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ACTIONES POPULARES IN ROMAN LAW IN PARALLEL WITH POPULAR ACTION IN BRAZILIAN LAW: A PROPOSAL FOR A PERSPECTIVE BETWEEN PUBLIC AND PRIVATE FOR THE PROTECTION OF PROPERTY

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REVISTA DIREITO MACKENZIE
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ABSTRACT: The article examines the evolution of popular action from its origins in Roman Law to its application in contemporary Brazil. Initially, it investigates whether, in Roman Law, there was a distinction between public and private interests as we understand them today and what the function of popular action was at that time. In present-day Brazil, the study focuses on the relationship between the State and the individual, analyzing popular action through qualitative empirical research and evaluating the cases and possible benefits for the plaintiffs. It concludes that, in Roman Law, the lack of distinction between public and private law resulted in popular actions that encompassed both aspects. Today, even with a clearer separation between public and private, a gray area persists that may question the relevance of this duality, following Kelsen's critique on the subject.

KEYWORDS: Popular action; private interest; public interest.

AS *ACTIONES POPULARES* NO DIREITO ROMANO EM PARALELO COM A AÇÃO POPULAR NO DIREITO BRASILEIRO: UMA PROPOSTA DE PERSPECTIVA ENTRE O PÚBLICO E O PRIVADO PARA A TUTELA DA PROPRIEDADE

RESUMO: O artigo examina a ação popular nas suas origens no Direito Romano em perspectiva comparada com a sua aplicação no Brasil contemporâneo. Inicialmente, investiga se, no Direito Romano, havia uma distinção entre interesses públicos e privados como conhecemos hoje e qual era a função da ação popular naquela época. No Brasil atual, o estudo foca na relação entre Estado e indivíduo, analisando a ação popular por meio de pesquisa empírica qualitativa, avaliando os casos e os possíveis benefícios para os autores das ações. Conclui-se que, no Direito Romano, a falta de distinção entre direito público e privado resultava em ações populares que abrangiam ambos os aspectos. Atualmente, mesmo com uma separação mais clara entre público e privado, persiste uma zona cinzenta que pode questionar a relevância dessa dualidade, seguindo a crítica de Kelsen sobre o tema.

PALAVRAS-CHAVE: Ação popular; interesse privado; interesse público.

1. Introduction

This paper is developed from the following research questions: (a) What would be the objectives of the popular action in the Roman context? (b) What are the objectives of the popular action in the current Brazilian context? (c) How does popular action manifest today within the broader dynamics of the relationship between the State and the individual in Brazil? The premises adopted are: (i) When the popular action was created in Roman Law, the duality between public and private, as it is understood today, did not exist, since it is a theoretical construction developed later in history; (ii) Modern concepts such as "State," "representation," and "citizenship" cannot be used to address Roman themes (Clementoni, 2016, p. 18). This study undertakes an examination of the public–private relationship in the context of Brazilian popular action, situating its analysis within the institution's origins in Roman law – a historical period in which the conceptual dichotomy between "public" and "private" had yet to be formulated. According to Myriam Benarros Clementoni, elements of continuity between Roman law and current Brazilian law exist and can be identified due to "[...] the reception and transfusion of the *actio popularis* into Portuguese law, either because Roman law was a subsidiary source in the application of the *Ordenações Filipinas*, or because Brazilian law was built from Portuguese law [...]" (Clementoni, 2016, p. 20-21). In addition, the paper seeks to verify whether it is possible to identify remnants of these relational distinctions between public and private in the current practice of the Brazilian popular action. This motivated the qualitative analysis of cases, based on Kelsen's theoretical framework, which criticizes the aforementioned classificatory duality. The qualitative empirical research through case study is expected to bring concreteness to theoretical assertions that could otherwise lack practical grounding, through the careful analysis of previously selected cases.

Thus, to analyze possible historical bridges on the subject, the methodology chosen was case analysis, with the aim of determining the parameters for configuring the public/private relationship in popular action – the basis for contemporary analysis of the subject – as Myriam Benarros Clementoni explains: "In sum, the *actiones populares* present characteristics that make it difficult to understand their legal nature, since some elements lead us to a public aspect, others to a private nature" (Clementoni, 2016, p. 6). The case study methodology was adopted in this chapter because it offers "[...] results

REVISTA DIREITO MACKENZIE
RDM | São Paulo | SP | 19(2) | e17349EN
2025 | v. 19 | n. 2 | p. 1-21 | ISSN 2317-2622. http://dx.doi.org/10.5935/2317-2622/direitomackenzie.v19n217349EN

of great utility for reflection on the relationships established between private individuals or between them and the State, institutional dynamics, understanding and applicability of legal institutions, description of a socio-economic panorama with which the Law needs to deal, etc." (Ghirardi; Palma; Viana, 2012, p. 177).

The study of the proposed cases makes it possible to analyze the following research question: What role does the popular action assume today within the relationship between the State and the individual in Brazil? To this end, the two cases selected in the São Paulo State Court (*Tribunal de Justiça do Estado de São Paulo – TJSP*) were examined based on the following questions: 1) What is the object of the action? 2) What is the relationship between the plaintiff and the object? Is it possible to perceive this relationship? If so, how can it be measured? 3) Will the plaintiff gain any personal benefit if the action is successful? Considering that "In general, the case can be understood as any concrete situation from which a given question can be analyzed" (Ghirardi; Palma; Viana, 2012, p. 178), the organization is structured to begin with the presentation of the case narrative and then proceed to its analysis based on the questions raised.

The case study method helps answering the research questions because it brings concreteness to broad concepts such as "public interest," and provides the factual framework for substantiating relationships that could otherwise remain overly abstract between the public and the private, which have a high degree of fluidity when considered apart from reality.

To adequately answer the research questions, it is necessary to outline the theoretical framework regarding the concepts to be interrelated – namely, the public and the private – within the duality traditionally considered in the legal phenomenon. The theoretical framework for conceptualizing the "public v. private" duality is based on Hans Kelsen's critique of the topic, which, in criticizing the classification, managed to organize the theories that justify the recurrently used division.

According to the theory of interest, "[...] the rules of law aimed at the general or collective interest are part of Public Law, while those aimed at individual interests are included in Private Law" (Klinghoffer, 2022, p. 416). In turn, the theory of added value justifies the division between public and private based on the position certain subjects occupy within a relationship: the State would have greater value than other subjects of law (Klinghoffer, 2022).

According to Hans Kelsen, the distinction between public and private is based on the source of legal production: whether it is permeated by the will of the subject or

imposed. Kelsen indicates that, in Private Law, the rule between the parties is created by their will, while in Administrative Law the rules are imposed by an administrative act. In other words, the State acts not as someone who "has a right," but as someone who exercises a function (competence). The public body acts because the law grants it authority, not because it has entered into an agreement with the citizen. It is not the public agent, as a person or body, who stands above the citizen, but rather the legal norm that binds the person. Power lies not in the individual, but in the norm they apply. The difference between Public and Private Law does not lie in the parties involved, but in the way the obligation arises (Kelsen, 2000, p. 294-295).

In any case, initiating the various criticisms directed at the public/private duality, the author recalls that the private contract between the parties exists because of the individualization of the State's norm, namely, the Civil Code. Thus:

> [...] the Pure Theory of Law relativizes the opposition, made absolute by traditional legal science, between private and public law, transforming it from an extra-systematic opposition – that is, a distinction between Law and non-law, between Law and State – into an intra-systematic distinction; and precisely because, in doing so, it also decomposes and destroys the ideology linked to the absolutization of the opposition in question, it proves its scientific character. By presenting the opposition between public and private law as the absolute opposition between power and law, or at least between State power and law, one creates the idea that in the domain of public law, especially in constitutional and administrative law – which have special political importance – the principle of legality does not apply with the same meaning and intensity as in the domain of private law, which is considered, so to speak, the truly legal domain (Kelsen, 1999, p. 197).

Furthermore, the classical division between public and private – object of Kelsen's critique – could lead one to believe that politics would be limited to the constitutional and administrative spheres, disregarding that "[...] private rights are political rights in the same sense as those usually designated as such, because both, albeit in different ways, share in the so-called formation of the State's will – that is, ultimately, in political domination" (Kelsen, 1999, p. 197). Thus, the theoretical framework of this research is centered on the ambiguity between public and private to the point of rendering such a distinction useless (Kelsen, 2000, p. 297).

REVISTA DIREITO MACKENZIE
RDM | São Paulo | SP | 19(2) | e17349EN
2025 | v. 19 | n. 2 | p. 1-21 | ISSN 2317-2622. http://dx.doi.org/10.5935/2317-2622/direitomackenzie.v19n217349EN

Based on these concepts, the aim is to establish, as far as possible, non-moralizing historical analyses of the Popular Action at the time of its creation in Roman Law, in order to propose perspectives between that period and current Brazil, where the instrument with the same name is still in use. The research is justified by the perception that the popular action is an instrument available to any citizen (private) to seek judicial protection to annul a (public) act harmful to public property or property of an entity in which the State participates, to administrative morality, to the environment, and to historical-cultural heritage (Article 5, LXXIII, CF).

From the duality between the standing for this instrument and its result – namely, the protection of goods that go beyond the private sphere of the plaintiff – some questions arise: (a) What were the objectives of the popular action in the Roman context? (b) What are the objectives of the popular action in the current Brazilian context? (c) What role does the popular action assume today within the relationship between the State and the individual in Brazil? This last question deserves further developments related to the very function of the popular action, considering its object according to the constitutional text. These developments will be addressed later in the empirical analysis of the topic.

To reach the core of the proposed research and present results, it is useful to provide a brief context of Roman Law, to avoid excessively generic statements about a long and relevant historical period. It should be noted, however, that the aim is not to exhaust the subject.

Although this contextual presentation is limited to the introductory aspect of the present work, we are aware of the importance of studying it in an interdisciplinary manner, going far beyond mere mention of dates (Cruz e Tucci, 1987). Thus, valuable historical study involves careful analysis of the social, economic, and cultural context in which a given institution developed. Considering the research limitations, this is what is sought here in the first stage. Then follows the study of the Roman *actio popularis*, and later the popular action in current Brazilian law – mainly focusing on its practical side, which will be done through qualitative empirical research, as already explained.

Finally, and most importantly, the analysis of the popular action between public and private will be carried out through two cases involving the theme of property, as this is an area directly impacted by the public/private duality. The reasons for choosing the theme will be presented, followed by the two selected cases, focusing on the role the popular action assumes today within the relationship between the State and

the individual in Brazil. Kelsen places property as a central element of what would be private law (Kelsen, 1999, p. 198) and, furthermore, the oldest territorial property was once linked to the collective (Clementoni, 2017, p. 50).

2. Notes on the Roman procedure

The analysis of the past through historical periods is a methodological construction for understanding a given narrative. It is a way of organizing events systematically, according to the objectives of the analysis. As a consequence, certain legal institutions may span different historical periods, assuming distinct functions within the legal order, even if they retain the same nomenclature. This study seeks to answer whether this occurs with the popular action – between its origin and what is practiced today in the Brazilian legal system.

Within this context, Roman civil procedure is usually explained through three major phases: (1) *legis actiones* (actions of the law); (2) *formulas*, or the formulary period; and (3) *cognitio extraordinaria*.

2.1 The first period – the *legis actiones* – and the procedure

The procedural system of that time should not be analyzed based on premises that were only consolidated over the centuries and are now considered unquestionable – such as, for example, the autonomy of procedure in relation to substantive law. The Roman perspective on the subject began from a pathological viewpoint, starting from the violation of a substantive right, which necessarily had to be proven for one of the actions to be considered (Azevedo; Cruz e Tucci, 2001).

In this context, there were five possible actions – that is, five pathological violations of substantive rights – that could justify the mobilization of a Roman citizen (*legis actio per sacramentum*, *legis actio per iudicis arbitrive postulationem*, *legis actio per condictionem*, *legis actio per manus iniectionem*, *legis actio per pignoris capionem*).

This mobilization had to be materialized through extreme formalism, solemnity, and orality, which dictated even the exact words to be spoken and how they should be spoken, under penalty of dismissal. Ritualism was extremely present, and the possible explanation for this likely lies in the combination of religious elements with law.

REVISTA DIREITO MACKENZIE
RDM | São Paulo | SP | 19(2) | e17349EN
2025 | v. 19 | n. 2 | p. 1-21 | ISSN 2317-2622. http://dx.doi.org/10.5935/2317-2622/direitomackenzie.v19n217349EN

With the secularization of the Roman justice system – that is, with the abandonment of religious dominance – the *legis actiones*, in this rigid and formalistic form, were revisited. There was a bipartition of the procedure, with the rationalization of procedural phases and the mitigation of its sacred character. From this revision onward, the participation of litigants was encouraged.

Moreover, the position of *praetor urbanus* (urban praetor) was created, and the *legis actiones* were made public to citizens. The bipartite process began before the praetor, who held jurisdiction because he was appointed permanently for official duties and organized the terms of the dispute in an orderly fashion. The case was then examined by a judge, appointed case-by-case by the praetor, along with a council of his trust, which judged in the name of the Roman people. In this period, the popular action was admitted and could be brought by any citizen.

2.2 The second period – the formulary system – and the procedure

As in the previous period, the procedure remained bipartite, but with a significant increase in the role of the praetor, since the content of the procedures was adaptable under the praetor's own management (Azevedo; Cruz e Tucci, 2001). This change resulted from the pursuit of less formalism and rigidity in the proceedings, which had previously hindered the analysis of the merits of the case.

2.3 The third period – the *cognitio extraordinaria* – and the procedure

This period, which began in 27 B.C. and lasted until the end of the Empire itself, was marked by the concentration of the procedure before what today is considered, for the first time, a state authority, later serving as a model for medieval and even modern procedure (Azevedo; Cruz e Tucci, 2001).

The magistrate acted as a kind of emanation of the prince's political power. The holder of supreme political authority, seeking to have his will fulfilled in all parts of the Empire, delegated powers to magistrates to judge directly in his name.

Thus, in this third and final period, the process acquired a more public character, due to the concentration of judicial acts in the figure of the judge, who became

responsible for examining evidence and rendering judgment, which was no longer optional and no longer an act exclusive to a Roman citizen. The judgment ceased to be the opinion of a citizen and became the command of an authority with characteristics of imperativity.

3. Popular actions in roman law

3.1 The public and the private in that period

To avoid the risk of misinterpretation regarding the concept and function of the Roman *actio popularis*, it must be emphasized at the outset that the relationship between the individual and what we now classify as the public and the private was not the same as we know today. The public/private dichotomy only emerged at a later stage. The notions of public interest and private interest were not clearly distinguished in the Roman context as they are in contemporary legal thought. This is not to suggest a linear path from simplicity to complexity, or from the individual to the collective, but rather that the perception of reality was different, in the following sense: "In fact, if we analyze the data we have concerning primitive societies, we will find that the first societies developed from collective realities." (Clementoni, 2017, p. 49). The Roman experience, as Clementoni points out, does not stand far from this scheme (Clementoni, 2017, p. 50).

The subtlety of what is at stake lies precisely in the difficulty of transcending our own social, familial, economic, and juridical categories. Essentially, one must understand that this institution was conceived to protect collective interests, within a society that was not yet familiar with the conceptual separation between public and private spheres. Citizens were perceived as equivalent to the community itself, and thus the representative of the interests of that society was not a fictitious entity external to the individual, but rather each citizen in particular (Silva, 2007). As Clementoni explains, popular actions "were commonly private criminal actions aimed at repressing offenses, insofar as they were acts contrary to the interest of the community" (Clementoni, 2017, p. 40). She further clarifies, drawing on the Digest (D.47.23.1): "We call popular action that which protects, as its own, the right of the people" (Clementoni, 2017, p. 41).

Accordingly, to speak of a popular action in this context – especially during the period of the *legis actiones* – does not imply the figure of an altruistic citizen dedicating

REVISTA DIREITO MACKENZIE
RDM | São Paulo | SP | 19(2) | e17349EN
2025 | v. 19 | n. 2 | p. 1-21 | ISSN 2317-2622. http://dx.doi.org/10.5935/2317-2622/direitomackenzie.v19n217349EN

his time to defending the public interest as distinct from his own. Rather, it signifies the collective defending itself through one of its members. The distinction between the subject of private law and the subject of public law simply did not exist at this historical moment (Silva, 2007).

This phenomenon may also be understood in light of the absence of a defined notion of "State," which gave rise to a natural bond of belonging between the individual and the gens. Rodolfo de Camargo Mancuso describes this link:

> In other words, the relationship between the citizen and the *res publica* was grounded in the feeling that the latter 'belonged,' in some way, to each Roman citizen; and only in this way can we understand that each was legitimized to bring claims in court on behalf of this universitas pro indiviso, constituted by the Roman collectivity (Mancuso, 2008, p. 46).

Thus, the *res publica* was common to all, and consequently all were entitled to defend it (Silva, 2007). From this perspective, the very concept of popular action as we use it today must be reconsidered when looking back at the origins of the institution, since the idea of public legal entities was foreign to that reality. As Hely Lopes Meirelles defines it in contemporary Brazilian law, popular action is:

> [...] the constitutional instrument made available to any citizen to obtain the annulment of administrative acts or contracts – or those equivalent to them – which are illegal and harmful to federal, state, or municipal assets, or to those of their autonomous agencies, para-state entities, and legal persons subsidized with public funds (Meirelles, 2007, p. 123-124).

The continuity between the modern notion of popular action and the protection of interests not strictly private is therefore evident. Building this historical bridge between the Roman *actio popularis* and its contemporary constitutional expression – and recalling the premise that at the time of its creation the public/private divide did not exist as it does today – it becomes necessary to revisit the questions outlined in the introduction: a) What was the purpose of the *actio popularis* in Roman society? b) What role does the popular action assume today in the relationship between State and individual?

3.2 The *actio popularis* in Roman law

To deepen the analysis of the purpose of the *actio popularis* in Roman society, the present section examines its origins within that context. Although its precise emergence cannot be determined, there is evidence of its existence as early as the period of the *legis actiones* (the first period, according to the division outlined above) (Silva, 2007). Records of its use also persist in the formulary period (the second period) (Azevedo; Cruz e Tucci, 2001), with gradual and incremental changes regarding standing (*legitimatio*, akin to the modern concept of standing to sue). The key development was the recognition that, even when the plaintiff had no personal stake in the matter (Silva, 2007), his action could nevertheless be considered legitimate, given the gray area between what we today regard as the public/private divide and what was then understood.

There is no consensus concerning the precise nature of the *actio popularis*. Rodolfo de Camargo Mancuso presents the controversy in the following terms:

> Some scholars take as a criterion the fact of whether the action is of a procuratorial nature or not. José Afonso da Silva clarifies that there are two theses on this matter: 'a) one that understands that the *actiones populares* are procuratorial in nature, the plaintiff acting *procuratio nomine*, in defense of a public interest (a role somewhat analogous to that of a relator in modern *qui tam* actions); b) another, according to which the plaintiff acted simultaneously to safeguard his own interest as well as the public interest.' Others, still, adopt as a distinguishing factor the circumstance of whether the proceeds of the condemnation reverted to the popular plaintiff or to the treasury (a distinction resembling whether damages are awarded to the private claimant or revert to the State) (Mancuso, 2008, p. 49).

According to Mancuso, the resolution of this debate must be sought from a historical perspective. In the earliest phase, there was no distinction between the interest of the *civitas* – the embryonic "State" – and the individual's private interest. Thus, when the popular plaintiff acted, he was at once defending his own interest and that of the social group. From a modern perspective, these interests appear blurred. Yet, with the gradual evolution of Rome's political organization, the beginnings of a separation between individual and public spheres emerged, producing a clearer distinction between private and public interests. Likewise, the *actiones populares* themselves evolved, progressively encompassing a broader range of interests (Silva, 2007).

REVISTA DIREITO MACKENZIE
RDM | São Paulo | SP | 19(2) | e17349EN
2025 | v. 19 | n. 2 | p. 1-21 | ISSN 2317-2622. http://dx.doi.org/10.5935/2317-2622/direitomackenzie.v19n217349EN

From what has been set forth, it can be affirmed that the *actiones populares* were not an exceptional phenomenon within Roman law, but rather something natural to that society. It was only with the much later advent of the State and the consolidation of the public/private divide that popular actions came to be viewed as exceptional with respect to standing (*locus standi*). Accordingly, it is essential first to grasp the socio-juridical relations of their original context before attempting any direct comparison with the institution as delineated in modern legal orders. From a contemporary standpoint, the object of Roman popular actions was neither the plaintiff's purely private interest nor the public interest of society or the State as an abstract subject, but rather something situated in between the two (a type of proto-collective redress).

4. Popular action in Brazil: an analysis from the empirical relationship between public and private

To address the third guiding question – namely: "c) What role does popular action assume today within the relationship between State and individual?"- we begin with a brief theoretical outline of the institution, which does not require extensive elaboration given the vast and consistent body of doctrine already established on the matter (Barbosa Moreira, 1977). We then move on to examine popular action in Brazil from an empirical perspective (placing it within the comparative framework of constitutional remedies and mechanisms of collective redress).

4.1 Brief theoretical notes on the Brazilian *Ação Popular* in the 21st century

The object of the *ação popular* today is the preventive, restorative, or annulatory protection of public assets, administrative morality, the environment, and historical-cultural heritage.

The concept of public assets (*patrimônio público*) within the *ação popular* is extremely broad, encompassing both direct and indirect administration, as well as any private entity subsidized by the State (similar to the U.S. doctrine extending public accountability to entities receiving federal funding). However, the invalidity of acts

against private entities is limited to the extent that such acts impact the use of public funds (treasury resources).

Moreover, "administrative morality" (*moralidade administrativa*) constitutes an indeterminate legal concept, functioning as a legislative technique employed "[...] for the construction of more fluid legal norms, which dispense with the specific instantiation of their predicates (factual requirements) and the corresponding detailed indication of consequences" (Pereira, 2014, p. 47). This resembles the use of standards and open-ended clauses in common law adjudication.

Active standing (*legitimidade ativa*) in the *ação popular* belongs exclusively to the citizen, who, according to Article 1, §3, of Law No. 4.717/1965 – the statute regulating the procedure of this constitutional remedy (constitutional remedy akin to taxpayer standing or citizen suits in U.S. environmental law) – is defined as the registered voter (*eleitor*). This statutory provision has not escaped criticism (Rodrigues, 2011). As Édis Milaré argues, in the environmental context, for instance, the individual citizen would face difficulties sustaining such actions alone, given the presence of adversaries wielding great political and economic power (Milaré, 2015).

Passive standing (*legitimidade passiva*) is broad in the *ação popular*, requiring the formation of a passive joinder (*litisconsórcio passivo*, similar to necessary joinder of defendants in civil procedure). The lawsuit must be filed against the natural or legal persons who authorized, approved, ratified, or executed the challenged act, or who remained omissive, as well as the beneficiaries of the act, in accordance with Article 6 of the *Lei da Ação Popular* (Rodrigues, 2011).

Given the differences between the Roman *actio popularis* and its Brazilian counterpart, Eurico Ferraresi argues that the Roman action was suppletive, since the popular plaintiff "represented" public power in a context where the State did not yet have legal personality, defending his own interest directly and, only consequently, that of the community. By contrast, under Brazilian law, the *ação popular* is corrective, insofar as it is brought against public power by the citizen (Ferraresi, 2009).

Having made these brief theoretical incursions into the contours of the *ação popular*, we now turn to the proposed empirical analysis, in order to deepen the inquiry into the role this instrument assumes today in the relationship between State and individual (a form of public interest litigation comparable to collective redress).

REVISTA DIREITO MACKENZIE
RDM | São Paulo | SP | 19(2) | e17349EN
2025 | v. 19 | n. 2 | p. 1-21 | ISSN 2317-2622. http://dx.doi.org/10.5935/2317-2622/direitomackenzie.v19n217349EN

4.2 Empirical dimension: qualitative analysis of *ações populares* in relation to public and private property

To analyze the public-private dichotomy in the context of the *ação popular* today, two recent cases from the São Paulo State Court of Justice (*Tribunal de Justiça do Estado de São Paulo*) were selected, both involving public property. The following guiding questions were posed: (1) What is the object of the action? (2) What is the relationship between the plaintiff and the object of the dispute? Is it possible to identify such a relationship, and if so, how may it be measured? (3) Would the popular plaintiff derive any personal benefit if the lawsuit were successful?

As the first case study, we selected the *ação popular* concerning the listing (*tombamento*, i.e., designation as protected heritage) of the *Constâncio Vaz Guimarães* Sports Complex, located in the city of São Paulo. This case gained wide media coverage and sparked intense political and social debates. At the time, the Governor of São Paulo announced his intention to demolish part of the complex, which includes the renowned *Ibirapuera* Park, in order to grant the area to private enterprise for the construction of a commercial center, shopping mall, and multipurpose arena. Even amid the restrictions on public gatherings imposed by the Covid-19 pandemic, the proposal generated strong popular mobilization and protests.

The choice of this case is justified by the complexity of the debates it involved, which articulated political, economic, and historical dimensions regarding the limits between the public and the private in the legal treatment of property. Due to its argumentative density and symbolic richness, the case proves particularly suitable for the analytical aims of the present study.

To establish a comparative framework with other cases in the same jurisdiction, a search was conducted in the São Paulo State Court of Justice. Initially, all cases whose case summary contained the terms "*Ação Popular*" and "Appeal" (*Apelação*) and whose judgments were published in 2023 were collected, resulting in 212 cases.

Given that the purpose of this inquiry – namely, verifying the current role of the *ação popular* in the State–individual relationship – would not be achieved by purely quantitative analysis, the research was narrowed to cases involving property, a subject typically subject to the public/private classification, as previously explained. Moreover, the debate surrounding the public-private dichotomy is especially rich when

property is at issue, for, as Caio Mário da Silva observes: "there exists no inflexible concept of property rights" (Pereira, 2017, p. 86).

Accordingly, we searched for judgments containing in their case summary: (i) "Ação Popular" and "Appeal" and "Land" (Terra), and (ii) "Ação Popular" and "Appeal" and "Property" (Propriedade), without temporal limitation. A total of 117 judgments were identified, of which only 18 actually concerned *ações populares*. In order to carry out a qualitative analysis of the selected cases, we further filtered the results to include only digital proceedings that had not yet been archived, which ultimately yielded a single judgment.

4.2.1 The first case: popular action regarding the listing of the complex housing Ibirapuera Park

The first case concerns Popular Action No. 1063273-73.2020.8.26.0053, filed by athletes, professors, jurists, lawyers, architects, and social scientists against the Governor of the State of São Paulo, the State Secretary of Sports, the President of the Council for the Defense of Historical, Archaeological, Artistic and Touristic Heritage (CONDEPHAAT), the Mayor of São Paulo, the Municipal Secretary of Culture of São Paulo, and the President of the Municipal Council for the Preservation of Historical, Cultural and Environmental Heritage of the City of São Paulo (CONPRESP).

(1) What is the object of the action?

The case – which, at the time of submission of the present paper (January 2024), was under appeal – contests the reduction of six council members in the composition of CONDEPHAAT at the moment when the opening of the process for the historical listing (*tombamento*) of the Constâncio Vaz Guimarães Sports Complex was rejected. According to the plaintiffs, the alteration in the composition of CONDEPHAAT's board occurred in order to safeguard political interests.

The plaintiffs point out that the Constâncio Vaz Guimarães Sports Complex covers an area of 92,000 m^2, including the Ibirapuera Gymnasium, and is composed of works that mark the history of Brazilian architecture. It has also been the training ground for various national athletes and the venue for significant events, such as the 1963 Pan American Games.

REVISTA DIREITO MACKENZIE
RDM | São Paulo | SP | 19(2) | e17349EN
2025 | v. 19 | n. 2 | p. 1-21 | ISSN 2317-2622. http://dx.doi.org/10.5935/2317-2622/direitomackenzie.v19n217349EN

Simultaneously with the rejection of the request to initiate the listing process, the Government of the State of São Paulo moved forward with the concession of the complex to private enterprise. For the plaintiffs, this represented a deviation of purpose (*desvio de finalidade*) and, coupled with the modification of the CONDEPHAAT board, a violation of administrative morality (*moralidade administrativa*) and an act of administrative improbity (*improbidade administrativa*).

(2) What is the relationship between the plaintiff and the object of the dispute? Is it possible to identify such a relationship, and if so, how may it be measured?

Given that the Constâncio Vaz Guimarães Sports Complex embodies historical elements relating to architecture, sports, and the city and State of São Paulo, and constitutes an important space for social development, the plaintiffs have a direct interest in the subject matter of the action, whether in a private/professional sphere or from a collective standpoint.

(3) Would the popular plaintiff derive any personal benefit if the lawsuit were successful?

Although there is a private dimension to the interest in this first popular action – since some of the plaintiffs trained there, while others are professionally engaged with the complex's architectural and cultural significance – such private interests cannot be disentangled from the public interest at stake.

4.2.2 The second case: popular action regarding the concession contract for the construction of the Atibaia Municipal Hospital

The second case is Popular Action No. 1009489-02.2020.8.26.0048, filed by a student, a physics professor, and a citizen who ran for city council in the year the lawsuit was brought against Saulo Pedroso de Souza (then mayor), Atibaia Saúde Empreendimentos Imobiliários SPE Ltda., and the Municipality of Atibaia.

(1) What is the object of the action?

The plaintiffs seek the annulment of Concession Contract No. 075/20 (Contract for the Concession of Real Right of Use), alleging harm to public property. The contract, a built to suit arrangement, concerns the construction of the Atibaia Municipal Hospital on public land. The plaintiffs argue that the concession contract executed by the Atibaia Municipality violates principles of public administration, as there is an opinion from the São Paulo State Court of Accounts (TCE-SP) indicating that the Municipality would expend an amount exceeding the estimated construction costs. Furthermore, the Municipality failed to demonstrate the advantages of the agreement.

(2) What is the relationship between the plaintiff and the object of the dispute? Is it possible to identify such a relationship, and if so, how may it be measured?

In this second popular action, it is also evident that private and public interests cannot be completely disentangled. According to the website of the São Paulo State Data Analysis System Foundation, one of the plaintiffs ran for city council as a candidate for the Socialism and Liberty Party (PSOL), whereas the then-mayor, Saulo Pedroso de Souza, was affiliated with the Social Democratic Party (PSD).

(3) Would the popular plaintiff derive any personal benefit if the lawsuit were successful?

Given that one of the plaintiffs was politically engaged, it is plausible that his genuine interest was in safeguarding public administration and the welfare of the local population by preventing damage to the treasury. At the same time, it is equally plausible that such interest was intertwined with the political implications of undermining the reputation of an opponent affiliated with a rival party.

5. From actio popularis to the Brazilian popular action: between historical perspectives and Kelsen's critique

The historical-comparative analysis proposed in this study begins with the premise that understanding contemporary legal institutions often requires an attentive

REVISTA DIREITO MACKENZIE
RDM | São Paulo | SP | 19(2) | e17349EN
2025 | v. 19 | n. 2 | p. 1-21 | ISSN 2317-2622. http://dx.doi.org/10.5935/2317-2622/direitomackenzie.v19n217349EN

examination of their origins, especially when such origins are located in distinct contexts. The Roman *actio popularis*, as demonstrated, arose in a setting in which the concepts of "public" and "private" had not yet been established as autonomous legal categories. Reconstructing this scenario does not mean anachronistically projecting modern categories, but rather evidencing how contemporary concepts emerged through processes of differentiation and institutional, social, and epistemological transformation.

In this regard, Hans Kelsen's critique of the traditional dichotomy between public and private law assumes a central role in the methodological and argumentative justification of this article. For Kelsen, the rigid separation between these two branches of law does not withstand scientific scrutiny, since it is grounded in extrajuridical and ideological presuppositions that obscure the normative structure of legal relations. He proposes overcoming this duality by recognizing that the criteria of distinction based on purpose (public interest vs. private interest) or on the subject (State vs. individual) are flawed. Instead, law should be understood as a unified normative system, governed by rules that apply regardless of their functional classification (Kelsen, 2000, p. 289).

Analyzing the Roman *actio popularis* in light of this critique highlights that the origins of the popular action were not rooted in the public/private dichotomy, but in a logic of collective belonging, whereby the citizen acted in the name of the *res publica* precisely because he was part of it. Thus, it is not possible to speak, with precision, of a distinct "public interest" separate from "private interest." The absence of such a division reveals that the popular action was not an exceptional remedy, but rather a natural manifestation of individual agency in defense of the indistinct collective – at least when interpreted in modern terms.

This perception becomes particularly relevant when contrasted with the current use of popular action (*ação popular*) in the Brazilian legal order. An empirical examination of concrete cases involving the defense of public assets – such as state-owned property with significant symbolic, historical, or urban value – demonstrates that, although the public/private dichotomy is formally adopted, the role of the plaintiff does not unfold in a purely public or purely private dimension. As the cases themselves show, the interests mobilized are hybrid, diffuse, and shaped by complex relations involving identity, belonging, collective utility, and individual valuation.

The comparison between past and present, therefore, is not intended to trace a naïve line of evolutionary continuity, but rather to show that the artificiality of the

public/private division is also revealed in contemporary judicial practice. Empirical data reinforce the theoretical critique: what emerges is not the clear application of a dualistic model, but a constant movement toward a gray zone, in which social functions, political interests, and individual expectations intersect, escaping traditional categories.

At this point, Kelsen's critique ceases to function merely as a theoretical reference and becomes an effective methodological tool: it dismantles rigid classificatory schemes and allows the reconstruction of popular action as a situated legal phenomenon, historically conditioned and sensitive to the complexity of the social contexts in which it operates. The historical-comparative analysis, articulated with Kelsen's critique, thus provides an interpretative framework for rethinking the legal rationality that currently structures the legitimacy and function of popular action.

6. Conclusions

As to the first research question – namely, the objectives of the popular action in the Roman context – it can be concluded that it did not seek to protect a purely private interest of the plaintiff, nor a public interest (a concept not yet developed at the time), but rather something situated in a gray zone between the two.

With respect to the second question concerning the role that popular action assumes today within the relationship between State and individual in Brazil, from a theoretical standpoint it can be said that popular action still bears traces of Roman law, but assumes a different role in light of the firmly established division between public and private. However, when the same question is approached from the perspective of empirical qualitative research, the conclusion is that the separation between public and private in popular actions for the protection of property is merely formal. Attempts to draw a substantive distinction inevitably lead to a gray zone in the delimitation of interests.

This, in turn, calls into question whether it is time to rethink the long-standing duality, especially in view of Kelsen's critique of: (1) the intrusion of metajuridical elements and their improper place within legal science – here, the public/private teleology; (2) the impracticality of separating norms according to whether they serve exclusively public or private interests; and (3) the division of norms based on the identity of the subject (State or individual), which contradicts the rational organization expected of any field aspiring to scientific status (Klinghoffer, 2022).

REVISTA DIREITO MACKENZIE
RDM | São Paulo | SP | 19(2) | e17349EN
2025 | v. 19 | n. 2 | p. 1-21 | ISSN 2317-2622. http://dx.doi.org/10.5935/2317-2622/direitomackenzie.v19n217349EN

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