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CONFLUENCES AT THE BOUNDARY BETWEEN PUBLIC AND PRIVATE PROPERTY

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Abstract: *Public property is characterized by an exorbitant legal regime, derogating from common law, as it is exercised over goods in the public domain of the state or administrative-territorial units, in order to protect the general interest. Often, however, in practice, situations are encountered in which the border between public property and private property is subject to misunderstandings between the public authorities representing the state or administrative-territorial units, on the one hand, and private property owners, on the other hand. We will analyse such situations, especially that of expropriation de facto, but also the situation in which there is a wrong application of the legislation on the reconstitution of the right of ownership in the matter of the land fund and in which there are overlaps regarding the same land, between the subject of civil law and the holder of the public property right.*

Key words: *public property, private property, expropriation, restitution in integrum*

1. Introduction

Regarding the way of acquiring property by the state, starting from the theory of legitimizing the ownership of an asset to the owner of the property right, judicial practice established that, based on the art. 645 of the former Romanian Civil Code (1864), the law is a modality of acquisition that does not allow the possibility for the state to become the owner based on an administrative decision. Although this method of acquisition was applied in the socialist regime, it was considered, in the most cases, a takeover *without a valid title* that allowed, after the entry into force of the reparative legislation on retrocessions, the recognition of the right to restitution of the former owners.

On the other hand, unlike the private domain, the public domain contains a much narrower sphere of goods, which are not found in the civil circuit, and which, according to the law or by their nature, are of general use or interest. However, we note that, in turn, the private domain of the state or territorial administrative units has a limited scope compared to the private property of natural or legal persons under private law.

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2. Legal Framework

The sphere of goods that make up the public domain must be acquired by the state or territorial administrative units in the ways provided by law. Art. 554 para. (1) Civil Code takes the previous provisions in an approximate form, but inserts a new criterion in the delimitation of the goods that form the object of public property, namely, that they have been *"legally acquired"* by the state or territorial administrative units.

We believe that this phrase has its origin in the provisions of *Law no. 247/2005 regarding the reform in the fields of property and justice, as well as some adjacent measures,* which recognized the application of the principle of *restitutio in integrum* and, consequently, admitted the restitution of the land in favor of the former owners - subject to repossession abusive practices from the communist period, including on the assets that, at that time, were in the public property of the state or territorial administrative units. The motivation was that, although public property is inalienable, it is conditioned by the way in which the goods acquired this legal regime.

The provisions of art. 859 para. (1) Civil Code resume the constitutional provisions in the matter: *"the public interest wealth of the subsoil, the airspace, the waters with exploitable energy potential, of national interest, the beaches, the territorial sea, the natural resources of the economic zone and of the continental plateau constitute an exclusive object of public property, as well as other assets established by organic law".*

On this occasion, we reiterate our support for the development of a Domain Code, for the purpose of the unitary regulation of the legal regime of public property. Although we have argued in the preceding, that the insertion of certain provisions in this field into the Romanian Civil Code is welcome, we emphasize that this legislative compromise solution must be temporary and anticipate the distinct codification of both the real rights of an administrative nature and the entire size of public property.

3. Short Aspects regarding the Public Property in the United States of America

In the United States of America, as a result of the codification of uniform legislation, at the federal level, Title 43 entitled “Public lands” contains, in almost 600 pages, detailed regulations regarding the administration and disposition of land and resources from the public domain.

We mention on this occasion that, although it is not a normative act in itself, the United States Code is a set of normative acts issued at the federal level, by the Parliament of the United States (United States Congress), published both in printed form in its entirety and given every 6 years, with annual supplements in the other 5 years that include legislative changes, as well as in online form, starting in 1994. The United States Code is published after its approval by a special session of Congress.

The Code includes 54 titles and 5 annexes, being the result of an extensive codification of legislation of a general nature and in force, carried out by the Office of the Legislative Council of the United States within the Chamber of Deputies (The Office of the Law Revision Council). The code contains titles regarding the so-called “positive law”, i.e. normative acts adopted by the Parliament, as well as titles regarding “the non-positive

law", i.e. compilations of normative acts based on the editorial decision of the Legislative Council Bureau.

4. The Inalienability of Public Property

The inalienability of the public domain has an exceptional character, but also a relative and temporary character. The limits of inalienability allow the possibility of decommissioning an asset from the public domain and, consequently, its transfer to the private domain.

In this regard, art. 864 from the Romanian Civil Code provides: *"the right of public ownership is extinguished if the good has perished or has been transferred to the private domain, if the public use or interest has ceased, in compliance with the conditions provided by law".*

In accordance with the principle of symmetry of legal acts, the decommissioning of an asset from the public domain is carried out based on the same procedure according to which an asset was transferred from the private domain to the public domain.

According to art.361 from the Romanian Administrative Code, the transition from the public domain to the private domain is made, as the case may be, by decision of the Government, the county council, respectively the General Council of the Municipality of Bucharest or the local council, unless the Constitution or the law provides otherwise.

The decommissioning of the asset from the public domain and its transfer to the private domain is conditioned by "fundamental justification of the cessation of use or the national or local public interest, as the case may be", under the penalty of the absolute nullity of the Government decision or the decision of the county or local council in question.

Consequently, an asset from the public domain, regardless of whether it belongs to the national, county or local public domain, cannot pass, through the effect of its declassification, directly into the patrimony of a natural person or legal entity under private law. An exception to this rule is the situation of the reconstitution of the ownership right on the old site, on some lands from the land fund of Romania, or the situation of the restitution in kind of buildings taken over abusively between March 6, 1945 and December 22, 1989. This decommissioning was carried out *ope legis*, but with the completion of the special procedures regarding retrocession, regulated by Law no. 18/1991, respectively, by Law no. 10/2001 regarding the legal regime of some buildings taken over abusively between March 6, 1945 and December 22, 1989.

We exemplify art. 36 para. (1) of the Land Fund Law no. 18/1991 for lands in the built-up area which assessed that the transfer operated directly, without any other procedures and, therefore, without the need to issue a government decision according to the provisions of Law no. 213/1998 regarding public property and its legal regime.

Case no.1: The right of ownership of a private person was violated by the Town Hall of M. Village, Brașov County over the arable land registered in the Land Register, cadastral no. xxxxx considering the fact that, following the parcelling in 2015 carried out by the same village hall, the property limits were shifted, so that approximately 9000 square meters overlap the flood defence dam, owned by the Romanian state and managed by

the Brașov Water Management System – Romanian Waters National Administration, according to Annex 12 of Government Decision no. 1705/2006 regarding the inventory of assets in the public domain of the state.

In this sense, the Brașov Water Management System – Romanian Waters National Administration confirms the existence of the overlapping of the land in its ownership (according to the new limits established by the land plot carried out in 2015 by the M. Village Hall and approved by the Brașov Cadastre and Publicity Office) and the hydro technical work (dyke). Therefore, from the surface of 2602 sqm – the total surface area of the land, 2551 sq m overlap with another identification cadastral no. yyyyy, including the dam. Also, the same public authority signals the fact that, according to the provisions of art. 40 paragraph (2) of the Water Law no. 107/1996 with subsequent amendments and additions, the width of the protection zones that belong to the Romanian state, is established according to annex no. 2, and the right of ownership also extends over the protection zones - 4 m from the base of the dike towards the protected area, representing the area of 1182 square meters.

By the Romanian Ombudsman`s Recommendation, The Mayor of M. Village, Brașov County, also the President of the Local Commission for the Establishment of Private Property Rights over M. Village lands, in the exercise of the powers provided for by the legislation in force, has to quickly take all the necessary measures in order to restore the plot plan and to identify the establishment of the surfaces of land located in the outside built-up area of the M.Village, in such a way as to reflect the reality on the ground, taking into account the defense dikes registered in the Government Decision for the inventory of goods in the public domain of the state no. 1705/2006, Annex 12.

5. The Conditions of Expropriation

Another case that provides for a different procedure for the decommissioning of assets from the public domain is the one regulated by art. 35 of Law no. 33/1994 on expropriation for reasons of public utility, republished, according to which, "if within one year the expropriated real estate has not been used according to the purpose for which it was taken from the expropriated or, as the case may be, the works have not been started , the former owners can ask for their retrocession, if a new declaration of public utility has not been made".

Law no. 33/1994 on expropriation for reasons of public utility regulates the situations and conditions in which immovable property owned by individuals or legal entities with or without profit, as well as those in the private ownership of communes, cities, municipalities and counties can be expropriated. Once expropriated, these assets are transferred to the public domain of local, county or national interest, as the case may be.

The decommissioning of an asset from the public domain can only be done in compliance with the appropriate public interest criterion, according to art. 864 of the Romanian Civil Code and art. 361 para. (3)-(4) of the Administrative Code. However, the lack of a legal framework that establishes certain ways to determine whether the use or public interest has ceased has been pointed out in the specialized doctrine. The

administrative authority that administers the asset from the public domain subject to decommissioning, the representative of the owner of the property right, thus finds itself in the situation of having an "increasing freedom in choosing the solution to be given to specific cases".

Transferring an asset from the public domain of the state or territorial administrative unit to their private domain is a decision of great responsibility, which we can say is an example of increasing the administrator's discretionary power, but perhaps most certainly, a proof of the decision-making power, the position of superiority of the public authority, but manifested within the limits of the law.

Case no.1: On the 31st of October 2023, The President of Romania sent to the Constitutional Court on Tuesday, an objection of unconstitutionality on the Law for the amendment and completion of Law no. 23/2020 regarding the legal regime of the Dacian Fortresses in the Orăștiei Mountains, which are part of the UNESCO World Heritage List, and some measures to protect them.

The purpose of the law is to amend and supplement Law no. 23/2020 regarding the legal regime of the Dacian Fortresses in the Orăștiei Mountains, as well as some measures aimed at removing from the forest fund the lands from the site area and the protection zone of the Dacian Fortresses, the procedure regarding the expropriation of some lands related to historical and archaeological ensembles and sites that are part of the Dacian Citadels of the Orăștiei Mountains, respectively the taking over in the county public domain of the citadels entered in the inventory of the national public domain.

The Romanian President argued that: *"initially starting from the need to remove some fallen trees and some diseased trees that would have fallen over parts of the historical monuments, a situation likely to put the condition and integrity of the monument in great danger, but also the safety of tourists, is reached, by using a phrase unclear, from the perspective of the zoning regime, to be removed from the national forest fund a significant area that can add up to more than 335 ha of forest fund, according to the information published by the National Heritage Institute. The phrase used, as well as the lack of predictability of the criticized law, are likely to create confusion on the extent of the land areas to be removed from the national forest fund, without payment and without compensation, with effects much more extensive than those formally declared in the statement of reasons. Therefore, the criticized norm violates the provisions of art. 1 paragraph (5) of the Romanian Constitution, due to the lack of clarity of the rule that does not allow the exact identification of the object of the regulation, respectively of the lands that are subject to removal from the national forest fund, without payment and without compensation".*

6. *De facto* Expropriation

In the doctrine but also in the judicial practice, it was emphasized that the limitation of the exercise of the right to private property, even if it is generated by a public interest, imposes certain correlative obligations on the public authority in question, and in the absence of a legal provision that regulates easements of public utility in reality it is possible to reach a *de facto* expropriation of privately owned land, or, the European

Court of Human Rights found that "certain restrictions, sometimes discretionary, of the public authority on property rights, can lead to real violations of guaranteed fundamental rights at the European level".

Also, in the jurisprudence of the European Court of Human Rights regarding art. 1 Additional protocol no. 1 to the European Convention, the application of the so-called "fair balance test"\" was stated, in the sense that the Court must determine whether the sign of equality has been established between the requirements of the general interest of the community and the protection of individual rights. The European court also showed that it respects the way a state "conceives the imperatives of the general interest", except in the situation where they do not have "a reasonable basis".

Case no.1: The B.Village Hall does not allow a person to exercise the right of private ownership over a plot of land of 17 square meters - a remaining area after the expropriation of the 10 square meter area and the demolition of the construction built in the year 1985 (garage annex).

Moreover, a bulldozer-excavator belonging to the B. Commune City Hall was found on its land, while carrying out work – an action which is considered by the owner of the land an abuse, taking into account that he had not been asked to give his consent by the Commune City Hall.

By the Romanian Ombudsman`s Recommendation, The Mayor of the B. Commune of Brașov County, in the exercise of the powers provided by the legislation in force, has to undertake measures that consist in offering the petitioner an exchange of land in a regulated area for garages, located near the petitioner's residence;

Also, The Mayor of the B. Commune, Brașov County, in the exercise of the powers provided for by the legislation in force, will take all steps to notify the petitioner in advance of the works that are necessary in the bordering area of the land privately owned by the petitioner and which involve access to his land.

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