p. 187.

11. R. Evangelio Llorca, "El límite entre las inmisiones permitidas y las prohibidas", *Criterios históricos de fijación en Anuario de Derecho Civil* 53 (2000), p. 855–921. Masferrer, *o.c.* (n. 10), p. 187–188; Çörtoğlu, *o.c.* (n. 3), p. 33–34; Ruiz, *o.c.* (n. 7), p. 28.

the requirements of ordinary life should be prohibited. According to this theory, to prohibit actions creating all kinds of disturbance spreading from one person's real estate to another, there was the possibility to bring an *actio negatoria.* For the compensation of the loss caused under this case, there was no need to prove *culpa* (the defect). With this view, Bonfante tried to balance the public interest and environmental impact, with the social necessity conception[12].

Romans accepted that there are different forms of emissions from neighboring land. At the beginning, the boundary between two lands has been determined so the two lands were separated. The concept of *immitere in alienum* corresponded to an emission and referred to the transfer of matter or objects with physical properties from one land to the other. Differing from the expression *immitere in alienum, facere in alieno* referred to the action taken by a person in order to intervene on a neighboring land. In examples provided in *Digesta* texts (D. 43.24.22.1; D.43.24.9.3; D.43.24.7.6; D. 43.24.7.7; D. 43.24.2 *pr*; D.43.24.22.3) if a person goes on to land owned by another person, carries out an agricultural activity on this land (*opus*), and leaves something as its own on this land causing damage; the exposure of this property to emission would be realized as *facere in alieno* and not *immitere in alienum.* Because in *immittere in alienum*, the neighborhood limit is exceeded as a consequence of the behavior of the property owner and the neighboring property is affected. For the *facere in alieno* to occur, a person must cause damage on the neighboring property, personally[13].

In Roman Law, immission generates legal consequences, according to cases of direct or indirect exposure. Direct exposure was realized in the case where the intervention starts directly on the neighbor's ownership area. For example, if the owner of the premises drains the water into the neighboring property with the neighbor's pipe, here immission is constant. Indirect immission starts firstly within the boundaries of the premises and its diffusing indirectly to the neighboring premises. For example, the smoke arising from someone's premises and it spreads by wind to the neighboring premises. As a current example to direct immission, we could mention the balcony overhang to the neighboring property. The immission created by the stack of fertilizer which is on the common wall (party-wall) with the neighboring property, will be an example of constantly and indirect immission[14].

> D.8.2.19 *pr* (Paulus libro sexto *ad Sabinum*)
> *Fistulam iunctam parieti communi, quae aut ex castello aut ex caelo aquam capit, non iure haberi Proculus ait: sed non posse prohiberi vicinum, quo minus balineum habeat secundum parietem communem, quamvis umorem capiat paries: non magis quam si vel in triclinio suo vel in cubiculo aquam effunderet. Sed Neratius ait, si talis sit usus tepidarii, ut adsiduum umorem habeat et id noceat vicino, posse prohiberi eum.*

12. See Bonfante, *Scritti Giuridici Varii II*, p. 807 ff.; Masferrer, *o.c.* (n. 10), p. 188.
13. P. Bonfante, *Corso di diritto Romano*, *II-1*, *La proprieta*, 1966, p. 372 ff.
14. Ruiz, *o.c.* (n. 7), p. 27–28; Fischer, *o.c.* (n. 8), p. 118.

Proculus had dealt with two cases of immission in this text. The first case was related to water or rainwater spread by a pipe from a cistern (water reservoir) leaning on a common wall. *Proculus* indicated that as the pipe was leaning on the common wall, any direct immission should be prohibited. In the second case mentioned in the text, there is indirect immission. In case humidity spreads from the common wall to both properties, contrary to the first case, this cannot be prevented. Namely, it would not be possible to prevent the ordinary activities realized by the neighbor, because the bathroom is used daily and a natural part of the property, indirect immission from there, cannot be prohibited and must be tolerated. However, this also had a legal limit: the *tepidarium* was not included in this scope, because the use of water in such a way constituted an excess and should be prohibited. Neratius indicated that the prohibition of immission is valid not only for the *tepidarium*, but also for activities spreading constant humidity and consequently causing damage to neighboring buildings, and completes the observations of Proculus on the issue[15].

The impact of indirect immissions was quite usual and it was arising from the normal usage of the premises. So it could not be prohibited. As the prohibition of indirect immissions would seriously restrict the right of property on the premises, such a prohibition has not been applied and indirect immissions have been tolerated[16].

In conclusion, direct and indirect immissions were distinguished from each other in a strict manner in Roman law. Indirect immissions could be limited only in certain cases; for this reason, these interventions having an impact on the environment should be tolerated. As to direct immissions, as they were prohibited, in certain cases it was exceptional to tolerate them.

2. Immissions from a cheese factory (*Tabernae casearia*) (D.8.5.8.5 Ulpianus libro 17 *ad edictum*)

In Ancient Rome, industrial works would sometimes cause harmful fetid odors and unpleasant smells. Related to this issue, the odor and smoke spread from a cheese factory has been examined in D.8.5.8.5 (Ulpianus libro 17 *ad edictum*)[17].

D.8.5.8.5 (Ulpianus libro 17 *ad edictum*)
Aristo Cerellio vitali respondit non putare se ex taberna Casiaria fumum in superiora aedificia iure immitti posse, nisi ei rei servitutem talem admittit. Idemque

15. Ruiz, *o.c.* (n. 7), p. 30; B. Tahiroğlu, *Roma Hukukunda Mülkiyet Hakkının Sınırları*, İstanbul, 2001, p. 92–93; M. De Villiers, "Nusiances In Roman Law", *The Law Quarterly Review* 13 (1897), p. 387.

16. Ruiz, *o.c.* (n. 7), p. 33.

17. For detailed information about D.8.5.8.5–7, see. J.M. Rainer, "*Die Immissionen: Zur Entstehungsgeschichte des §906 BGB*", Vestigia Iuris Romani, Festschrift für Gunter Wesener, 1992, Leykam Verlag, p. 358–367.

ait: et ex superiore in inferiora non aquam, non quid aliud immitti licet: in suo enim alii hactenus facere licet, quatenus nihil in alienum immittat, fumi autem sicut aquae esse immissionem: posse igitur superiorem cum inferiore agere ius illi non esse id ita facere. Alfenum denique scribere ait posse ita agi ius illi non esse in suo lapidem caedere, ut in meum fundum fragmenta cadant. Dicit igitur Aristo eum, qui tabernam Casiariam a Minturnensibus conduxit, a superiore prohiberi posse fumum immittere, sed Minturnenses ei ex conducto teneri: agique sic posse dicit cum eo, qui eum fumum immittat, ius ei non esse fumum immittere. Ergo per contrarium agi poterit ius esse fumum immittere: quod et ipsum videtur Aristo probare. Sed et interdictum uti possidetis poterit locum habere, si quis prohibeatur, qualiter velit, suo uti.

In this text, it is observed that smoke and water are subject to the same terms by Aristo. The said text brings to mind the questions of whether all the aspects of the immission created on neighboring properties by the matters mentioned can be prevented by an "*actio negatoria*", or whether determined criteria are taken into consideration or not for the use of this legal mean in each case, or whether under Roman Law, the impact of immissions such as noise, apart from smoke, are handled as an important issue or not[18].

Everyone has the right to not be disturbed while naturally using and benefitting from its own property. Therefore, no one had the right to intervene in use and disposal of another person's property. Unless there is a special right conferred on this matter (for example a servitude to this effect) or an ongoing fact on its own property for which the neighbor cannot be held responsible, no immission can be made to the neighboring property. Moreover, the ongoing event causing risk on the neighbor's property can be prevented by an *interdictum*[19].

Furthermore, as indicated in the related text, the owner of the property exposed to smoke coming from the cheese factory being prevented from freely using its own land, could also benefit from the *interdictum uti possidetis* protecting the possession of land. Unless there is a servitude related to the neighboring property for emitting smoke (*fumum immitere*), the best way is to bring an *actio negatoria*[20].

Following the consideration of the jurist Titius Aristo (around 100 AC), no smoke was allowed to permeate into the buildings situated above the cheese factory, unless the affected owner had granted a servitude in favor of the cheese factory. Conversely, one would not be permitted to allow water or other substances to seep in from above. Smoke was said to be like water — a (forbidden) emission. Thus, the owner of the upper property could by way of an *actio negatoria* assert that the cheese factory does not have the right to discharge the smoke. Alfenus also granted the *actio negatoria* against a quarry owner in order to protect against

18. Bonfante, *o.c.* (n. 13), (Corso II-1), p. 378–379.

19. De Villiers, *o.c.* (n. 15), p. 387.

20. C. Lázaro Guillamón, "Von Ulpian bis Accursius: Responsa über D.8.5.8.5", *RIDA* 52 (2005), p. 236–237; Erdoğmuş, *o.c.* (n. 7), p. 55.

stone pieces falling onto the plaintiffs land. Finally, should the lessee of the *taberna ceasearia,* who was confronted with the *actio negatoria*, have to discontinue the production of cheese, then, according to Aristo, he would have a claim against the town authorities arising out of the lease (the *actio conducti*)[21].

D.8.5.8.6 (Ulpianus libro 17 *ad edictum*)
Apud Pomponium dubitatur libro quadragensimo primo lectionum, an quis possit ita agere licere fumum non gravem, puta ex foco, in suo facere aut non licere. Et ait magis non posse agi, sicut agi non potest ius esse in suo ignem facere aut sedere aut lavare.

The first clues related to the criteria to be taken into consideration for the protection from immissions, under Civil Law, are observed in Ulpianus's said texts (D. 8.5.8.5–6). Accordingly, whereas a cheese factory located at the lower part was not authorized to transmit its smoke to a building situated higher, the same case does not apply for emissions qualified as "*fumos non gravis*". As an example to "*fumos non gravis*", Pomponius showed the case of smoke coming out of a furnace. The difference in between is made clearer with the comparative examples provided by Pomponius, because according to Pomponius, smoke coming out from the fire of a furnace is considered as a fire made by a property owner on its own land, like the right of habitation or right to wash[22].

At this point, we were faced with the issue of,when the smoke was prohibited type, that was creating immission as "*gravis*" (serious). On this subject, it would not be very appropriate to use criteria like "as is the custom" as we do nowadays, for Ancient Rome, because in the texts of Ulpianus on the issue, there is no information on whether small cheese factories/dairies are located in residential areas or commercial areas. The translation of the term "*gravis*" as "disturbing" is not considered appropriate, because the smoke of a furnace or even a small fire can be disturbing for the neighbor at the same degree. In certain sources, it is observed that an attempt is made to provide a classification with the use of the word "requirement". Accordingly, it is necessary to show tolerance for emissions qualified as a social requirement and one which arises from unavoidable works[23].

With respect to the general social standard of people living in Rome, lighting of a furnace for heating or cooking purposes or washing itself were considered as compulsory activities. As the requirements of a house were taken as a basis in the assessment, it was possible to prohibit the activities of a commercial enterprise

21. A. Wacke, "Protection of the Environment in Roman Law", *Roman Legal Tradition* 1 (2002), p. 7; S.H. Butler, "Headwinds to a Clean Energy Future: Nuisance Suits Against Wind Energy Projects in the United States", *California Law Review* 97 (2009), p. 1343; G. Van Den Dergh, "Cheese or Lavender? Elegantiae Circa D.8.5.8.5", *Acta Juridica* 3 (1979), p. 185; M. Sitek, "Legal Protection of The Natural Environment In Roman Law", in *Au-Delà Des Frontières, Mélanges de droit romain offerts à Witold Wolodkiewicz*, Varsovie, 2000, p. 879.

22. Rainer, *o.c.* (n. 17), p. 364; Lázaro Guillamón, *o.c.* (n. 20), p. 243.

23. Bonfante, *o.c.* (n. 8), p. 378–379; De Villiers, *o.c.* (n. 15), p. 389.

spreading emissions to neighboring properties, with "*actio negatoria*". In order to pose an obstacle to economic life, it would not be possible for commercial enterprises carrying out such activities to be established in residential areas. In Ancient Rome, there is no information in texts related with the issue on the supremacy of such commercial and industrial activities on neighborhood rights, with respect to the balance of interests. However, at least at the time of the jurist Titius Aristo (around 100 A.C.) in cases where smoke causes disturbance as indicated, in general, personal interest predominated over commercial interests[24].

In conclusion, according to D.8.5.8.5 and D.8.5.8.6, there were three types of emission: first, the smoke coming out of a cheese factory and affecting the neighboring property; second, the effect of stones used in the construction of a real estate on the neighboring property; and finally smoke coming out from the chimney of a house as a result of ordinary use are provided as examples. As smoke coming out of a cheese factory clearly constitutes an excess, it is prohibited. Alfenus also granted the *actio negatoria* against a quarry owner in order to protect against stone pieces falling onto the plaintiffs' land. Whereas smoke coming out of a house's chimney being an indirect immission and its impact being part of an ordinary use cannot be prevented[25].

If the activity causing immission is the subject of a servitude, it would not be possible to sue to by means of an *actio negatoria* against this. If the activity causing immission is carried out in order to execute a right, the right could be exercised by alleging *vindication servitutis.* The proof that the servitudes are based on a *vindication servitutis* was provided in D.8.5.9 *pr*[26].

Whether activities causing immissions can be subject to servitude is debatable. According to one view, under Classical Roman Law, as servitudes were of a *numerous clausus*, regarding activities causing immissions, it was not possible to establish atypical servitudes. In this case, an *actio negatoria* is an application always valid in terms of immission control. However, according to another view provided in the *Digest* texts, it was quite probable to establish servitudes with no standard content[27].

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24. Fischer, *o.c.* (n. 8), p. 119–120.

25. Çörtoğlu, *o.c.* (n. 3), p. 31–32.

26. D.8.5.9 *pr* (Paulus libro 21 *ad edictum*): *"Si eo loco, per quem mihi iter debetur, tu aedificaveris, possum intendere ius mihi esse ire agere: quod si probavero, inhibebo opus tuum. Item Iulianus scripsit, si vicinus in suo aedificando effecerit, ne stillicidium meum reciperet, posse me agere de iure meo, id est ius esse immittendi stillicidium, sicut in via diximus. Sed si quidem nondum aedificavit, sive usum fructum sive viam habet, ius sibi esse ire agere vel frui intendere potest: quod si iam aedificavit dominus, is qui iter et actum habet adhuc potest intendere ius sibi esse, fructuarius autem non potest, quia amisit usum fructum: et ideo de dolo actionem dandam hoc casu Iulianus ait. Contra si in itinere, quod per fundum tibi debeo, aedifices, recte intendam ius tibi non esse aedificare vel aedificatum habere, quemadmodum si in area mea quid aedifices."*

27. Ruiz, *o.c.* (n. 7), p. 57.

D.8.5.17.2 (Alfenus libro secundo *digestorum*)
Secundum cuius parietem vicinus sterculinum fecerat, ex quo paries madescebat, consulebatur, quemadmodum posset vicinum cogere, ut sterculinum tolleret. Respondi, si in loco publico id fecisset, per interdictum cogi posse, sed si in privato, de servitute agere oportere: si damni infecti stipulatus esset, possit per eam stipulationem, si quid ex ea re sibi damni datum esset, servare.

The dung heap humidifying the neighbor's wall is considered as a harmful emission and unless there is servitude entitled on this subject, the owner of the affected premises could sue to *actio negatoria*, or request the compensation of the loss incurred with *cautio damni infecti*, if compensation of the loss incurred is promised by means of a *stipulatio*[28].

Another way of compensating eventual losses arising from immissions was realized through the *lex Aquilia.* However, in this case, the perpetrator should directly cause damage with its own physical activity; the application field which was narrow due to the condition of causing direct physical damage by touching had been expanded so as to cover illegal actions having direct impact on the occurrence of the damage, by the *praetor*'s intervention[29]. Immission arising from the actions of burning, breaking, or spoiling could cause damage to the soil, vegetation or ground in the neighboring land (as in the case of the damage of the wall mentioned in D. 8.5.17.2). The degree of fault sought was not only *dolus*, the person's fault as *culpa* (negligence) was also sufficient to appeal to the *lex Aquilia*[30].

D.47.10.44 (Iavolenus libro nono *ex posterioribus Labeonis*)
Si inferiorum dominus aedium superioris vicini fumigandi causa fumum faceret, aut si superior vicinus in inferiores aedes quid aut proiecerit aut infuderit, negat Labeo iniuriarum agi posse: quod falsum puto, si tamen iniuriae faciendae causa immittitur.

In the 1st century B.C. Labeo tried to solve the legal structure of the issue qualified as immission in the city and made assessment on the smoke coming from residential areas located at a high level to those located at a lower level. According to this jurist, it was not possible to determine *dolus* aimed at causing such damage. For this reason, it was not possible to appeal to the *actio iniuria* against damages arising from immissions. It is observed that this solution could not resist time and as Iavolenus indicated, in such cases it is possible to appeal to the *actio iniuriarum*[31].

The idea in D.47.10.44 of foreseeing to sue *actio iniuriarum* is valid also for the case in D.8.5.8.5. In this case, the *actio iniuriarum* was not sued for preventing immission. In this case where the *actio negatoria* can be sued, in order to provide

28. Ruiz, *o.c.* (n. 7), p. 66–67; Çörtoğlu, *o.c.* (n. 3), p. 33.

29. P. Somer, *Roma Hukukunda Mala Verilen Zarar, (Damnum Iniuria Datum)*, İstanbul, 2008, p. 6.

30. Fischer, *o.c.* (n. 8), p. 124.

31. Sitek, *o.c.* (n. 21), p. 878; Lázaro Guillamón, *o.c.* (n. 20), p. 242; De Villiers, *o.c.* (n. 15), p. 394.

for the compensation of the damage, the *actio iniuriarum* was another possibility provided as well as other legal instruments[32].

The *interdictum uti possidetis* was the *interdictum* providing the protection as such of the existing possession. The *interdictum uti possidetis* was alleged mutually by usufructuary, owners or holders of other usage rights[33].

When the *Interdictum uti possidetis*'s general structure is considered, it gives the impression that it is not a means of protection against immissions. Because, in events causing immission, rather than the protection of the possession of a land, there was an emission spreading to the neighbor's area. In this context, the question of whether in Classical Roman Law, the *interdictum uti possidetis* was used as immission protection must be answered[34]. As the *interdictum uti possidetis* was used as a means of preparation to the case of protection of the ownership, its use as protection against immissions could be possible by considering immission as a disturbance caused on the premises[35].

It is observed that the *interdictum uti possidetis* was probably used for all emissions. In order to firmly establish this assumption, we must refer to D.8.5.8.5 (Ulpianus libro 17 *ad edictum*) taken as a basis in Roman law concerning immission protection[36].

In the last sentence of the related text *(sed et interdictum uti possidetis poterit locum habere, si quis prohibeatur, qualiter velit, suo uti*), the owner of the premises exposed to smoke coming out of the cheese factory could benefit from the *interdictum uti possidetis* protecting the land possession, as it prevented him from freely using the land[37]. The use of the *interdictum uti possidetis* as a legal instrument regarding activities causing immissions connected to certain results due to its nature of *interdictum duplex:* first, a person could use the *interdictum uti possidetis* to have situations caused by itself and qualified indirectly as immissions accepted by the other party (D.8.5.8.6). Second, the *interdictum uti possidetis* could be used as a legal means providing protection from immissions arising from neighboring lands. In conclusion, the *interdictum uti possidetis* was a legal instrument used for the preparation of cases protecting ownership rights, as well as an instrument of protection against immissions and consequently could be used for troubles caused on the premises[38].

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32. Lázaro Guillamón, *o.c.* (n. 20), p. 241.
33. Z. Umur, *Roma Hukuku Lügatı*, İstanbul, 1983, p. 94; See. M. Kaser, *Das Römische Privatrecht*, München, 1975, p. 141, 387.
34. Ruiz, *o.c.* (n. 7), p. 93.
35. Ruiz, *o.c.* (n. 7), p. 96.
36. Sitek, *o.c.* (n. 21), p. 874; L. Labruna, *Vim fieri veto. Alle radici di una ideologia*, Napoli, 1971, p. 217–229.
37. Fischer, *o.c.* (n. 8), p. 125.
38. Ruiz, *o.c.* (n. 7), p. 113.

In Roman law, by the *interdictum uti possidetis* and the *actio negatoria*, a general and very comprehensive protection was provided against immissions. With the *interdictum uti possidetis*, it was possible to object to all kinds of discomforts caused on the premises. Immission is assessed within the scope of disturbances caused on the premises[39].

3. *Actio aquae pluviae arcendae* (D.39.3.3 *pr* Ulpianus libro 53 *ad edictum*)

In case of the pollution of water due to the activities of dry cleaners (*fullones)*, there was a special legal instrument: the *actio aquae pluviae arcendae*.

D.39.3.3 *pr* (Ulpianus libro 53 *ad edictum*)
Apud Trebatium relatum est eum, in cuius fundo aqua oritur, fullonicas circa fontem instituisse et ex his aquam in fundum vicini immittere coepisse: ait ergo non teneri eum aquae pluviae arcendae actione. Si tamen aquam conrivat vel si spurcam quis immittat, posse eum impediri plerisque placuit.

According to Trebatius, it was not appropriate for the neighbor to have recourse to the action for removing rainwater (*actio aquae pluviae arcendae*) instead of requesting the prevention of the bad odor coming from the neighbor to be mixed up with waste water. However, according to the views of many jurists, it appears from the conclusion of the text that it is possible to complain about this situation and to be sued. In this case, another opinion asserted that it was possible to appeal to the action for removing rainwater (*actio aquae pluviae arcendae*) the same as an *actio utilis*. Moreover, the *actio negatoria* that can be sued for smoke coming from the cheese factory can also be sued in this case[40].

Ulpianus indicates in fact in this text that, Trebatius debated about three different situations: In the first case entitled *"Aquam in fundum vicini immittere coepisse"*, due to the outflow from the facility (*circa fontem*), water on the land placed lower was polluted. Trebatius indicated that, in this case, *actio aquae pluviae arcendae* could not be brought, because there was no *aqua piovane* (rainwater) but *aquae sorgivae* (spring water) in this case[41].

In the case called "*Aquam conrivare*", it is indicated that *fullonis* was authorized as dry cleaning and that under ordinary circumstances, water pollution could not pose a threat to the land placed at a lower level, but that heavy rainfall not only caused flooding but also pollution. In this case, it is indicated that the *actio aqua pluviae arcendae* can be sued against the dry cleaner[42].

39. See Bonfante, *o.c.* (n. 13), (Corso II-1), p. 431; Labruna, *o.c.* (n. 36), p. 224 ff.

40. Wacke, *o.c.* (n. 21), p. 9–10.

41. Sitek, *o.c.* (n. 7), p. 868. See. D.8.5.10.1; D. 39.3.8; A. Di Porto, *La Tutela della «salubritas» fra editto e giurisprudenza. Il ruolo di Labeone*, Milano, 1990, p. 73 ff.

42. Sitek, *o.c.* (n. 7), p. 868–869; A. Rodger, "*Roman Rain-Water*", *Tijdschrift voor Rechtsgeschiedenis*, 38 (1970), p. 427.

In the last case, emphasis is placed on the content of flowing water consisting of waste arising from the cleaning activity (*fullo*). Although water does not by itself lead to unfavorable consequences on the land placed below, this situation conferred the right to sue by an *actio aquae pluviae arcendae*[43].

The owner of the premises exposed to the risk of damage could benefit from the *actio aquae pluviae arcendae.* The defendant was responsible for the risk of damage caused due to "*immissio"*, the flowing of the water to the neighboring property, contrary to the ordinary water regime. It is observed that it reaches two conclusions via this legal instrument: The first one is that the related regulation constitutes the first step of preventive regulations developed in modern times. Second, that Roman jurists foresaw the responsibility for the activity affecting neighboring premises[44].

In conclusion, the opinion is reached that the *actio aquae pluviae arcendae* is not limited to rainwater only.

4. Rules under Turkish Civil Code against Intervention creating an Environmental Impact

Under Civil Law, losses arising from interventions causing an environmental impact (immissions) are governed by Article 737 of the Turkish Civil Code.

Article 737 of the Turkish Civil Code, which is composed of three paragraphs, regulates under the heading of Neighbor's Right that:

> "Everyone must avoid excess that may unfavorably affect its neighbors, when exercising its rights arising from property ownership and especially when carrying out operating activities.
> In particular, it is forbidden to cause a disturbance with smoke, mist, soot, dust, odor, noise or vibration which exceed the degree of tolerance by neighbors, according to the position, nature of the property and local customs.
> Rights related to adjustments complying with local customs and arising from unavoidable excess are reserved."

Restrictions on property rights, arising from neighborhood law or restrictions imposed in favor of neighbors and their duties are governed by Articles 737–750 of the Turkish Civil Code. In the mutual relationship arising from neighborhood, the aim was to prevent neighbors from disturbing each other, cause damage to one another and to ensure a balanced use of the property right among neighbors[45].

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43. Sitek, *o.c.* (n. 7), p. 869.

44. D. Nikolić, "From Liability For Immissio to Liability For Emissions", *Zbornik Radova* 40 (2006), p. 406.

45. Ulusan, *o.c.* (n. 4), p. 154; Çörtoğlu,o.c., p. 55; J.G. Akipek – T. Akintürk, *Eşya Hukuku*, İstanbul, 2009, p. 557; M.K. Oğuzman – Ö. Seliçi – S. Oktay-Özdemir, *Eşya Hukuku*, İstanbul, 2015, p. 564; Ş. Ertaş, *Yeni Türk Medeni Kanunu Hükümlerine Göre Eşya Hukuku*, Ankara, 2008, p. 385.

With Article 737 of the Turkish Civil Code, the aim is to impose on the one hand the obligation of tolerance to the neighboring real property owner, as a requirement of the neighborhood, against the environmental impact which arises, and on the other hand, when this impact reaches excessive limits, the obligation of tolerance is removed and the power to object to this excess and an obligation of avoidance is foreseen[46]. This obligation of the real property owner constitutes at the same time, a restriction to its powers arising from the ownership. For the existence of a neighborhood relationship, the real properties need not be absolutely adjacent to one another. If the premises are affected in any way whatsoever from the use of other premises, due to their position and situation, a neighborhood relationship is admitted to exist among these two real estates[47].

As usage that does not exceed the degree of tolerance among neighbors is not considered as excessive, according to the situation and nature of the property and the local customs, each neighboring property owner must tolerate these interventions that are in compliance with the law. For this reason, with this provision of the Turkish Civil Code, contrary to German Civil Code, Article 906 (*BGB* § 906), the "freedom to intervene" is accepted[48].

In Article 737 of the Turkish Civil Code, interventions causing an environmental impact are listed as smoke, mist, soot, dust, odor, noise or vibration. However, doubtlessly, interventions causing environmental impact are not limited to the foregoing[49].

Under the Swiss doctrine, interventions are considered in two groups, namely direct and indirect interventions. Direct interventions arise from a certain source, affect a certain area and are directed to the material of the real estate. Such interventions can be in the form of trespass on the premises, collection of its fruits, throwing hard materials, as well as right of compulsory access, right of compulsory conduit, trespassing onto somebody else's land, collection of falling things, excavation and construction, outstretching of tree and branch roots to somebody else's property[50].

Direct interventions remain out of the scope of Article 737 of the Turkish Civil Code. If there are special provisions regarding them or a legal process among the parties, these regulations will apply. There is no need to investigate whether there is excess, for the prevention of these interventions or the compensation of the damage. As their existence will constitute a contravention of the law, the provisions of

46. Çörtoğlu, *o.c.* (n. 3), p. 69–77; F. Eren, *Mülkiyet Hukuku*, Ankara, 2016, p. 372.

47. Ulusan, *o.c.* (n. 4), p. 154; Oğuzman – Seliçi – Oktay-Özdemir, *o.c.* (n. 45), p. 564, fn.1343; L. Sirmen, "Taşınmaz Mülkiyetinin Kullanılmasında Çevre Etkileri Yaratan Müdahalelerden Dolayı Malikin Sorumluluğu", *Ankara Üniversitesi Hukuk Fakültesi Dergisi* 1–4 (1988), p. 282.

48. Ulusan, *o.c.* (n. 4), p. 154; Çörtoğlu, *o.c.* (n. 3), p. 57.

49. Sirmen, *o.c.* (n. 47), p. 286; Ertaş, *o.c.* (n. 45), p. 385; Ulusan, *o.c.* (n. 4), p. 161–173; Çörtoğlu, *o.c.* (n. 3), p. 105–174.

50. Çörtoğlu, *o.c.* (n. 3), p. 101–104.

Article 730 of the Turkish Civil Code (responsibility of the real estates' owner) will apply.

As to indirect interventions, they result from the exploitation or use of a property, they affect neighboring premises, they are generally undesired according to the ordinary course of state and are material or intangible consequences having a causal relationship with human behavior.

Indirect interventions are interventions in the sense of Article 737 of the Turkish Civil Code. They are interventions arising during the exercise of authority conferred by the property ownership or the exploitation activity. If there is an appropriate causal relation among these interventions arising from human behavior (performing or avoiding), according to Article 730 of the Turkish Civil Code, the strict liability of the property owner can arise. Article 737 of the Turkish Civil Code regulating neighborhood relationship is a special application case of Article 730 of the Turkish Civil Code regulating the responsibility of the real estates' owner[51].

Article 730 of the Turkish Civil Code regulates that:

> "A person suffering loss or faced with the risk of loss as a result of the exercise by a real estate owner of its property right in contravention with legal restrictions, can sue for the restoration of the situation and the removal of the risk and the compensation of the loss it incurred.
> The judge can pronounce the offsetting of the loss arising from unavoidable excess with an appropriate value, in compliance with local customs."

The person affected by the excess, can, based on Articles 983–984 of the Turkish Civil Code and on the grounds that its possession has been violated, claim the suspension of this violation, its prevention and compensation for the loss. The action aimed at preventing an ongoing violation of the property right, the prevention of trespassing (Article 683 of the Turkish Civil Code — *actio negatoria in rem*) can also be sued. However, it will be more appropriate for the plaintiff to prevent interventions in the form of excess, within the framework of Article 730 of the Turkish Civil Code[52].

Article 742 of the Turkish Civil Code, entitled "Naturally flowing water" regulates the tolerance to water flowing naturally to the land of a property from the land of a property owner located higher, rain, snow and undammed spring water.

> "The property owner must tolerate the natural flow of water from the upper land to its own land, and especially rain, snow and undammed spring water.
> None of the neighbors can change the flow of this water to the harm of the other.
> The owner of the upper land can keep water required for the lower property only to the extent it is necessary for its own property."

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51. Ertaş, *o.c.* (n. 45), p. 392; Akipek – Akintürk, *o.c.* (n. 45), p. 569; Oğuzman – Seliçi – Oktay-Özdemir, *o.c.* (n. 47), p. 465; Sirmen, *o.c.* (n. 47), p. 288–289; Eren, *o.c.* (n. 46), p. 377; C. Yavuz, "Türk Hukukunda Çevre Kirletenlerin Hukuki Sorumluluğu", *Marmara Üniversitesi Hukuk Fakültesi, Hukuk Araştırmaları Dergisi* 1–3 (1990), p. 44.

52. Ulusan, *o.c.* (n. 4), p. 181.

This article refers to the flow of rain and snow water coming from a higher level to the land placed lower, with the ordinary slope of the land. In this case, the said land owner must tolerate the passing of water and take measures to prevent water cause damage to its own crops. However, the measures taken by the owner of the lower land, must not lead the water to accumulate in the upper land and cause damage to the neighbor.

Interventions arising from rain and snow water regulated by Article 742 of the Turkish Civil Code are not considered interventions in the sense of Article 737 of the Turkish Civil Code and the criteria of excess regulated in the said provision will not apply. Article 742 of the Turkish Civil Code refers to water available naturally in the soil or above ground[53].

5. Conclusion

In conclusion, following the principles of Roman law related to the protection from interventions causing environmental impact and the regulations forming the basis of the neighborhood law, it is possible to see the traces of well-known protection means in contemporary law. However, losses arising from the property limitations (apart from the compensation of damage with *cautio damni infecti*) have not been considered as a balancing of sacrifice (*Aufopferungsprinzip*), and a claim on this subject, has not been mentioned. The provision entitled "Neighbor's right" in Article 737 of the Turkish Civil Code refers to interventions having an environmental impact and is based on Roman law.

Article 742 of the Turkish Civil Code indicates that none of the neighbors can cause harm to the other, pose obstacles to water flowing naturally, and it repeats the forms of application of *actio aquae pluviae arcendae* in Classical and *Iustinianus's* laws.

53. Oğuzman – Seliçi – Oktay-Özdemir, *o.c.* (n. 47), p. 573; Y. Abik, "Taşınmaz Malikinin Olumlu Müdahaleler Nedeniyle Komşulara Karşı Sorumluluğu", *Erzincan Üniversitesi Hukuk Fakültesi Dergisi* 3–4 (2010), p. 160–161.

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