Special Domenial Regimes

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Abstract: The reason that justifies the existence of rules with particular feature which derogates from common law rules, in matters of public administration property, is represented by the public interests, that that the administration is committed to accomplish them. Domenial regime is a specific legal regime on the property, under the norms of public law. Domenial regime presupposes, in general, the establishment of different forms of property – public property - and the allocation of some features of the private property regime on the property holders of public powers. The problem of special domenial regime is important in particular in terms of how to restrict the exertion of private property right over the property belonging to physical and judicial persons, as provided by article 53. of the Constitution. Special Domenial Regimes present, in fact, limitations to private ownership, by developing a safety and security regime applicable to such properties, for preservation and transmission to future generations.

Keywords: public domain, public property, private property, inalienability, domenial regime

1 The concept of public domain

The interest for the traditional institution in administrative law is determined by the implications of the way in which there were understood the economic, social and even political realities.[1] The notion of public domain becomes once again a current term after 1989, especially after the adoption of the Law no. 18/1991, that nominates lands belonging to public domain, except the rule of reconstitution of the right to private property.

The notion of public domain is the result of sustained researchers by the doctrine, authors of public and private law.[2] In shaping this concept there have been contributions to a large extent from jurisprudence, sharing within its solutions its elaborated theories. Domain theory is a fundamental change brought to the property under civil law.[3]

As the renowned professor Jean Vermeulen said: "discussions that arise around the concept of public domain do not only show a theoretic, doctrinarian interest, but it also offers a practical interest, the public domain being submitted to a special legal regime, which drifts away not only of the legal regime of individual

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[1] Iorgovan, Antonie, *Tratat de drept administrativ*, vol. II, Ediţia 4, Bucureşti, Editura All Beck, 2005, p. 123.
[2] Giurgiu, Liviu, *Domeniul public*, Seria „Repere Juridice”, Bucureşti, Editura Tehnică, 1997, p. 12.
[3] *Idem*.

property, but even of the legal regime of private domain of the state submitted to the common law stipulations.[1]

The properties that comprise the administrative domain are divided into two categories: some to which the rules are applicable to private law, others for public use, non-susceptible for individual approach, forming the public domain. Its delimitation is made under conditions that differ from the Civil Code provided for private properties, and the litigations that arise in connection with properties of public domain attract the material competence of administrative contentious courts. The contemporary doctrine the collocation "public" has a broader meaning[2] that includes not only public property assets, as provided in the Law no. 213/1998, but also the categories of assets in private property that presents a significance and an importance that exceed the interests of the holder, which will lead to the coexistence of two different applicable regimes, that of common law (because it is a private property right) and an exorbitant regime, which includes rules of public power.[3] Therefore, the concept of public domain does not only circumscribe to the assets that make the object of public property, but in some ways they belong to the public and property domain (movable or immovable) which are private property.[4] These assets, which are applicable to a mixed regime (private and public law) and they can be found in the property of any subject of law, they are included in the national cultural heritage, "being national values, that must be passed on from one generation to another", have always made the object of a special protection.[5]

According to André Laubadère, all these special rules, derogatory to common law is "the domenial regime"[6].

2. The juridical regime of public domain

The rule of public domain inalienability, subordinated to affecting property of this domain of a general utility, emerged from the need for making the distinction

[1] Vermeulen, Jean, *Curs de drept administrativ*, Bucureşti, 1947, p. 181.

[2] Professor Antonie Iorgovan defined public domain as "those public or private assets, which by their nature or expressed deposition of law, should be held and passed on to future generations, representing values destined to be used in the public interest, directly or through the public service and they are submitted to an administrative regime, that is a mixed system, under which the power regime is decisive, being in the property of, of, where appropriate, under the protection of legal persons of public law (Antonie Iorgovan, *Tratat de drept administrativ*, vol. II, Ediţia 4, Bucureşti, Editura All Beck, 2005, p. 173).

[3] Vedinaş, Verginia, Ciobanu, Alexandru, *Reguli de protecţie domenială aplicabile unor bunuri proprietate privată*, Bucureşti, Editura Lumina Lex, 2001, p. 74.

[4] Iorgovan, Antonie, *Drept administrativ - tratat elementar*, vol. III, Bucureşti, Editura Proarcadia, 1993, p. 47.

[5] Iorgovan, Antonie, *Tratat de drept administrativ*, vol. II, Ediţia 4, Bucureşti, Editura All Beck, 2005, p. 173.

[6] André de Laubadère, Yves de Gaudermett et Charles Venezia, *Manuel de droit administratif*, Paris, 1988, p. 336.

between public and private domain, to promote general public interest. After H. Berthélémy, the inalienability rule is a consequence of the fact that the assets of public administration domain have no property right.[1]

Given the destination of the public property assets, the public use or public interest, on the one hand and the preservation need, passing them on to future generations, the public domain assets can not be alienated. The inalienability principle of public domain property is expressly established in the revised Romanian Constitution, article 136. paragraph (4), in Law no. 213/1998 (article 11), Civil Code (article 475), in the Real Estate Fund Law no. 18/1991, but in relation to assets which are part of the public domain. The main attribute of the property is to dispose something, that is the right to alienate or destroy it. Therefore, an owner is, mainly, always entitled to dispose his things, the alienability being the general rule for private assets.[2]

Unlike inalienability, the old royal domain, which was absolute and general, the inalienability of public domain has a relatively and limited content.Relative feature of inalienability results from the fact that the rule applies only to the public domain while the asset belongs to the domain.[3]If the asset is no longer part of the public domain, being downgraded, it passes into the private, which mean that the inalienability rule no longer applies. Under the stipulations of article 11 of Law no. 213/1998, public domain assets can not be alienated. But the impossibility of their alienation does not exclude the existence of some forms of valuing private public assets, they may be, under the same stipulations, "data in administrating leasing or renting, according to the law."

To admit that all the assets of public domain, including the private ones, are inalienable, it means to exclude unjustifiably important categories of assets from possible alienation.[4] It would affect also the state law and administrative-territorial units, which would lose the opportunity to acquire these assets, because they can not be alienated. As such, one can speak of an absolute and unlimited inalienability of public assets from the public domain and a relative, limited inalienability of private asset that belong to public domain[5] as said the well-known professor Anthony Iorgovan, on the inalienability principle of public domain assets that make the subject of public property and on the prohibition or restricting principle of selling domain assets that are the subject of private property.[6]

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[1] Berthélémy, H., *Traité du droit administratif*, Arthur Rouseau, Paris, 1913, Ed.VII, p. 417, taken from Giurgiu, Liviu, *op. cit*. p. 70.
[2] Hamangiu, C., Rosetti – Bălănescu, Băicoianu, Al., *Tratat de drept civil romîn*, Vol. II., Bucureşti, Ed. Naţională S. Ciorne, 1929, p. 92, quoted from Antonie Iorgovan, *Tratat de drept administrativ*, vol. II, Ediţia 4, Bucureşti, Editura All Beck, 2005, p. 210.
[3] Giurgiu, Liviu, *op.cit.,* p. 71.
[4] Vedinaş, Verginia, *Drept administrativ*, Ediţia a II-a revăzută şi actualizată, Bucureşti, Editura Universul Juridic, 2009, p. 210.
[5] Idem.
[6] Iorgovan, Antonie, *op.cit.,* p. 211.

As shown in the literature, nowadays, the concept of public domain can not be designed uniformly, or be submitted to the same rules, but to a graded system, which presupposes the appliance of all or only some of these rules, according to the needs and importance of assets which make up the domain.[1] In this regard, Leon Duguit refers to "domeniality scale, which allows sharing domenial assets according to their regime's decreasing exorbitance. According to this theory, public domain assets are submitted to exorbitant legal regime, to the extent where it is necessary to ensure its protection and affection.

As regards the movable assets of the public domain, the inalienability rule applies only to those who need such protection (works of art from museums, collections of libraries, military equipment, places of worship, etc.).

As a consequence of its inalienability, the public domain is imprescriptible, an aspect that must be understood in terms of both acquisitive and extinctive. In relation to acquisitive prescription property acquisition, it is excluded the possibility of obtaining domain assets towards usucapion or possession in good faith. Moreover, this rule was established on the stipulations article 1844 of the Civil Code, according to which it can not prescribe the domain of things that, by their nature or by a statement of the law, can not be objects of private property, but are taken out of commerce. Contrariwise the assets which are part of private domain of the state or territorial administrative units are prescriptive. Therefore, they may be acquired by usucapion or by good faith possession in the case of movable assets.Under an extinctive report, the owners of such assets may recover them at any time and without any compensation obligation to individuals that own them, even if they are on good faith.

Another feature of the assets in the public domain is exemption from seizure, which means that the assets in the public domain can not be submitted to compulsory execution, immovable or movable, may not be the subject of real rights accessories: pawn, mortgage, privileges.[2] On that issue, G. N. Luţescu says that there is no question on compulsory pursuing on the ground that the state is presumed to always be solvable.[3] In the insolvability case it must be a distinction between public and private assets in the public domain.[4] If public assets are of completely exemption from seizure, the private property may be spoken of a limited exemption from seizure, as it is envisaged as a pre-emption right of the state and restricting the scope of any creditors or excluding foreign physical and legal entities etc.

In conclusion, public domain assets are submitted to special rules, exorbitant from common law that put the administration in a privileged position compared with the private individuals.

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[1] Giurgiu, Liviu, *op.cit.,* p. 72.

[2] Adam, Ioan, *Proprietatea publică şi privată asupra imobilelor din România*, Bucureşti, Editura All Beck, 2000, p. 94.

[3] Luţescu, G. N., *Teoria generală a drepturilor reale*, Bucureşti, 1947, p. 159 and the next.

[4] Vedinaş, Verginia, *op. cit*, p. 210.

3. Special domenial regimes

The problem of special domenial regimes focuses in particular in terms of "how to restrict the exercise of the right to private property over immovable belonging to natural or legal persons"[1], according to article 53 of the Constitution. It is the identification of protection and security regime applicable to the private property, for some reason, in the purpose of preservation and transmission to future generations.

Not only the doctrine, but also the civil law specialists developed the idea of certain limitations brought to the right of private property. Thus, in one of the studies[2] on property after coming into effect the Constitution, it was mentioned as limitations of the right of private property, in relation to some general interests, keeping the real estate fund law text, the obligation of all owners of agricultural land to ensure cultivation and soil protection. In this study there was a reference to an article in the law which stipulated that landowners who do not fulfill their obligations were summoned in writing by the local public administration authorities and those who missed the deadline, were to be sanctioned to pay annually a sum of money, in relation to using category of the land.

However, the Real Estate Fund Law establishes the prevention and combating principle of soil degradation and pollution process, caused by natural phenomena or due to economic and social activities, establishing obligations on public authorities regarding the preparation of studies and projects of protection and improvement, and also obligations related to the execution of these works. As shown in the literature[3], land owners are not "mere spectators" in the process of protection and improvement; on the contrary, from the point of view of the legislator, they must participate in this process, since this is about the achievement of public obligations. Therefore, the prerogatives of ownership require compliance with a rule of public policy.[4] Thus, the law provides that "through degradation and pollution, the land was lost totally or partially the productive capacity for agricultural crops or forest" they will be in premises to improve. Holders of land, while retaining ownership, are obliged to put at disposal the lands in the perimeter of improvement, in order to apply the measures and works set out in the improvement project. The inclusion of certain land in improvement perimeters can be made with the owner's consent, and when the owner does not agree, the city hall will make reasoned proposals for the prefecture hall to decide. In this case, it is clear that we are dealing with safety and security regimes established on land that belong to physical entity, for their preservation and

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[1] Apostol Tofan, Dana, *Drept administrativ*, vol. II, Bucureşti, Editura All Beck, 2004, p. 165.
[2] Uliescu, Marilena, *Proprietatea publică şi proprietatea privată – actualul cadru legislativ*, in *Studii de drept românesc*, serie nouă, nr. 3, 1992, p. 223.
[3] Iorgovan, Antonie, *op.cit.*, 2005, p. 274.
[4] *Idem.*

transmission to future generations.

Many tasks and restrictions of private property right may be found in the law that governs the environment protection,[1] which assigned some special domenial regimes, whereas the environment protection represents the objective of major public interest.

According to article 65 Emergency Ordinance no. 195/2005, the protection of soil, of subsoil and terrestrial ecosystems is carried out through adequate housing, conservation, organization and arrangement of the territory, actions that are "compulsory to all holders, on any title". We may observe that the normative act establishes protection rules and not for private public asset, but for the ones that belong to private owners. Special rules of protection and security are also in the in the Forest Code which provides that the national forest[2] found is entirely submitted entirely to the forest system, which represents a system of forest technical standards, economic and legal planning, culture, exploitation, protection and security of this fund. Furthermore, forest owners and holders of any title must ensure compliance with regulations relating to the forest regime. The law also stipulates that private forest property belong that belong to physical entities are submitted to the forest regime. Therefore, owners are required to ensure their security and to perform the necessary work required by the forest regime through their own means.

The law establishes equally a domenial regime for protected areas, defined as "areas of land, water and / or groundwater, with a legal established perimeter and having a special regime for protection and conservation, where there are species of wild animals, bio-geographic, landscapes, geological, paleontological, or speleological elements and formations and others of ecological, scientific or cultural value.

Thus, under the provisions of Emergency Ordinance no. 57/2007 on the regime of natural protected areas, the conservation of natural habitats, flora and fauna, the managers of protected natural areas and physical and legal entities that hold or administer the land and other assets and / or operating in and around the perimeter of natural protected area are required to ensure compliance with the regulations of the protected natural areas. As it can be seen in this case the legislature imposes a set of protection and the security rules in a particular domenial regime, seeking to ensure conservation and sustainability use of natural patrimony, targeting the major public interest.

Field regime established by the Emergency Ordinance no. 57/2007 consists of

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[1] It is about the Emergency Ordinance no. 195/2005 regarding the environment protection that abrogated the Law no. 137/1995.

[2] According to article 1, of the Forest Code, the forest found of the country consists of forests, lands destined to afforestation, the ones that serve the need for crops, manufacturing or forestry administration, ponds, streams beds and also the unproductive land that are included in forest holdings "regardless the nature of law property”.

a protection regime, expression of exercising protection and security right,[1] a right that appears as an obligation of the state towards the citizen's fundamental right to a healthy environment.[2] According to article 35 paragraph (2) of the Constitution, the State is required to provide the legal framework for exercising the right to a healthy environment, which completes the requirement in article 135 paragraph (2), letter e), that state's obligation to provide "the recovery and protection of the environment and maintaining the ecological balance". However, the state is required to ensure "the exploitation of natural resources in line with the national interest" (article 135 paragraph (2), letter d). It is clear that there are the major constitutional basis of the security and protection regime, on the environment, in general, national monuments and special natural areas in particular.[3]

Special domenial regime is established through norms that regulate: the national terrestrial communication channels; interior maritime water regime; the territorial sea and the contiguous area of Romania; the Danube water regime, the airspace of Romania, the cultural public domain, etc.

As a conclusion, we remember the statement of the doctrine according to which the assets covered by the mentioned legal acts, which are found in the possession of private individuals, retain their membership status to the private property, being however entailed certain restrictive and also mandatory conditions, regarding the ways and means of protection, management, conservation and in particular on their legal circuit, which should be carefully supervised by public authorities.[4]

The text of the analyzed law, to which it can be added others, is an example of special legal regimes, established also on some private property, which, without coming within the public domain (as it would become inalienable), is subject to security and protection rules, unconscionable from common law.[5] The essential idea of establishing such special domenial regimes specific on certain private assets is their preservation and transmission to future generations, being the basic idea of sustainable development.

4. References

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[1] Iorgovan, Antonie, *op. cit.,* 2005, p. 287.
[2] Article 35 of the Constitution provides:
"(1) The State recognizes the right of every person to a healthy and ecologically balanced environment.
(2) The State shall provide the legal framework for exercising that right.
(3) Physical and legal entities have the duty to protect and improve the environment. "
[3] Iorgovan, Antonie, *op. cit.,* 2005, p. 288.
[4] Vedinaş, V., Ciobanu, Al., *op. cit.,* p. 110.
[5] Apostol Tofan, Dana, *op. cit.,* p. 170.

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