

THE IMPORTANCE OF CLASSIFYING AN ASSET AS BELONGING TO THE PUBLIC DOMAIN

Cătălina-Georgeta DINU¹

Abstract: *According to the special Law no. 165/2013 regarding the measures to complete the restitution process, the Local Land Fund Commissions drew up the validation proposal from Annex no. 29, in Annex 23, meaning that the County Land Fund Law Enforcement Commissions revoked the decisions that contained the recognition of the right to property on the land that was illegally taken by the communist regime and entered the state property. So, this type of land can be unavailable for the former expropriated owner, in favour of the state? On the other hand, Romania adopted new regulations which complete Law no. 222/2017 with a provision allowing the alienation, by donation to third parties, of a Patriot system owned by the Romanian state. This research wants to highlight two situations where the delimitation between public and private domain has practical importance.*

Key words: *public domain, land, property, military assets*

1. Introduction

By the entry into force of the provisions of article 6 paragraph (6) of Law no. 165/2013 regarding the measures to complete the restitution process in kind or by equivalent of the buildings taken over abusively during the communist regime in Romania, with the ensuing amendments and additions, respectively according to Law no. 45/2009 on the organization and operation of the ASA and the research-development system in the field of agriculture, forestry and food industry (according to which the lands under the administration of the research-development institutes are inalienable and cannot be removed from public property), the Local Land Fund Commissions drew up the validation proposal from Annex no. 29, in Annex 23, meaning that the County Land Fund Law Enforcement Commissions revoked the decisions that contained the recognition of the right to property on the land that had illegally been taken by the communist regime and entered the state property.

So, this type of land can be unavailable for the former expropriated owner, in favour of the state? On the other hand, Romania wants a draft law to complete Law no. 222/2017 (law specifically dedicated to the purchase of the Patriot missile system) with

¹ *Transilvania* University of Braşov, catalina.matei@unitbv.ro, senior Lecturer, Ph.D.

a provision allowing the alienation, by donation to third parties, of a Patriot system owned by the Romanian state. The Patriot missile system, purchased in accordance with the law by the Romanian state, through the Ministry of National Defense and which represents an essential element for national security, is public property. So, can it be donated? An analysis of these issues is carried out in the following article.

The criterion of the declaration of law is the main way of including some goods in the public property and, in fact, the only criterion on the basis of which the legal regime of the goods is established.

The goods that are exclusively the object of public property must be established by law, in accordance with the constitutional provisions. The declaration of the law is "the first and main criterion of public domain".

On the other hand, the deed of attachment that removes the asset from the civil circuit must be based on legal provisions, but it also represents a valid title justifying its subsequent belonging to the public domain.

The existence or not of a valid title is important in the context of the application of the legislation on the retrocession of real estate taken over abusively by the communist regime.

In this case, we bring forward the legal situation of the building components of the former Sinaia domain – Peleş Castle and Pelişor Castle which were at the time of the retrocession in the public ownership of the Romanian state and under the administration of the Ministry of Culture and Religion; The Knights' House, the Foişor Castle, the Treasury, the former stables, the electrical plant, the silver fox farm and the other dependencies were owned by the Romanian state and managed by RAPPS (Matei, 2012, p.115).

Returning to the formal aspects of highlighting public domain assets, we note that the formal act of classifying an asset as belonging to the public domain represents the "mirror" of the application of the criterion of the declaration of law and creates additional protection for public property assets.

Also, goods classified according to the law as being subject to the legal regime of public property must be effectively intended for public utility.

According to the general interest theory, the administrative domain is divided into two categories: the public domain and the private domain, the public domain being affected by the general interest.

Since the goods of the public domain follow a regime exorbitant to the common law, they are considered inalienable and imprescriptible, and, as a result, the rights exercised over the goods of the public domain are separated from the right of ownership, for the purpose of the economic use of natural resources, for example (Tofan, 2017, p. 283).

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.

Conversely, the private domain of the state or territorial administrative units has a limited scope in relation to the private property of natural or legal persons under private law.

The inalienability of the public domain has an exceptional character, as I stated before, 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 transmission into the private domain.

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

The decommissioning of the asset from the public domain and its transfer to the private domain is conditioned by “substantial justification of the cessation of use or the national or local public interest, as the case may be”.

The transfer of 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 discretionary power of the administrator, 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.

Regarding the way in which the state exercises its right of ownership over private property, the Administrative Code regulates that it enters into civil law relations, as a subject of common law, without benefiting from certain special prerogatives over any other subjects of civil law (Bularca, 2023, p.19).

2. The Reconstitution of Lands that Belong to Public Property

By the entry into force of the provisions of article 6 paragraph (6) of Law no. 165/2013 regarding the measures to complete the restitution process in kind or by equivalent of the buildings taken over abusively during the communist regime in Romania, with the subsequent amendments and additions, respectively under Law no. 45/2009 on the organization and operation of the ASA and the research-development system in the field of agriculture, forestry and food industry (according to which the lands under the administration of the research-development institutes are inalienable and cannot be removed from public property), the Local Land Fund Commissions have drawn up validation proposals from Annex no. 29, in Annex 23, meaning that the County Commissions for the Application of Land Fund Laws have adopted validation decisions. An example in this regard is the claimed locations that are found in the perimeter of INCDSZ (The Beet and Potato Research-Development Institute of Brasov), Applicants in this situation being registered on Annex no. 23, must wait for the file to be sent to The National Authority for the Restitution of Properties, in order to grant compensation for the difference in retroceded land.

Persons dissatisfied with these transformations do not have to formulate requests for revocation pursuant to Law no. 554/2004 on administrative litigation.

The procedure to be followed is regulated by the provisions of article 27 paragraph (3)-(8) of the 2005 Regulation regarding the procedure for establishing, attributions and functioning of the commissions for establishing private property rights over land, the model and method of awarding titles of property, as well as the possession of the

owners, with subsequent amendments and additions, approved by Government Decision no. 890/2005, with subsequent amendments and additions, according to which the complaint must be filed in court against the County Land Commission's Decision, within 30 days of communication.

However, taking into account the provisions of article 12 of Law no. 165/2013 regarding the measures to complete the restitution process in kind or by equivalent of buildings taken over abusively during the communist regime in Romania, with subsequent amendments and additions, according to which, "in the situation in which the restitution of agricultural land on the old sites is not possible, after the validation of the extent of their property rights by the county land commissions or, as the case may be, by the Land Fund Commission of the Municipality of Bucharest, the former owner or his heirs are assigned a plot of land in another location, in the order provided by the same laws".

Therefore, the files regarding the reconstitution of the ownership right, with land areas listed in Annex no. 23 (compensations) must go through several preliminary stages regulated by law, prior to their transmission to the National Authority for Property Restitution.

These stages preceding the submission of the file to the ANRP refer to the Commission's proposal for the allocation of land on another site, "in the following order:

a) on the lands in the reserve of the local land commission;

b) on public property lands, transferred, according to the law, to the private property of the state, or on the private property of the state, which were administered within the scope of the administrative-territorial unit by institutes, research stations or other public institutions;

c) on public property lands, transferred, according to the law, to the private ownership of the state, or on the private property of the state, which were administered by institutes, research stations or public institutions within the range of neighbouring localities, located in the same county;

d) on the lands occupied by outbuildings".

However, if the former owner wishes to reconstitute the right of ownership on the same site, this fact is not possible from a legal point of view, if, in accordance with the provisions of Law no. 45/2009, it is necessary to reduce the area of land which is indispensable for the activity of INCDCSZ.

For example, according to Annex no. 14 of Law no. 45/2009 regarding the organization and functioning of the "Gheorghe Ionescu-Sișești" Academy of Agricultural and Forestry Sciences and the research-development system in the fields of agriculture, forestry and food industry, the minimum unavailable area to the INCDCSZ Braşov activity within the radius of the Ghimbav locality, is 386.93 ha.

Or, according to article 6 paragraph (6) of Law no. 165/2013 on measures to complete the restitution process, in kind or by equivalent, of buildings taken over abusively during the communist regime in Romania, with subsequent amendments and additions, "are exempted from the application of the procedures provided for in para. (5) the areas of land with agricultural purpose which are indispensable for the activity of research-development-innovation and the multiplication of plant and animal biological material,

of public utility, provided in annexes no. 1-5 and 7 to Law no. 45/2009 regarding the organization and functioning of the "Gheorghe Ionescu-Sișești" Academy of Agricultural and Forestry Sciences and the research-development system in the fields of agriculture, forestry and food industry, with subsequent amendments and additions.

3. The Limits of Inalienability. Case study

The inalienability of the public domain has an exceptional character, as I stated before, 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 transmission into the private domain.

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

Currently, the procedure is regulated by article 361 of the Administrative Code, remaining unchanged.

Paragraphs (2) (3) and (4) of the same article specify that the decommissioning of the asset from the public domain and its transfer to the private domain is conditioned by "substantial justification of the cessation of use or the national or local public interest, as the case may be", under the penalty of absolute nullity of the Government decision or the decision of the county or local council in question.

The Association for the Defence of Human Rights in Romania - Helsinki Committee (APADOR-CH) submitted to the People's Advocate the request to appeal to the Constitutional Court Law no. 246/2024, by which Romania donated a Patriot defense system to Ukraine, considering that the constitutional provisions prohibit the alienation (sale or donation) of public property.

The organization claims that the Romanian state could have given free use of the defence system, while keeping ownership of it.

The two grounds of unconstitutionality that can be invoked in the referral to the CCR would be: A. The vagueness of the law; B. Public property is inalienable.

Through the single article of Law 246/2024, article 1 of Law 222/2017 includes three new paragraphs.

The first of them is drafted unclearly, almost at the limit of logic, not fulfilling the conditions of clarity and predictability required for a legal provision, in the sense of article 1 paragraph 5 of the Constitution.

Thus, in article (3/1) it is stipulated that: A PATRIOT surface-to-air missile system... is the subject of acts of donation to third parties, under the law, by the decision of the Government."

"From the writing of this article, it is not clear whether the Patriot system has already been donated or is to be donated, since a verb in the present tense *makes the object* is used, nor if it is about a single act of donation or several, since the plural *deeds of donation* is used for a single system", argued the association.

In order for the state to be able to donate the public property (the Patriot missile

system), it was not enough to amend a law (in this case, Law 222/2017), but also the Constitution, respectively article 136 paragraph 4 of the Constitution.

APADOR-CH considers, therefore, that the newly introduced paragraph (3/1) article 1 of Law 222/2017 is unconstitutional since according to it a Patriot missile system could be donated.

However, the Legislative Council favourably approved the draft law, specifying on the one hand that it cannot rule on the annex that is part of the law, considering that it was not submitted for approval and on the other hand, that the solution of the legislation according to which the Patriot surface-to-air missile system is the subject of acts of donation to third parties is insufficiently clear, which affects the predictability and accessibility of the rule.

Moreover, the annex to which this system is a part is classified, hence its belonging to the public domain is uncertain, at least from the point of view of publicly accessible information.

We specify that by the same law, the Government of Romania is entitled to undertake the necessary steps, for the reconstitution of the ground-based air defence capability, related to the essential endowment program “High-impact surface-to-air missile system (HSAM)”, by assigning it to the Government of the United States through the Letter of Offer and Acceptance type of state contract - (LOA) specific to the Foreign Military Sales Program - (FMS) for the purchase of 1 (one) PATRIOT surface-to-air missile system configuration 3+, respectively of the major equipment, means of transport, materials, parts, maintenance equipment, initial logistic support package and training service, cryptographic and special regime equipment.

Extrapolating, if it refers to Decision no. 726 of December 13, 2023 of the Constitutional Court of Romania, regarding the objection of unconstitutionality of the Law for the amendment and completion of Law no. 23/2020 on the legal regime of the Dacian Citadels in the Orăştiei Mountains, which are part of the UNESCO World Heritage List and some measures to protect them, published in the Official Gazette no. 510 of 31.05.2024, we note that, in accordance with the jurisprudence of the Constitutional Court in the matter, considering that the goods subject to transfer by the criticized law do not constitute an exclusive object of public property, in the absence of an express declaration of the organic law, they should have been transferred from the public property of the state to the property of the administrative-territorial units, by decision of the Government, at the request of the Hunedoara County Council and, respectively, of the Alba County Council.

Thus, by disregarding the provisions of article 860 of the Civil Code, in conjunction with article 292 paragraph (1) of the Government Emergency Ordinance no. 57/2019 on the Administrative Code, the criticized law was adopted in violation of the principle of legality, established in article 1 paragraph (5) of the Constitution.

At the same time, the Court held that the transfer of an asset, which is not an exclusive object of public property, from the public domain of the state to the public domain of an administrative-territorial unit will be carried out by a decision of the Government. (see, in this regard, Decision no. 19 of February 15, 2023, published in the Official Gazette of Romania, Part I, no. 347 of April 25, 2023, paragraph 85, 86-92).

By Decision no. 70 of February 3, 2021, paragraphs 29 and 30, citing its previous jurisprudence on the matter, the Court held that according to article 136 paragraph (3) the final sentence of the Fundamental Law, related to article 860 paragraph (3) the first sentence of the Civil Code, when the goods form the exclusive object of the public property of the state or of the administrative-territorial unit, based on an organic law, the transition from the public domain of the state to the public domain of the administrative-territorial units or vice versa operates only through an amendment of the organic law, respectively through the adoption of an organic law amending the organic law by which the goods had been declared to be the exclusive object of public property.

4. Conclusion

Therefore, a problematic situation will exist if this defence system is subject to the organic law by which its exclusive belonging to the public domain is regulated, considering that Law no. 246/2024 is an ordinary law, adopted by the Senate and later in the Chamber of Deputies as a decision-making body.

However, returning to the Dacian fortresses, the Constitutional Court also states that, according to article 286 paragraph (2) of the Civil Code: "The public domain of the state is made up of the assets provided for in article 136 paragraph (3) of the Constitution, from those provided in annex no. 2, as well as from other goods which, according to the law or by their nature, are of national public use or interest", and according to annex no. 2 of the Administrative Code, point 28: "historical and archaeological ensembles and sites" belong to the public domain of the state.

Therefore, from the analysis of the existing regulations, the ensembles, historical and archaeological sites are established as belonging to the public domain of the state, as a general rule, and not of the counties. At the same time, according to Annex no. 3 point 6 of the Administrative Code, historical and archaeological ensembles and sites can belong to the public domain of the counties only to the extent that they are not declared to be of national public interest.

Regarding the provisions of article 1 paragraph (3) of the criticized law, with reference to the introduction of article 111 in Law no. 23/2020, it is stated that, in accordance with the constant jurisprudence of the Constitutional Court, the taking over of the Dacian Citadels from the Mountains by the city into the county's public domain, based on the criticized law, contravenes the provisions of article 120 paragraph (1) regarding the principle of local autonomy and article 136 paragraph (2) regarding public property.

We must take into consideration that the public authority must relate the legal provisions to each individual case, without committing an excess of power. According to article 2 lit. n) Law no. 554/2004 regarding administrative litigation, the excess of power is defined as "the exercise of the right of appreciation of public authorities by violating the limits of competence provided by law or by violating the rights and freedoms of citizens".

Last but not least, we mention that the decommissioning of assets in the public domain is in full accordance with the principle of inalienability, not having the translational implications of ownership in civil law (Dinu, 2023, p.35).

References

- Bularca, A. R. (2023). *Teoria generală a obligațiilor* [The General Theory of Obligations Law]. Bucureşti: CH Beck.
- Dinu, C. G. (2023). *Contracte administrative* [Administrative Contracts]. Bucureşti: CH Beck.
- Matei, C.G. (2012). *Aspecte referitoare la Decizia Curții Constituționale nr. 600 din 9 noiembrie 2005 cu privire la constituționalitatea Legii pentru reglementarea situației juridice a unor bunuri care au aparținut fostului suveran al României, Mihai I* [Aspects related to the Decision of the Constitutional Court no. 600 of November 9, 2005 regarding the constitutionality of the Law for the regulation of the legal situation of certain assets that belonged to the former sovereign of Romania, Michael the 1st], The volume „Repere Actuale din Jurisprudența Curții Constituționale a României și perspective de justiție europeană [Current Highlights from the Jurisprudence of the Constitutional Court of Romania and perspectives of European justice], Craiova: Sitech, Craiova.
- Tofan, D. (2017). *Drept administrativ* [The Administrative Law]. Bucureşti: CH Beck.
- The Institution of the Romanian President, <https://www.presidency.ro/ro/media/sesizare-de-neconstitutionalitate-asupra-legii-pentru-modificarea-si-completarea-legii-nr-23-2020-privind-regimul-juridic-al-cetatilor-dacice-din-muntii-orastiei-care-fac-parte-din-lista-patrimoniului-mondial-unesco-si-unele-masuri-pentru-protejarea-acestora>
- The Association for the Protection of Human Rights in Romania – The Helsinki Committee, <https://apador.org/cerem-avocatului-poporului-sa-atace-la-ccr-donarea-sistemului-patriot-catre-ucraina/>