Evolution of the Judicial Regime Applicable to Public Property

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Abstract: - The paper analyses the distinction between two complementary notions: public and private, starting from the beginnings of their historical background. In order to understand the importance of every one of these two categories of judicial regimes, it is necessary to underline the historical context of the creation of the public domain and the implication of other causes that determined the creation of the public property. Is it really still necessary to identify boundaries between public and private domain? The study tries to answer this question guiding the reader to the origins of these institutions and to their historical meaning in Romania and other relevant countries that inspired the Romanian Civil Law, like France and Canada.

Key-Words: - property, public domain, private property, state property, law, goods

1 Introduction

The purloining of the private appropriation of a category of goods destined for the use of the entire community [1] has been a concern acquiring to historic dimensions, since the Roman law to present. In an incipient form goods were considered common even in the period of emerging tribal communities [2], but the category of public property goods represents, both semantically and content wise the complex result of centuries of judicial as well as economic evolution once with the occurrence of state organisation. Gradually a category of goods emerged not subject to private appropriation and that could not belong to anyone, namely the category of goods representing the public domain [3].

Also, the classification of goods, particularly of non patrimonial goods [4] includes the goods belonging to a community, called *res universitatis*, that, being destined for public use, could not be alienated, only made subject of concessions.

2 The Public Property in the French Law History

Leaving behind the faraway ancient history, we retrieve the importance of classifying goods belonging to public property in the more recent history of France and early French law. French law has a significant contribution to crystallizing the conception of public domain even since the period of absolute monarchy, when it was known as "Crown Property" of "Crown Domain", which, however, was not distinctive from the king's private property, the two categories overlapping. Thus, until the French Revolution of 1789, the king remained owner of the "Crown Property" goods, having the sovereign right to freely decide in relation to these.

The Edict of Moulin (1566) introduced the principle of public domain inalienability, hence the goods of kings were inalienable, as being part of the Crown Domain, in the sense of state. Nevertheless, the king's property right over the Crown Domain goods was recognized, and significantly, not a simple administration right. Possibly for the first time during the efforts of pencilling the characteristics of property law, on the occasion of the Declaration of the Rights of the Man and of the Citizen (26 August 1789) Robespierre was presenting property as the most sacred right, hence, in the view of this eminent politician, the determination of the legitimate character of property right had to follow from the regulations of the Declaration [5]. This opinion is applicable, by extrapolation, also to public property law, as goods belong to private or public property according to established legal criteria, but also depending on proving the property right belonging to a legal subject, either community or individual. Constantin François Volney, in one of his speeches on quality, liberty and property emphasizes the concept of private property of the individual, on the general note of the conceptions emerged during the French Revolution, considering property to be a physical attribute of man – each man being the absolute, full

owner of the results and products of his work. Even though private property acquires new merits, the notion of public domain is not eliminated, the French nation being declared its owner, and in 1790, the Domains Code (1790) regulates the transfer of property over the public domain from the king to the nation. Starting, however, from the idea that the nation's property right cannot be limited, the principle of inalienability is abandoned, and the state as owner of the property right is replaced by the nation, as a distinctive entity. Thus, consequently to removing the property right of the state in favour of the nation, the rationale preceding the Domains Code was deemed irrelevant to the substantiation of the modern theory of the public domain.

By the 1867 Constitution of Canada the domainial situation is regulated, by granting full control and disposition over the grounds of the Crown to the executive administration of the provincial governments and legislatures, the Crown lands thus becoming public property of the respective provinces of their location [6].

Victor Proudhon is the first French author who resumes the debate over the concept of public domain versus private domain, his conception being generally valid at the end of the 19th century and still being actual at present. According to this conception, the notion of public domain held a threefold significance: the domain of sovereignty, the public domain and the private domain. The public domain consisted mainly of the power specially assigned to govern and administer goods by law granted for the use of everybody and not owned by anybody. Even though Proudhon considered that notwithstanding the fact that the public domain is granted to public utility, this cannot belong even to the public legal body, the sate being the "public's attorney". It was not till the beginning of the 20th century that this theory was disputed, by recognizing ownership of the private property right to the public legal body. Thus the concept of „administrative property" is born and the distinction between public property, depending on the public nature of the owner on one hand, and public domain, characterized by the dedication and inalienability of the good, on the other is put up for study [7].

3 The Royal and the Crown Domain

From a historical view, without going into further detail on the evolution of the notion of property right and its expansion in Romania, we only point out the remaining uncertainty of the distinction between the goods belonging to the Royal Domain, property of the king, and the goods belonging to the Crown Domain, property of the state, with usufruct right of the sovereign, what led to a truncated knowledge of the judicial situation of the lands belonging to the two domains in 1948. Another opinion asserts, that parallel to and distinctively from public property and its goods, in 1884 the Crown Domain is established including certain goods indicated by law, and considered inalienable and imprescriptible. However, according to the Regulations for Enforcement of the Law for Satisfying the Normal necessities of Fire and Construction Wood of the Rural Population in the Old [Romanian] Kingdom, in Bessarabia and Bucovina (1925) [8], when the state had no woods within a 20 km radius of the village centre, the woods of the Crown Domain and of all "public or private moral persons" were to be expropriated, wherefrom unequivocally follows that the Crown Domain was distinctive from the state domain.

By Decree no. 38 of 1948 for the inclusion into state property of the goods of former King Michael I and of the members of the former royal family, all mobile and immobile goods property of former King Michael I of members of the former royal family at the 6th of March 1945 were transferred on the same date to the property of the Romanian State. Thus starts the socialist era of Romania and new forms of collective property are established, the socialist state property right being defined as "the right belonging to the entire people [nation], materialized by the state, of appropriating all means of production and products, exercising possession, utilization and disposition of these, by its own power and in its own interest, as recognized by socialist law, as expression of the will of the entire people" [9]. Thus the dimensions of state property – public property and private property – are abolished and replaced by what was called socialist state property.

4 The Meaning of the Public Domain according to the Romanian Law

The modelling process of public property in successive historical eras has allowed controversy on the polarity and criteria of distinction between the public and private domain. The principle of inalienability is reiterated as a particularity of the public domain and a consequence of the fact that public property goods re dedicated either to

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utilization or to public interest [10]. The other two aspects of judicial character of private property, namely imprescriptibility and unseizability follow from inalienability that becomes the main axis of the judicial regime of public domain. The relativity of the principle of public domainiality has yielded the relativity of the rule of inalienability, in the sense that public property goods can be transmitted into private property, subject to strict regulations. Thus, the transfer of a good into private domain requires a judicial deed of at least equal force to the initial one establishing the respective good belonging to the public domain.

Unlike private property, public property concerns a far more limited range of goods, typically removed from the civil circuit and included into the notion of public domain, namely certain goods that by their nature are of general utility or interest [11].

According to art.136 par.(2) of the Romanian Constitution, republished, public property if guaranteed and protected by law and belongs to the state or to administrative - territorial units. Consequently the holders of public property right are determined exhaustively, hence the administrative-territorial units being the village, the town, the city and the county as judicial-administrative entities with territorial competence, and the notion of state defining those public authorities whose competence is general, encompassing the entire territory of the country. On the other hand, Law 213/1998 regarding Public Property and its Judicial Regime, uses both the phrase public domain as well as public property, hence a discussion on the contents of the two phrases and their possible identity.

Starting from the idea that the public domain is a traditional institution of administrative law, it has been considered that the area of what is known as public property is different from what we understand by public domain. Public domain is understood as including those public or private goods that by their nature or by express provision of law need to be preserved and transmitted to future generations, being in the property or custody of public law legal bodies, forming the so-called „scale of domainiality". According to other descriptions, the public domain is identified as the totality of goods referred to by the law of public property [12]. Further it has been argued that the goods forming the object of public property represent the public domain and are called domainial goods, as opposed to the rest of goods that form the civil domain and belong to private property. A viewpoint criticized in literature asserted that public property can be of public domain, namely the goods mentioned at art.135 no. 4 of the Constitution of Romania [art.136 par.(3) of the Constitution of Romania, republished], or can be of private domain, namely all other goods that are object of public property.

The highlight of all these doctrinarian analyses, however, is the analysis of in a larger and a stricter sense of the notion of public domain, the complexity of the mentioned notions requiring a thorough view capable of explaining the extent of the public domain and implicitly of that of public property law. Consequently, *lato sensu*, we understand by public domain all goods that are object of public property, as well as certain goods belonging to private property and being in custody and under the protection of the state or administrative-territorial units, subject to a regime of public law. *Stricto sensu,* the public domain includes only the goods that are the object of the public property right of the state and administrative-territorial units, without however confusing the phrase "public domain" with that of "public property". Thus public domain is the totality of public property goods, "while public property is a judicial institution with holders determined by constitutional norm". The overlapping and complementarity of analyses in literature on administrative and civil law, respectively, is consequently inevitable and natural.

Incidentally, both public and private properties are characterized by a special judicial regime rendering them distinctive, "even if they overlap in an exceptional and strictly limited manner" [13]. The exceptional character of state property also follows from art. 1 of the additional Protocol no. 1 to the European Convention on Human Rights, that provides that "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law", however asserting "the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest…".

Already in the period between the two World Wars the judicial situation of certain categories of domainial goods was regulated, as follows for example from the Law of Mines (1924) or the Law of Waters (1924). Thus, according to art. I. of the Law of Mines, state property were considered: "from the surface to the depths the ore deposits (…) natural gases of any kind, mineral waters in general and any riches of the underground". In individual private property remained the masses of common rock, the quarries of construction materials and the peat deposits. The phrase "state property" can be

assimilated to public property, the state being the holder of the property right „by virtue of the capacity of public law, as public law person" [14]. According to art. I-II. Of the Law of Waters of 1924, waters generating motor force, as well as those that can be used for community interests are public goods, and the waters feeding the waters belonged to the abutting owners, excepting the beds of the rivers: Jiu, Olt, Lotru, Argeş, Dâmbovița, Ialomița, Siret, Moldova, Bistrița and Prut, that remained in state property. The natural state, as modality of establishing the public domain can be found in a situation related to the one expressly provided by law, namely when the not navigable river that does not generate motor force becomes navigable as soon as transferred to public domain.

At present it was considered that in view of the exorbitant regime, derogatory from common law, to which public property [15] is subjected, the riches "of any kind" of the underground are the object exclusively of public property, as provided also by art.135 par.(3) of the Constitution of Romania, republished. Upon revising of the Constitution, art.136 par.(3) regulated the judicial regime of the riches "of public interest", so that this category of goods has been restricted as to the extent of public property right. *Per a contrario,* the underground can be object of private or public property right, so that the owner of the ground and the respective underground can alienate part of the underground. Hence the underground belongs to the owner "to the full depth, to the centre of the Earth". Also, it is signalled the necessity of legislating a clear delimitation between the riches of national and local interest, as the phrase "riches of public interest" does not provide this distinction, that, as has been noticed, was not necessary in the past. Thus for example, according to the Law of Mines of 1924, all riches of the underground belonged exclusively to the state, regardless of their nature and destination. Relevant is also the distinctive character of the property right of the state or administrative-territorial units over the respective ground and underground and the property right over the riches of the underground on one hand, and respectively between the latter and the utilization right of the underground on the other. In this sense the state or the administrative-territorial unit can exercise this real right under public law regime.

5 Conclusion

In French literature [16] it is pointed out, that legislation does not consecrate a general criterion to allow the delimitation of public from private domain whose holder is a public law person. Still, the French Civil Code includes by art.538-541 provisions regarding the domain of the public person, while the Napoleonic Code did not include a distinction between public and private domain, what led to the absence of criteria for public domainiality. The French Civil Code reiterates the idea found in the Domainial Code according to which goods not susceptible as belonging to private domain due to their nature or destination are considered as belonging to the public domain. Notwithstanding the possibility was recognized of declassification of the majority of goods from the public domain, for the very purpose of being transferred to private domain. The special legislation however, clearly distinguished the belonging of certain goods to the public domain, like motor ways, express ways, the ground and underground of the territorial sea.

Although there are reasons to believe that the public domain is still searching for its limits and features, the necessity of maintaining the inalienability of certain goods is unquestionable. It is the obligation of the legislative power to find the more efficient means in order to underline, beyond any doubt, the distinction between public and private property and the differences between public property and public domain, in the context of a modern understanding.

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