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PRIVATE VERSUS PUBLIC DOMAIN

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Abstract: *The purloining of the private appropriation of a category of goods destined for the use of the entire community 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, 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.*

Key words: *property, public interest, private domain.*

1. Introduction

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. Also, the classification of goods, particularly of non patrimonial goods 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.

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.

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 utilization or to public interest.

The other two aspects of judicial character of private property, namely imprescriptibility and unseizability follow

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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.

2. Romanian Law regarding Public Property.

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.

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.

3. A Historical Point of View

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".

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 was 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".

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 [7].

At present it was considered that in view of the exorbitant regime, derogatory from common law, to which public property 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.

4. French literature

In French literature 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.

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