



THE 7TH EDITION OF THE INTERNATIONAL CONFERENCE
**EUROPEAN INTEGRATION
REALITIES AND PERSPECTIVES**

Considerations on the Right to Public Property

Adriana Pascan¹

Abstract: From ancient times, property has been perceived as being something absolutely necessary for life as the human society could not have been perceived without property which was characterised in the doctrine as being “the matrix of the modern subjective rights”. According to the Bible, at the origin of the humanity, the owners of goods could only have been Adam and Eve, a social equity in an ideal world that could have existed in the pre state age and will continue to exist in a future world. We can therefore consider the property as being natural and necessary for humans. Without it the social organization cannot be possible as the property relations are the most important element in the production relations, together with the exchange activity between humans. The individual property is the indispensable condition for freedom.

Keywords: private property; right to property; administrative units; holder of right to property; legislation

1 Introduction

The property (Dogaru & Sambrian, 1966) represents a social relation of proximity being at the same time an economic relation of property, acknowledged as a proximity relation between people for the material goods as a condition of their existence, of assuming the material premises of a production process that also creates a particular behaviour for the neighbours (Ungureanu & Munteanu & Rujan, 2005). “Good proximity entails at least two duties: first, the neighbour will not prejudice the neighbour and second, the neighbour will not inconvenience the neighbour in an intolerable manner”. When this property is protected and guaranteed by the coercive force of the state, it becomes a property relation, namely the right to property and is part of the economic basis of every human society the jurisprudence having the creative role and difficult task to conciliate the legitimate interest of the proprietor with social interest, when the discussion regards the proximity relations based on laws, regulations, customs and jurisprudence (Boroi & Stanciulescu, 2003).

2. Judicial Features of the Right to Public Property

Analysing the constitutional dispositions in the matter of the right to private property as well as the provisions of the laws comprising incidental norms in the matter of the judicial regime of the right to property, the doctrine underlined that the following judicial characteristics are specific to the latter: inalienability, non prescriptible character, indeterminable. This triple area of features for the right to public property results from the texts of law. Accordingly, article 136, paragraph 4 in the Constitution establishes that the public property goods are inalienable, article 5 paragraph 2 in Law 18/1991 stipulates that the terrains part of the public domain are inalienable, non prescriptible and indeterminable. Article 120, paragraph 2 in Law 215/2001 regulates the principle according to which the goods part of the public domain are not alienable, non prescriptible and indeterminable as follows:

a) they cannot be alienated but can be given in administration, concession or rented, under the

¹Senior Lecturer, PhD, Danubius University of Galati, Faculty of Law, Romania, Address: 3 Galati Blvd, Galati, Romania, tel: +40372 361 102, fax: +40372 361 290, Corresponding author: adriana.pascan@univ-danubius.ro.

conditions of the law; b) they cannot be subjected to forced execution and no real guarantees can be placed over them; c) they cannot be acquired by other persons by the effect of possession in good faith over the mobile goods”.

The inalienable character as judicial feature of the right to public property results from the legal regulations listed above and signifies the circumstances that the goods under this judicial regime cannot be alienated, meaning that the alienation acts over these goods are absolutely void.

As indicated in the literature, this feature of the right to property is not the consequence of the righteous holder- the state or the territorial administrative units, nor the nature of the public domain but the result of the fact that the goods making the object of this right are affected by the use of public interest. Because of the fact that the mobiles and immobile goods are destined to the use of the public interest, they have been declared inalienable namely *res extra commercium* in order to maintain their destination.

Expressly, article 22, paragraph 2 in the Law on the public property stipulates that the judicial acts concluded with the breach of the provisions in article 1 on the judicial regime of the goods in public domain are void and not annulled (Adam, 2002).

Also, article 120, paragraph 2 in the Law on local public administration no. 215/2001, republished, states that “the goods that are part of the public domain are inalienable, non prescriptible and indeterminable. An important provision is comprised in Law 182/2000 according to which the mobile cultural assets in the public property of the state of the territorial administrative units are also inalienable, non prescriptible and indeterminable. Therefore, the acts of alienation concluded regarding these goods are absolutely void.

Over the goods representing the object of the right to public property cannot be pledged or pawned. The servitudes over the assets in the public domain are valid only if they are compatible with the use or public interest to which the affected goods are destined to (Adam, 2002). In case servitudes have been constituted prior to the entering of the good in the public domain, they are maintained only in case they serve the use or the public interest. The terrains part of the public domain can only be given for administration, concession or rented under the provisions of the law. In case a terrain has been place from public property to private property of the state or territorial administrative units, then the terrain can be alienated under the provisions of the law.

The public domain goods are imprescriptible, namely that over the goods in the public domain the right to demand is imprescriptible and third parties cannot invoke, against the holder of the right to property the effect of the good faith possession as way to acquire the property. The assets which by nature or by law cannot be constituted as objects or private property cannot be assigned.

The goods belonging to the public property are indeterminable, namely the creditors of the state or of the administrative territorial units cannot follow, in order to satiate their claims and cannot represent real guarantees over the goods that are part of the public domain. The goods in the public domain cannot make the object of forces execution. The judicial acts concluded with the breach of the legal provisions of the goods in the public domain are absolutely void.

3. Subjects of the Public Property

The public property belongs to the state or the territorial administrative units while the private persons and the other legal persons cannot own goods in this category. The state is legal entity in the relation in which it participates as subject of rights and obligations represented by the Ministry of Finances, except for the cases in which the law established and assigns other organs for this purpose.

In the text of law 215/2001 the territorial administrative units are: the commune, the city, municipality and county. As legal entities of public law, with own patrimony and full judicial capacity, the communes, cities, municipalities and counties have, in public property, under the conditions of the

law, the goods of use or public local or county interest, expressly established by law (Ungureanu & Munteanu, 2008).

The holders of the right to property over the forest fund which is public property exert their right to property within the limitations and under the conditions of the law and have the obligation to follow the preservation, sustainable development of the forests. Irrespective of the form of property, the state establishes the strategy for the exploitation, economic, social or ecologic of the forests. The national forest fund comprises the forests, terrains destined for forestation, those serving the necessities of culture, production or forest administration, riverbeds, ponds as well as the non productive terrains included in the forest landscaping under the conditions of the law and irrespective of the right to property. The forest national fund is either private or public property and is an asset of national interest. The right to property over the terrains representing the national forest fund is exerted according to the Forestry Code. The forest fund public property of the state is administered by the National Directorate for Forests (Chelaru, 2000).

4. Object of the Public Property

It has been observed in the literature (Ungureanu & Munteanu, 2008) that the criteria for the determination of the goods representing the object of public property are controversial.

The assets making the object of the public property are listed in article 136, paragraph 3 in the Romanian Constitution as follows: assets of public interest of the subsoil, air space, waters with energy potential that can be exploited in national interest, beaches, territorial sea, natural resources of the economic area and continental plateau, other assets established by organic law. These assets have been also listed in Law 213/ 1998, which stipulates in paragraph 1 of the annex that the following represent the public domain of the state: subsoil richness, air spaces, surface waters with minor riverbeds, underground waters, interior seawaters, beaches with exploitable energetic potential, territorial sea and sea bottom, interior waterways, forests and terrains destined for foresting, those serving the necessities for culture, production or forest administration, ponds, riverbeds as well as non productive terrains introduced in the forest administration which are part of the national forest fund and are not private property etc (Chelaru, 2000).

The territorial administrative unit can become holder of the right to public property over assets only if the quality of owner is recognised based on an organic law (Nicolae, 2001). The public domain can also be of local or county interest, case in which the property over those goods belongs to the counties, cities or communes in regime of public law. The goods for public use comprise also those goods which by nature are of general use: markets, bridges, public parks etc. and the goods of public interest comprise those goods that by nature are destined to be used or exploited within a public service such as: railways, power distribution networks, buildings of public institutions etc.

Although the Constitution uses the term of public property, some special laws use the expression of "public domain" and we assert that from judicial point of view, the two terms are identical.

The right to public property is different from the right to private property under the aspect of the specific judicial features it presents, features that shape an own judicial regime and distinct from the right to private property (Ungureanu & Munteanu, 2008). According to article 136 paragraph 4 in the Constitution, the goods that are included in the public property are inalienable. In developing the constitutional provisions, paragraph 1 in article 74 of Law 69/1991 on the local public administration stipulates that the goods part of the public domain are inalienable, non prescriptible and indeterminable.

5. Limitations of the Right to Public Property Determined by the General Interest

It is mentioned in Law 213/1998 on the public property and judicial regime that the servitudes on the goods in the public domain are valid only to the extent in which these servitudes are compatible with the public interest to which the goods are destined.

There are a series of limitations among which we mention the limitation in urban and urban purposes (C. Hamangiu & I Rosetti-Bălănescu & Al. Băicoianu, 1997). To this end, Law 50/1991 established certain limitations for the civil, industrial, agricultural or any other type of buildings in what concerns the lines, the height and respect of the sistematization plan.

Article 44, paragraph 7 in the Constitution mentions the limitations for the protection of the public health and sanitation concern the obligations resulting from the plan for landscaping, general urban plan, detailed urban plan and urban regulations, including the obligations regarding the hygiene of the buildings, swage system, environment protection.

For the defence of the country, there are a series of limitations concerning the creation of military bases or for the protection of airports, ports or other economic and objectives of general interests. Decree no. 95/1979 mentioned that it is forbidden for building to be placed near takeoff or landing areas that can endanger the safety of the flights. There are limitations also near the protection spaces and air transportation.

Among the other limitations regarding public utility we mention the limitations on the space near waterways, on the location of the constructions near the railways, on which the emergency Ordinance no.12/1998 establishes that in the protection area it is forbidden the placement of any type of construction, even with temporary, material storage or plantations (C. Hamangiu & I Rosetti-Bălănescu & Al. Băicoianu, 1997)

The public utility limitations also include those resulting from the judicial regime of waters, forests, road construction and some mobile goods. Regarding the latter, the private persons cannot sell or use in certain conditions, a series of mobile goods among which we list: medicine or toxic substances, drugs, weapons and ammunition, goods in the archive fund, assets in the national and cultural patrimony.

References

- Dogaru, I., Sâmbrian, T. (1966). *Drept civil român. Teoria generală a drepturilor reale/ Romanian Civil Law. General theory of the real rights*, Treaty, volume II. Craiova: Europa.
- Boroi, G., Stănculescu, L. (2003). *Drept civil. Curs selectiv/ Civil Law. Selective course*. 2nd edition. Bucharest: All Beck.
- Ungureanu, O., Munteanu, C., I.C.Rujan (2005). *Evoluția istorică și fundamentele filosofice, juridice, sociologice, economice și teologice ale proprietății asupra pământului/ Historic evolution and philosophic, judicial, economic, theological fundaments on the property over the land. Pandectele Române/ Romanian Pandects*, no. 5/2005, p. 108.
- Chelaru, E. (2000). *Curs de drept civil. Drepturi reale principale/ Civil law course. Real principal rights*. Bucharest: All Beck.
- Nicolae, M. (2001). *Discuții privind interdicțiile legale de înstrăinare a unor bunuri imobiliare/ Discussions on the legal alienation interdictions of immobile goods in Dreptul/ Law no. 7/2001*.
- Hamangiu, C., Rosetti-Bălănescu, I, Băicoianu, A. (1997). *Tratat de drept civil român/ Treaty of romanian civil law*, 2nd volume, reedited. Bucharest: All.
- Adam, I. (2002). *Drept civil. Drepturi reale/ Civil law. Real rights*. Bucharest: All Beck.
- Ungureanu, O., Munteanu, C. (2008). *Tratat de drept civil. Bunurile. Drepturi reale principale/ Treaty of civil law. Assets. Real principal rights*. Bucharest: Hamangiu.