Juridical Regime of the Public Domain

Vasilica Negruţ

„Danubius" University in Galaţi, Faculty of Law, negrut.vasilica@univ-danubius.ro

Abstract: The goods that form the administrative domain are classified in two categories: some to which the private law rules can be applied, some others meant for public use, unliable of individual approach, forming the public domain. The term of juridical regime of the public domain has in view the assembly of rules that can be applied to the goods belonging to the public domain as well as the juridical relations born between the owners of these goods and third persons. The public property goods are subjected exclusively to a juridical regime by public law, while the private property goods belonging to the public domain are governed simultaneously by two types of juridical regimes and more exactly by a mixed juridical regime by common right and by power. The principles that can be applied to the public domain goods are: the inalienability, the imprescriptibility and the imperceptibility.

Key words: public domain, public property, inalienability, imprescriptibility, imperceptibility.

I. The term of public domain

The interest in this traditional institution in the administrative law is determined by the implications that the way in which it is understood has in the field of economical, social and even political[1] realities. The term of public domain becomes again an actual term after 1989, especially after the Law no 18/1991, which nominates fields belonging to the public domain and excluded from the rule of reconstruction of private property right, has been adopted.

The term of public domain is the result of some constant researches of doctrinarians, authors of public and private right.[2] Also the jurisprudence contributed to a certain extent to outlining this term sharing the theories elaborated in this way within its solutions.

The theory of domain is an essential modification made to the property in the civil right.[3]

As the famous professor Jean Vermeulen has shown, „the discussions that appear around the term of public domain do not present only a theoretic and doctrinary interest but they also offer a practical interest, the public domain being subjected to a special juridical regime that estranges it not only from the juridical regime of individual property but even from the juridical regime of the private domain of the state which is subjected to the dispositions of common right".[4]

The goods forming the administrative domain are divided into two categories: some to which the rules of private right can be applied and some others meant for public use, unliable of individual approach, forming the public domain. Its delimitation is made in conditions that differ from the

[1] Antonie Iorgovan, Tratat de drept administrativ, vol.II, Ediţia 4, Editura All Beck, Bucureşti, 2005, p.123.
[2] Liviu Giurgiu, Domeniul public, Seria „Repere Juridice", Editura Tehnică, Bucureşti, 1997, p.12.
[3] Idem.
[4] Jean Vermeulen, Curs de drept administrativ, Bucureşti, 1947, p.181.

limits provisioned by the Civil code for the private properties and the litigations related to the goods in the public domain draw the material competence of the administrative disputed claims office instances.

In the opinion of André de Laubadère, the assembly of all these special rules, derogatory from the common right represents the "domain regime".[5]

II. The juridical regime of public domain

Initially, under the French kings' reign, the rule of inalienability of crown's domain constituted a counteracting measure of the monarch's generosity. Considering the alienation faculty as an essential attribute of the property right, the rule of inalienability was replaced by the French Law from 22nd of November 1790 with the rule of alienability of goods that formed the national domain at that time.

The inalienability rule of public domain subordinated to affecting the goods in this domain to a general utility appeared from the necessity of making a distinction between the public domain and the private one in the purpose of promoting the general public interest.

According to H.Berthélémy, the inalienability rule represents a consequence of the fact that the administration has no property right[6] on the goods belonging to the public domain.

Given the destination of the public property goods, the public use or interest on one hand and the necessity of preservation as well as their transmission to future generations, the goods belonging to the public domain cannot be alienated.

The inalienability principle of the goods belonging to the public domain is recognized deliberately in the revised Constitution of Romania, in art.136.alin. (4), in Law no 213/1998 (art.11), the Civil code (art.475), in the Law of land fund no 18/1991, but referring to the goods which are part of the public domain.

The main attribute of the property is the right to dispose of a thing, this meaning the right to alienate or to destroy it. Consequently, an owner always has, in principle, the right to alienate his thing, the goods alienability being the general rule for private goods.[7]

Unlike the inalienability of the old domain of the crown, which was absolute and general, the public domain inalienability has, at present, a relative and limited content.

The relative character of the inalienability results from the fact that the rule cannot be applied but to the public domain and only for the period in which the good belongs to this domain.[8]

If the good is no longer part of the public domain, as it is rejected, and is part of the private domain, the inalienability rule cannot be applied any longer.

According to the provisions of art.11 in the Law no 213/1998, the goods belonging to the public domain cannot be alienated. But the impossibility of their alienation does not exclude the existence of some modalities of capitalizing the public property goods, and according to the same

[5] André de Laubadère, Yves de Gaudermett et Charles Venezia, Manuel de droit administratif, Paris, 1988, p.336.
[6] H. Berthélémy, Traité du droit administratif, Arthur Rouseau, Paris, 1913, Ed.VII, p.417, preluat din Liviu Giurgiu, op.cit.p.70.
[7] C. Hamangiu, Rosetti – Bălănescu, Al. Băicoianu, Tratat de drept civil romîn, Vol.II., Ed.Naţională S.Ciorne, Bucureşti, 1929, p.92, citat din Antonie Iorgovan, Tratat de drept administrativ, vol.II, Ediţia 4, Editura All Beck, Bucureşti, 2005, p.210.
[8] Liviu Giurgiu, *Op.cit*., p.71.

provisions they could be „given for administration, granted or rent under the conditions of the law".

To admit that all goods belonging to the public domain, including the private ones, are inalienable means to unreasonably exclude from the possibility of alienation[9] some important categories of goods. Thus, the right of the state as well as the right of administrative – territorial units would be affected as they would lose the possibility to get these goods as they cannot be alienated.

Therefore, we can talk about an absolute and unlimited inalienability of public goods belonging to the public domain and about a relative, limited inalienability of private property goods belonging to the public domain[10] or, as the famous professor Antonie Iorgovan said, about the principle of inalienability of the public domain goods which are the object of public property and about the principle of prohibition or restriction of selling the domain goods that are object of private properties[11].

As the specialty literature shows, at present, the term of public domain cannot be imagined uniformly anymore, subjected to the same rules, but as a gradual regime that supposes the application of all or just some of those rules, according to the needs and the importance of the goods constituting the domain.[10] In this way, Leon Duguit refers to the „domain scale", which allows the domain goods to be divided according to the decreasing excessiveness of their regime. According to this theory, the goods belonging to the public domain are subjected to an excessive juridical regime to the extent in which this regime is needed in order to assure its protection and affectiveness.

As regarding the mobile goods of the public domain, the inalienability rule is applied only for those which need such a protection (art works in museums, collections of some libraries, military technique, religious houses etc.).

In the hypothesis of breaking the rule of inalienability of public domain, the following sanctions intervene: selling the good without its previous regular decommissioning can be annulled, with the reservation of payment of a compensation to the good faith buyer; the administration can claim anytime, by a civil action, the good that belongs to it; as long as the good is owned by the administration, all actions through which a definitive alienation would be attempted can be neutralized by invoking the exception of public domain.[10]

As a consequence of its inalienability, the public domain cannot be prescribed, aspect that should be understood both in an acquisitive and extinctive way. In relation to the acquisitive prescription, the possibility of getting the domain goods by acquisitive prescription or by good faith possession is excluded. As a matter of fact, this rule has been instituted also by the dispositions of art.1844 in the Civil code according to which the domain of goods that by their own nature or by a declaration of the law cannot be considered as objects of private property but out of the commerce cannot be prescribed. On the contrary, the goods that are part of the private domain of the state or of the administrative – territorial units can be prescribed. Therefore, they can be obtained by acquisitive prescription or by a possession of good faith in the case of mobile goods.

Under extinctive relation, the owners of such goods can recover them anytime and without any obligation of remuneration from the private owners even if they are of good faith.

Both inalienability and the imprescriptibility do not represent the consequence of the nature of the public domain.[11]

---

[9] Verginia Vedinaş, Drept administrativ, Ediţia a II-a revăzută şi actualizată, Editura Universul Juridic, Bucureşti, 2009, p.210.
[10] M. Anghene, Utilizarea domeniului public. Teză de doctorat, Imprimeriile Româneşti, Bucureşti, 1941, p.25.
[11] Liviu Giurgiu, *Op.cit.*, p. 71.

As it is shown in the specialty literature, it is about a "direct consequence of the fact that the public domain has been affected to a general interest. So as the mobile and immobile goods affected to a general interest to be kept for the purpose for which they have been affected, they have been declared inalienable and imprescriptible. In this case, the issue related to the principle of inalienability and imprescriptibility of the public domain, is not an issue concerning the existence of the property right as this right exists, but only an issue regarding the way in which this property right can be exerted by the administration. The exercise of the property right upon the public domain is restricted because the goods serve to a general interest. The goods belonging to the public domain are therefore only taken out of commerce, they are only *res extra comercium".*[12]

Another characteristic of the goods belonging to the public domain is imperceptibility, which means that the goods in the public domain cannot be subjected to forced execution, if they are movable or real estate, they cannot constitute the object of some accessories real rights: mortgage, deposit, privileges.[13]

Regarding this aspect, G. N. Luţescu stated that we cannot talk about the forced pursuit for the reason that the state is presumed to be always solvable.[14]

Also in the case of insolvability we have to make a distinction between public goods and the private ones in the public domain.[15] If the public goods are absolutely imperceptible, related to the private property goods we can talk about a limited perceptibility of theirs as a preemption right of the state is taken into consideration as well as the restraint of the sphere of some possible creditors or the exclusion of some foreign natural and juridical persons etc.

To conclude, the goods belonging to the public domain are subjected to some special, excessive rules from the common right, which place the administration in a privileged situation compared to the private persons.

Bibliography

Iorgovan, Antonie. (2005). *Tratat de drept administrativ*, vol. II, Ediţia 4, Bucureşti: Editura All Beck, p. 123.
Liviu Giurgiu, (1997). *Domeniul public*, Seria „Repere Juridice", Bucureşti: Editura Tehnică, p. 12.
André de Laubadère. (1988). Yves de Gaudermett et Charles Venezia, Manuel de droit administratif, Paris p. 336.
H. Berthélémy, *Traité du droit administratif*, Arthur Rouseau, Paris, 1913, Ed.VII, p. 417, preluat din Liviu Giurgiu, op.cit.p.70.
C. Hamangiu, Rosetti – Bălănescu, Al. Băicoianu. (1929). *Tratat de drept civil roman*, Vol. II., Bucureşti: Ed. Naţională S. Ciorne, p. 92,
Antonie Iorgovan. (2005). *Tratat de drept administrativ*, vol. II, Ediţia 4, Bucureşti: Editura All Beck, p. 210.
Verginia Vedinaş. (2009). *Drept administrativ*, Ediţia a II-a revăzută şi actualizată, Bucureşti: Editura Universul Juridic, p. 210.
M. Anghene. (1941). *Utilizarea domeniului public*. Teză de doctorat, Bucureşti: Imprimeriile Româneşti, p. 25.
E. D. Tarangul. (1944). *Tratat de drept administrativ*, Cernăuţi: Editura Glasul Bucovinei pp. 363-364.

[12] E. D. Tarangul, Tratat de drept administrativ, Editura Glasul Bucovinei, Cernăuţi, 1944, pp.363-364.
[13] Ioan Adam, Proprietatea publică şi privată asupra imobilelor din România, Editura All Beck, Bucureşti, 2000, p. 94.
[14] G. N. Luţescu, Teoria generală a drepturilor reale, Bucureşti, 1947, pp.159 şi urm.
[15] Verginia Vedinaş, *Op. cit*, p. 210.