Public Law

Considerations Concerning the Necessity of Ruling the Public Ownership Right in Romania Through the Administration's Code

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Abstract: Due to the enforcement in Romania of the New Civil Code on October 1-st 2011[2], the public ownership right is ruled through this Code's articles 858-875. As a consequence, the set of norms which was previously ruling over the "public ownership and its juridical regime in Romania"[3], a set which had been stated by the Law nr.213 of November 17-th 1998 designated at its enforcement as a "Law concerning the public ownership and its juridical regime"[4], has been divided into fragments. Practically speaking, the public ownership right is actually ruled inside of an aggregate of norms pertaining to civil law, while the juridical norms which do concern "the goods under public ownership"[5] are ruled through a normative act which does pertain to the domain of the administration's law. In what concerns as well the concepts of the state's private ownership or of the administrative-territorial units' private ownership, there is no explicit regulation reserved for them, but the civil law norms are applied which do usually concern the private law's moral persons, through the assimilation of the state and of the administrative-territorial units to the private law's moral persons. Many normative acts which, in a lot of cases, do refer in a point-like manner only to the public ownership right do as well come to render more complicated the legal frame which does concern the exercise of the public ownership right. The objective of the present work is to state, through valid argument lines, the necessity of modifying the legislative frame which does concern the public ownership right and the goods which, thereby, do pertain to the public domain, in the sense that these matters should be ruled by the Administration's Code. Our reason for

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[2] The Civil Code enforced on December 1st 1865 has been, thereby, substituted.
[3] The respective expression, present in the title of the concerned normative act, was instituting the feature of unity for the norms which were constituting the juridical frame elaborated for the exercise of the public ownership right.
[4] Published in the Official Monitor of Romania, Part I, no. 448 of November 24th 1998.
[5] According to the dispositions of the Law nr.71 of June 3-rd 2011 for the applying of the Law nr.287/2009 concerning the Civil Code, published in the Official Monitor of Romania, Part I, no. 409 of June 10th 2011 in its art. 89 item 1, the title of the Law no. 213/1998 has become: "Law concerning the goods under public ownership".

sustaining this point of view under the actual legislative frame is the fact of taking into consideration the initiative of elaborating the Administration's Code, an action which is carried on as we are speaking.[1]

Keywords: Public ownership right; public domain; Administration's Code

1. Introduction

Twenty-seven years after the events that have occurred in December 1989, the Romanian society is still undergoing some re-defining or either re-organizing processes which do concern some of the existing juridical institutions. The matter of the public ownership has required from the specialists, in order to be adequately ruled, a rather long time to be devoted to the reflection upon it. Thus, a normative act having as its object the public ownership and its juridical regime has been enforced only in the Official Monitor of Romania no 448 of November 24th 1998, that is to say approximately 9 years after the grounds of the social system from Romania have been changed through the restoring of the state of law. In juridical literature have been previously expressed some opinions through which the attempt has been made to provide a few theoretical premises to the legislator. Thus, the statement has been made that: "The administration's domain is composed of the mobile and immovable goods only. It is not to be mistaken for the patrimony of the administrative-territorial units, a larger concept into which are included, according to the Law of the public administration currently enforced, in its art. 79[2], "the mobile and immovable goods pertaining to the public and private domains of a local interest, as well as the administrative-territorial units' rights and obligations which are of a patrimonial nature" (Giurgiu, 1997)[3]. The fact has also been demonstrated that[4]

[1] The Decision of the Government of Romania nr.196 of March 23rd 2016 concerning the approval of the prior Theses of the Administration Code's draft has been adopted, published in the Official Monitor of Romania, Part I, no 237 of March 31st, 2016.

[2] The Law nr. 69/1991 concerning the local public administration was enforced at that time, republished in the The Official Monitor of Romania, Part I, no. 79 of April 18th 1996, modified through the Law no. 50/1997, its article 79 being formulated as follows: "The patrimony of the administrative-territorial unit is constituted by the mobile and immovable goods that pertain to the public domain of local interest or to its private domain such as the rights and obligations pertaining to its patrimony".

[3] During that period, when a legal regulation of the administrative domain was lacking, the specialized literature has taken upon itself the credit to underline the existing distinction between the administrative domain and the patrimony of the administrative-territorial units, bringing to the readers in general and to the legislators particularly the proof of the fact that such a regulation ought to be elaborated which could sustain the idea that the second concept is more comprehensive. (Giurgiu, 1997, p. 11).

[4] The lack of regulations in the matter of the administrative domain has convinced the researchers to outline the defining features of the expessions "good of a public use" and "good of a public interest",

(Tudorache, 1992) by "public use goods" should be understood: "these goods which, by their own intrinsic nature, are destined to be made use of by all of the persons situated under the respective administration and to which all of these persons do have access", e.g. the market places, the public parks, the streets, the ways of communication etc., while the *"public interest goods"* are the ones which: "are meant to be made use of in the frame of an activity and about which all of the society's members are interested, though they cannot be used by whatever person", e.g. the plots of land where are situated the schools, the libraries, the theatres, the museums. Though, in the frame of the "Paul Negulescu" Institute of Administration' Sciences, the specialists throughout the country have expressed long time since their preoccupation for the elaboration and enforcement of an Administration Code as well as for the ones of an Administration Procedure Code (even since 2001) yet, at the present moment, the respective processes consisting in elaborating as systems the norms pertaining to the Administration's Law, respectively to the Administration Procedure Law and in expressing them through specialized Codes do remain for us some objectives good to be fulfilled. The Decision of the Government of Romania no 1360/2007 concerning the approval of the prior Theses of the Administration Procedure Code's draft has been enforced on October 22nd 2008[1]. In March of the present year the Decision of the Government of Romania no. 196 of March 23-rd 2016 concerning the approval of the prior Theses of the Administration Code's draft has been published in the Monitorul Oficial al României, Part I, no. 237 of March 31st, 2016. In the text of the Annex which does contain the prior Theses of the Administration Code's draft the precision is brought that, among the domains which ought to constitute the object of this Code's regulation should as well be enumerated: "the exercise of the public and private respective ownership rights by the state and by the administrative-territorial units"[2]. The Annex's item II B, sub-item B5- "Dysfunctions concerning the regulations' essence" does, indeed, state upon some aspects regarding: "The exercise of the public and private respective ownership rights by the state and by the administrative-territorial units". As a consequence, we have appreciated as being necessary to express a few opinions of ours concerning the regulation of the public ownership's regime in Romania.

2. Theoretical Issues

in order to identify the specific features of each and the existing differences between the two of them. (Tudorache, 1992, p. 19).

[1] Published in the The Official Monitor of Romania, Part I, no. 734 of October 30th, 2008.

[2] Item I letter e) from the Annex containing the prior Theses of the Administration Code's draft.

For a given community, the vital importance of the concepts: "public domain" and "public ownership right" does indeed result from the social practice itself, from the existential exigencies of the community concerned. Therefore, as it is demonstrated in specialized literature[1]: "in order to meet its prerogatives consisting in the assurance of the regular and continuous functioning of the public services, the public administration does need a series of mobile and immovable goods, which are parts of the patrimony of the state or of the one of the local collectivities, thereby constituting the administrative domain." Suiting the juridical regime to which are imparted the goods that do compose the administrative domain the distinction is made between the public and the private sides of it, with the mention of the fact that the common function of these two types of domains is the one: "of allowing the public persons to fulfill their administrative missions."[2] The unanimous opinion about this matter is the one that the term "domain" has a Latin origin, as the Explicative Dictionary of the Romanian Language - elaborated and published in 1998, at the Editura Univers Enciclopedic from Bucharest by Romanian Academy's Institute of Linguistics <<Iorgu Iordan>> does identify, at page 315, it as the Latin word "dominium". In what concerns the path taken towards the legal definition of this concept, it is for us imperative to underline the existence throughout time of the evolution of the theories concerning the domain' statute (Bălan, 2007). As it has been demonstrated in the specialized literature (Nedelcu & Nicu, 2002, p. 373): "The actual sense held by the term <<public domain>> has been outlined at the moment when the grounds of the state were laid, when the forms of primitive ownership which had been previously known by the family and by the kindred tribes have been eliminated, leaving instead of them, for the state, a right of collective ownership upon the slaves - servi publici - and, respectively, upon the conquered land (ager publicus) (Iorgovan, 1996, p. 11). This has been the modality through which has come to be constituted the <<res extra patrimonium>>, that is to say the goods which could in no way be owned by the private persons." The relationship between the public ownership right and the public domain had as well to stroll upon a sinuous path. From the general perspective that the ownership right, understood as a concept, could in no way be associated with the concept of public domain, through the development

[1] The author does explain the natural determining of the goods' administrative law. (Bălan, 1998, p. 9) (Bălan, 2007, p. 9).

[2] Though the juridical regime which is applicable to the goods pertaining to the state's public domain or to the one of the administrative-territorial units is different from the juridical regime which is applicable to the goods pertaining to their respective private domains, the role which they both hold is an one and only. (Bălan, 1998, p. 14) (Bălan, 2007, p. 7).

of jurisprudence, the "idea of ownership upon the public domain" has gradually developed itself till coming to be generally accepted (Bălan, 2004, p. 20). Nowadays, the multitude of normative acts which do effectively rule upon matters that pertain to the state's public or private domains or either to the respective ones of the administrative-territorial units[1], respectively upon matters that pertain to the exercise of the public ownership right do demonstrate the fact that the evolution of the domains' theories has not been concluded yet and that, as a correlative consequence of this situation, the legislator and the scientific researchers specialized into the fields of the administration's law or of the administration' sciences, respectively, ought to reunite their efforts in order to render clear and to adequately correlate the currently functioning concepts at the normative level.

3. Scientific Research

Through the analysis of the current legal frame concerning the public ownership right as well as the one of the administrative domain we have ascertained the following facts:

1. the public ownership right is ruled through the Constitution of Romania in its art.136 and through the New Civil Code in its articles 858-875;

Thus, the Constitution of Romania in its art.136 does bring the precision that: "Ownership is public or private"[2], the public one being: "guaranteed and safeguarded by the law"[3] and belonging to "the state or to its administrative-territorial units"[4], while the private one "is inviolable, under the conditions stated by the organic law"[5].

The Constitution of Romania in its art.136 paragraphs (3) and (4) do rule over the objects of the public ownership and over the features of the goods which do fall under the incidence of the public ownership right. Therefore we may say that the first ever elements of the juridical frame which does concern the public domain are,

[1]Exempli gratia: the Constitution inits art.136 par. (1)-(5); Law upon the land estate ownership nr.18/1991, republished, with updated modifications; the waters' Law nr.107/1996; Law nr.407/2006 on hunting and on the protection of the cynegetic patrimony; the New Sylvical Code – Law nr.46/2008 etc.

[2] The Constitution of Romania under its form republished in 2003 in its art.136, par. (1).

[3] The Constitution of Romania under its form republished in 2003 in its art.136, par. (2).

[4] Ibidem.

[5] The Constitution of Romania under its form republished in 2003 in its art.136, par. (5).

in fact, held by the Constitution of Romania's art.136 in its paragraphs (3) and (4).[1]

Art. 858 does define the public ownership, the precision being brought that it is: "the ownership right which does belong to the state or to one of its administrative-territorial units upon the goods which, due to their nature or by law' statement, are meant to be of a public use or interest, under the condition that they should be acquired through one among the modalities stipulated by the law." Next, precisions are made concerning the object of the public ownership (art. 859), the features of the public ownership right (art.8 61), the limits of the public ownership right in its exercise (art. 862), the cases of acquiring the public ownership right (art. 863), the extinction of the public ownership right (art. 864), the defence of the public ownership right (art. 865). In the New Civil Code's article 866 the precision is made that: "The real rights which do correspond to the public ownership are the right of administrating, the concession right and the right to make use of under a gratuitous title, since in the articles from 867 to 875 some precisions are brought which do concern the right of administrating, the concession right and the right to make use of under a gratuitous title.

2. the concept of public domain, the outline of which is realised in the Constitution's art.136, is explicitly mentioned by the New Civil Code's article 860 and ruled in its details by the Law nr. 213/1998 - law concerning the goods situated under public ownership;

The New Civil Code's article 860, entitled: «The national, departmental and local public domain» does precise that: (1) The goods situated under public ownership are parts of the public domain, should it be national, departmental or local, suiting the case. (2) The delimiting among the national, departmental or local public domains is to be done under the conditions stated by the law. (3) The goods which do form the exclusive object of public ownership by the state or by the administrative-territorial units according to an organic law could not be moved from the state's public domain to the administrative-territorial unit's public domain or vice-versa unless should it be

[1] "(3) Natural resources of the subterranean riches of a public interest, the air space, the waters with energetic potential of a national interest, the beaches, the territorial sea, the natural resources of the economical zone and the ones of the continental plateau as well as other goods established through the organic law do constitute the exclusive object of public ownership.
(4) The goods situated under public ownership are inalienable. Under the conditions stated by the organic law, they could be given in order to be administrated by the autonomous management units situated under State supervision or by public institutions, or either they could be placed under concession or let out; they might as well be given to be made use of under a gratuitous title by the institutions of a public utility."

a consequence of having modified the concerned organic law. In the other cases, the passage of a good from the state's public domain to the administrative-territorial unit's public domain or vice-versa is to be done under the conditions stated by the law. Let us remark the fact that the organic law is always referred to. Yet, this organic law - the Law nr.213 of November 17th 1998 concerning the goods situated under public ownership-is a normative act which, due to the fact that it has not been republished though many among its articles have been abrogated has come into a shape which, in our opinion, is contrary to the dispositions of the Law nr. 24 of March 27-th 2000 concerning the norms of legislative technique for the elaboration of normative acts in its article 7 paragraph 4, which does explicitly precise that: "the legislative text ought to be formulated in a clear, fluent and intelligible manner". In the present case, the concerned normative act is not fluent. The law starts by its article 3, continues by article 4 which is followed by article 6, article 8 and article 10, which has only its paragraphs 2 and 3 since its paragraph 1 has been abrogated; as for article 11, it is composed of its paragraph (5) only.

3. The public domain's legal regulation is realised in a point-like manner and through special laws. For example:

- the Law upon the land estate ownership no. 18/1991 does contain dispositions concerning the public domain, by bringing precisions about which are the goods that pertain to the public domain and which are the features of these goods[1];

- in the Law upon waters no. 107/1996[2] in its article 1 paragraph (2) the precision is brought that: "Waters are an integrated part of the public patrimony", while "The water resources' knowledge, protection, revaluation and sustainable use made of are

[1] Law nr.18/1991, republished in 1998 and modified including through the Law nr.38/2015 for the completion of the Law upon the land estate ownership nr.18/1991 in its art.(5): (1) Do pertain to the public domain the land plots upon which are situated the buildings of a public interest, the market places, the communication paths, the streets' networks and the public parks, the ports and airports, the land plots vowed to a sylvan destination, the beds of streams and of rivers, the tubs of lakes of a public interest, the bottom of the maritime interior waters and the one of the territorial sea, the shores of the Black Sea including its beaches, the land plots vowed to support natural reservations and national parks, the monuments, the archaeological and historical ensembles and sites, the monuments of nature, the land plots vowed to the needs of defense purposes or to other uses which, according to the law, do pertain to the public domain or which, due to their own intrinsic nature, are of a public use or interest. (2) The land plots which are parts of the public domain are inalienable, could not be grasped and are as well imprescriptible. They could not be inserted into the civil circuit unless, according to the law, they should be at first disaffected from the public domain."

[2] Published in the The Official Monitor of Romania, Part.I, no. 244 of October 8th 1996, modified inclusively through the Law no 196/2015.

actions to be taken for the general interest.";

-the Law upon waters no. 107/1996 in its article 3 paragraph (1) does bring the precision that: "do belong to the public domain the surface waters with their minor river beds longer than 5 km and with hydrographical basins which are larger than the surface of 10 km^2, the lake' shores and vats as well as the subterranean waters, the seaside internal waters, the sea's cliff and beach with their natural rich assets and their capitalized energetic potentialities, the territorial sea and the bottom of the maritime waters.";

- in the Law no. 407/2006 on hunting and on the protection of the hunting heritage's article 2^1 the precision is brought that: "the fauna hunting of interest is the regenerating natural resource which is a public asset of a national and international interest";

- the Law no. 46/2008 in its article 3 paragraph $(1)^2$ - the New sylvan Code - does stipulate that: "the national forest' plots are, suiting the case, situated under public or private ownership and do constitute goods of a national interest";

- the Law no. 182/2000 concerning the protection of the mobile national cultural patrimony[3] in its article 5 paragraph (1) does dispose that: "The mobile cultural goods may be situated under the public or the private ownership of the state or of the administrative-territorial units or under the private ownership of the individual persons and of the private law moral persons. (2) Upon the goods stated by the paragraph (1) may be constituted, suiting the chosen ownership form, under the conditions stated by the law, a right of administrating them or other real rights, suiting the case.";

- the Law no. 422 of July 18-th 2001 concerning the protection of the historical monuments[4] in its article 4 paragraph (1) does stipulate that: "The historical monuments do pertain either to the public or private domain of the state, of departments, cities or communes or are the private property of the individual or moral persons. (2) The historical monuments situated under the public ownership of

[1] Published in the The Official Monitor of Romania, Part. I, no. 944 of November 22-nd 2006 modified inclusively through the Law nr.34/2016.
[2] Published in the The Official Monitor of Romania, Part. I, no. 238 of March 27th 2008, republished in the The Official Monitor of Romania, Part. I, no 611 of August 12th 2015 and modified through the Law no 227/2015 concerning the Fiscal Code.
[3] Republished in the The Official Monitor of Romania, Part. I, no 259 of April 9th 2014.
[4] Republished in the The Official Monitor of Romania, Part. I, nr.938 of November 20th 2006 and modified inclusively through the Law no 106/2016.

the state or of the administrative-territorial units are inalienable, imprescriptible and could not be grasped; these historical monuments may be given to the public institutions in order to be administrated, may be placed under concession, may be given to the institutions of a public utility in order to be made use of under a gratuitous title or to be hired out under the conditions stated by the law, under notification issued by the Ministry of Culture and Cults or, suiting the case, under notification issued by the de-concentrated public services pertaining to the Ministry of Culture and Cults.";

- the Law on the local public administration no. 215/2001 in its article 119[1] does establish the fact that the administrative-territorial units do own a patrimony which is composed of mobile and immovable goods that pertain to the public domain of the administrative-territorial units or either to their respective private domains, as well as of the rights and obligations pertaining, respectively, to the concerned patrimonies;

- the Law on the local public administration no. 215/2001 in its article 120 does precise the fact that within the public domain of a local and/or departmental interest do enter "the goods which, according to the law or due to their own intrinsic nature are of a public use or interest and are not declared in virtue of the law as being of a national public use or interest", the features of these goods being precised;

- in the same normative act's art. 121 the precision is brought that into the public domain of the administrative-territorial units do enter the mobile and immovable goods that, according to the law or due to their own intrinsic nature, are not of a public use or interest or the ones which are declared in virtue of the law as being of a national public use or interest, these goods being submitted to "the dispositions of the common law, should the law not dispose otherwise". Of course, we could continue with the examples' list, but we appreciate that the mentioned ones are sufficient in order to outline the conclusion drawn by our investigation.

[1]Republished in the The Official Monitor of Romania, Part. I, nr.123 of February 20th 2007 and modified inclusively through the Law no 265/2015.

4. Conclusions and Consequences

From the analysis we have performed upon doctrine and current legislation, the fact does result that actually the public ownership right and the administration's domain are wrongly regulated. Practically, we could not speak of a norm' system into this domain, because of the fact that the existing multitude of normative acts into this matter does lead towards lacks of clarity and parallelisms; or, this fact is contrary to the dispositions of the Law no. 24/2000 concerning the norms of legislative technique for the elaboration of normative acts in its article 2 paragraph 1. According to the above mentioned juridical ground, the role held by the legislative technique and, consequently, the role held by the Law no. 24/2000 is the one of: "systemizing, unifying and coordinating the legislative corpus". The actual way of ruling over the ownership right and over the administration's domain is as well contrary to the stipulations of the Law no. 24/2004 in its articles 14 and 16 which, respectively, state that:

- "The regulations of the same level and having the same object are, as a rule, to be contained by an one and only normative act[1]";

"In the legislative process it is forbidden to institute the same regulations into several articles or paragraphs from a same normative act or in two or several normative acts. In order to underline some legislative connections, the reference norm has to be made use of. (2) Should some parallelisms exist, they ought to be removed either through abrogation or through the respective matter's concentration in unique regulating acts. (3)The regulations concerning the same matter that are dispersed throughout the enforced legislation are as well to be submitted to the respective concentration process."[2]

As a consequence, in order to make jurists as well as the profane citizens to feel comforted in what does concern the social relationships which have as their object the public ownership right, respectively the use made of the goods which do compose the administration's domain, we do appreciate as being necessary the improvement of the actual juridical frame, through the following actions which ought to be taken:

-the regulation, through the Administration's Code, of the concepts of "public ownership right", respectively "public domain";

-the regulation, through the Administration's Code, of the features held by the public

[1] Law no. 24/2000 in its art.14 par. (1).
[2] Law no. 24/2000 in its art.16 par. (1), (2) and (3).

ownership right, of the limits assigned to the exercise of the public ownership right, of the cases when the public ownership right could be acquired, of the public ownership right's modalities of extinction, of the public ownership right's defence, of the real rights which do correspond to the public ownership: "the right of administrating, the concession right and the right of use under a gratuitous title", as well as the regulation of modalities;

- to regulate through the Administration's Code the goods' transfer procedures from the public domain towards the private one or vice-versa, respectively the goods' transfer procedures from the administrative-territorial units' public domain towards the state's public domain or vice-versa;

- after the enforcement of the Administration's Code, to harmonize all of the normative acts with it in order to avoid parallelisms.

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