UNIVERSITY OF CRAIOVA

FACULTY OF LAW AND ADMINISTRATIVE SCIENCES

PhD THESIS

THEORETICAL AND PRACTICAL ASPECTS CONCERNING THE DISTINCTION BETWEEN THE PUBLIC AND PRIVATE DOMAIN

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ABSTRACT

One of the fundamental changes brought into the Romanian society by the events which took place in 1989 concerns the legal regime of property. According to the Romanian Constitution in 1991, as revised in 2003, "The right of property, as well as the debts incurring on the State are guaranteed. The content and limitations of these rights shall be established by law. Private property shall be equally guaranteed and protected by the law, irrespective of its owner. Foreign citizens and stateless persons shall only acquire the right to private property of land under the terms resulting from Romania's accession to the European Union and other international treaties Romania is a party to, on a mutual basis, under the terms stipulated by an organic law, as well as a result of lawful inheritance". Therefore, the Romanian legislator, according to the fundamental principles used for governing the social life within a democratic state, considered as necessary to mention at the level of fundamental law the fact that one natural or legal person's right to private property is guaranteed and protected by the Romanian state. And still, the constitutional text mentions about "the content and the limits" of the ownership. Who defines the limits? The legislator stated that this prerogative was assigned to it, the limits – as well as the content – being mentioned by the law. But what gives the legislator the right to impose limits? The public interest expressed in the Constitution as "public utility" or "works of general interest". In the same text, the legislative authority mentioned a few fundamental limits which can be brought for the ownership: "No one shall be expropriated, except on grounds of public utility, established according to the law, with a just compensation paid in advance. (…) For works general interest, the public authorities are entitled to use the subsoil of any real estate with the obligation to pay compensation to its owner for the damages caused to the soil, plantations or buildings, as well as for other damages imputable to these authorities. Compensation provided under paragraphs (3) and (5) shall be agreed upon with the owner, or by the decision of the court when a settlement cannot be reached", alongside with the generic obligation of each owner referring to the "observance of duties relating to environmental protection and insurance of neighbourliness, as well as of other duties incumbent upon the owner, in accordance with the law or custom" and with the statements that the "Legally acquired assets shall not be confiscated. Legality of acquirement shall be presumed" and that "The nationalization or any other measures of forcible transfer of assets to public property based on the owners' social, ethnic, religious, political, or other discriminatory features", but that "Any goods intended for, used or resulting from a criminal or minor offence may be confiscated only in accordance with the provisions of the law".

The concept of expropriation for the public utility automatically leads to the definition of the second type of property: the public property. The legal regime of this type of property is extremely complex and was difficult to define. This statement is not sustained only by the present method of regulation, but also by the method in which the enactment activity evolved in this matter after the events that took place in December 1989. Thus, while a law of agricultural real estate intended for the reestablishment or establishment of natural persons' ownership was adopted even before having a Constitution of a democratic Romania and in regard to the lands being in the property of the state owned trading companies, at the date of their registration, needed to carry out the activity according to their purpose, it was adopted the Decision of the Romanian Government no 834 on the

14th of December 1991 regarding the establishment and the evaluation of certain lands owned by the state trading companies, and according to this decision these lands "are determined for the trading companies registered by a Government decision, by the bodies who, according to the law, fulfill the attributions of the resort ministry, and for the trading companies registered by the decision of the bodies of the state local administration, by the county public authority", a law referring to public property and its legal regime which did not became valid until 1998.

The particularities concerning the right of public property and the public domain result from the fact that this type of property has some special owners: large collectivities, who, compared to the legal persons of private law, are not constituted by legal documents which express their will stated on the ground of legal equality, nor by going through some procedural stages imposed by the legislation concerning the associations and foundations or by the trading law, but, just by gaining the quality of inhabitant or resident on the territory of the administrative unit where the respective collectivity lives. As a consequence, a special scientific interest is presented by the analysis of the particularities which appear in defining the content of the concepts of public and private domain belonging to the state and administrative territorial units, the particularities which characterize the social relations created in connection to the establishment of the public domain, with the use of component assets and with the change in the legal regime of certain assets in order to transfer them from the public domain into private domain.

All these aspects determined me choose the subject "Theoretical and practical aspects concerning the distinction between the public and private domain of the state", trying to emphasize the elements that make necessary and useful the regulation of social relations, created when the public interest is served by the state in the name of the people using certain assets that we call the public domain of the state, to make out a case for the utility of the concept of private domain of the state and to make a critical analysis regarding the current regulations starting from the reference aspects met in legal practice.

Therefore, I considered as useful, that before making the comparative analysis between the concepts of public and private domain of the state, to make a substantiation of the analysis on elements of general theory of patrimony. *With title II called "Comparative analysis between the right to public property and the right to private property", the original part of the study is actually started, the novelty consisting in the fact that by now no comparative analysis between the state public and private domain had been performed*. Thus, starting from the aspects concerning the appearance of public property and the evolution of public and private property in Romania and from the presentation of the Romanian constitutional regulations regarding the public and private property, I directed the scientific discourse toward the comparative analysis concerning the notion, the content and the legal regime of the right to public and private property, I outlined the essential aspects referring to the restrictions and limitations in exercising the right to private property (including by making references to jurisprudence of the European Court of Human Rights). I considered as necessary to introduce in this paper considerations regarding the right to public and private property in the constitutional jurisprudence of several European states, given Romania's membership to the European Union, comparative law became one of the instruments to improve the social relations in Romania, including in the matter of the state and administrative territorial units' public and private property.

After this entry title from elements of general theory concerning the patrimony to the actual subject of the paper I made the comparative analysis between the state's public and private domain, emphasizing the distinctive criteria between the two concepts, making the comparative analysis of the content of the notions from the point of view of the object, the legal regime applicable to assets, performing a comparative analysis concerning the exercise, the protection and the termination of the right of the state to public property and the right of the state to private property, proving the utility of the notions public property of the state and private property of the state.

A. **The comparative analysis of the notions generated the following main conclusions**: 1. Within the system of property, *the private property is the rule, and the public property is the exception*, meaning that the public property assets must be declared as such by the Constitution, by the law or by decision of the county or local council, depending on the case, and as long as they do not fit in the category of assets declared as public assets or are not declared individually as public assets, using the same method, the assets are in private property.

2. Regarding *the terms used in special laws*, it is noticeable that *the notions used to designate the private property are sometimes different, depending on its owners*. Thus, when making reference to the private property of the state and administrative-territorial units, the notion of *private domain* is used, and when its owners are natural persons or legal persons of private law, the notion used by the legislator is *private property*.
3. Because, the state, as owner or the private domain, participates in civil law relations, as a subject of the common law, as it does not benefit from certain special prerogatives compared to any other subjects of civil law, we can conclude that *the legal regime of the assets of the private domain and that of the assets of the private property is the same*.
4. The right to private property can be defined as being a subjective real right belonging to natural persons, legal persons, the state or to administrative-territorial units movable and imovable assets, a right which grants its owners the right to use, possess and dispose, attributes which are exercised exclusively and perpetually, by own power, in the conditions established by the law. *In opposition with the right to private property, the right to public property is the ownership upon the assets of public domain, belonging to the state and to the administrative-territorial units which exercise the possession, the use and the disposition as public right, by their own power and in the public interest, in the limits foreseen by the law*.

B. **The comparative analysis of the legal regime generated the following main conclusions:** 1. The public property and its legal regime are regulated by the *Law no 213/1998*. The form of the right to private property is foreseen in *art. 136 par.(l) from the Constitution*. Also, *the Law no 18/1991 regarding the agricultural real estate*, regulates the right to private property having the lands as object. *There are also other laws with special character which establish the legal regime of the right to private property, but* the most complete regulation for the right to private property is enclosed into the *Civil Code*.

2. From the constitutional and legal dispositions results that *owners of the right to public property are the state* upon the assets from the public domain of national interest *and the administrative-territorial units* upon the assets from the public domain of local interest.

According to art.122 par.(1) from the Law no 215/2001 of the local public administration "to the public domain of local or county interest belong the assets which, according to the law or by their nature, are of public use or interest and are not declared by the law as being of national public use or interest". The assets of public property constitute the public domain, which may be of national interest, in this case the property upon it in regime of public right, belongs to the state, or of local interest, in this case the property, also as public right, belongs to the communes, towns, cities or counties. *The private apropriation of certain assets by these legal persons is not excluded,* so that*, in their patrimony, the right to public property and the right to private property can coexist* (V. Stoica, Dreptul de proprietate publică, in „Curierul Judiciar" no 7-8/2004, p. 130), the legal regime applicable to the right to private property being the common one, namely the one of civil law.

3. Unlike the right to private property to which is applied the legal regime of common law foreseen by the Civil Code and by other normative acts, *the right to public property is characterized by a special regime, derogative, due to the proper specific legal features*. *Thus*, the right to public property is *a real right, opposable erga omnes and is intangible*. The intangibility of the public property, although is not mentioned as such by the Constitution, results both from *its exclusive character*, meaning that the assets making its object cannot be under another regime of property, and by *its inalienable character*, as a consequence of this exclusivity. The right to public property is the ownership upon the assets from the public domain of national interest and from the public domain of local interest belonging to the state and its administrative-territorial units, which are exercised as public law regime, being *inalienable, indefeasible and intangible*.

C. The comparative analysis regarding the exercise, the protection and the termination of the state right to public and private property generated the following main conclusions:

1. The state and the administrative-territorial units are the only subjects of law which can be right holders of public property, and they have this quality because they are the only subjects of public law invested with prerogatives of power. Meanwhile, the state and the administrative-territorial units are also legal persons, namely subjects of civil law, and the right to public property is one of the ownership forms, the last one being an institution of the civil law. *These are the premises which determine that the matter for exercising the right to public property to be governed by legal norms of public and private law*.

2. In the doctrine was made *the distinction between the general administration of the public property assets and the exercise of the attributes from the legal content of the right to public property, emphasizing that* the general administration of the public property assets, understood as an organization to exercise the right to public property, expresses the exercise of the attributes of power by the state and the administrative-territorial units, in the regime of public law, while the real rights resulted as such always and exclusively belong to natural and legal persons, as subjects of civil law. In this opinion there are two realities which act on different plans, plans that still interfere in the process of organizing the exercise and actual practical exercise of the right to public property. *In our opinion, this distinction should not be generalized*. The organization for exercising this right comes to, according to the law, the central bodies of the executive power, referring to the assets from the public domain of national interest and to local public authorities referring to the assets from the public domain of local interest, though, most of the times, they are

also entities with legal civil personality, when they enter into relations concerning the assets that make the object of public property, they exercise their capacity of administrative law, but they are never right holders of public property (they only belong to the state and administrative-territorial units). *Thus, the organization for exercising the ownership is exclusively dependent on the public right*.
In case of actual exercise of the right to public property, including by building up some specific real rights, *one cannot speak about the existence of a legal regime regulated exclusively by the norms of civil law. This is actually the domain where the norms of public domain interfere with those from the private law*. Of course, that most of the time is difficult to make such a distinction for each case, but the ambition to finalize such a demarche would be also fatuous, if we take into account the fact that the borders between the branches of the law are permeable when the practical needs ask for it. Absolutely, the instauration of the legal regime for exercising the right to public property represents such a need. *Thus, we subscribe to the idea that the legal regime of the right to public property is a synthesis of elements of public and private law and the exercise of its attributes is not possible only by facts and legal acts of private law*.
The distinction takes also into consideration the fact that the authorities competent to organize the exercise of the right to public property are designated by the law. *Thus*, when we speak about the agricultural lands, from the state public domain, used by national companies, research and agricultural production institutes and stations and agricultural and forestry educational units "the administration function" was granted to the State Domain Agency. This results from the provisions of art. 4 of the Law no 268/2001 concerning the privatization of trading companies which have in administration lands in public and private property of state with agricultural destination and the establishment of the State Domain Agency. For the public property of the administrative-territorial units, the quality of general manager is assigned to, depending on the case, local councils, general council of Bucharest or county councils. For example, according to art.36, par.(2) let. c) from the Law no 215/2001 regarding the local public administration, republished, the Local Council exercise attributions regarding the administration of the public and private domain of the commune, town or city. In exercising these attributions, the local council decides to hand over for administration, lease or rent the assets that are in the public property of the commune, town or city, depending on the case, as well as the public service of local interest, in the conditions of the law; it decides about the sale, concession or rent of the assets in the private property of the commune, town or city, depending on the case, in the conditions of the law; it verifies and approves, in the conditions of the law, the documentations regarding the territorial organization and urbanism for settlements; it grants or changes, in the conditions of the law, the name of the streets, markets and objectives of public interest [art. 36 par. (5) from the Law no 215/2001, republished]. Similarly, the County Council exercises attributions regarding the administration of the county patrimony [art. 91 par. (1) let. c) from the same law]. In exercising these attributions, the county council decides to hand over for administration, to concession or to rent the assets from the county public property, depending on the case, as well as the public services of county interest, in the conditions of the law; it decides the sale, the lease or the rental of the assets from the county private property, depending on the case, in the conditions of the law; it assigns, in the conditions of the law, names of objectives of county interest [art. 91 par. (4) from the

same law]. *We notice the fact that the law institutes the quality of general administrators for the authorities mentioned above regarding the public domain as well as in the private domain, a fact with repercussions also over the exercise of the right to private property of the state and administrative-territorial units*.
If we take into consideration the provisions of art. 36 from Law no 215/2001, referring to the local council attributions, *we reach the conclusion that it is an administrator for the patrimony of the administrative-territorial units, just like a company management board administrates the assets of this subject of law* (**E. Chelaru**, Drept civil. Persoanele, Publishing House C. H. Beck, Bucharest, 2006, p. 128). The reference to the administration of assets from the private domain strengthen our idea, because the real right of administration cannot be constituted except based on the right to public property. The same idea comes out from the provisions of art.1, par.(5), let. c) from the Law regarding the organization and operation of the Romanian Government and ministries, regarding the function of general administrator for the public and private property of the state, that is fulfilled by the Government. Of course that, the Government, as a public institution, is also the owner of the real right of administration, but it has as object only assets granted to it in the patrimony for the performance of its purpose.
3. The holders of the right to public property can exercise the attributes of this right directly or by the formation of some specific real rights in favor third subjects of law, or by renting assets which are the object of this property.
The indirect exercise of the right to public property is performed by the establishment of some specific real rights: the right of administration, the right of lease and the real right to use some real estate assets. To these methods of indirect exercise are added the rental of the assets of public property. When we talk about agricultural lands, they can be leased [art. 4 let. d) from the Law no 268/2001], the lease being only a type of rental. Sometimes the law also foresees the possibility to change the way of exercising the right to public property upon certain assets, with another method, but by keeping the holder. This is the case of lands in the public property of the state, used by national companies, by the research and agricultural production institutes and stations and by the agricultural and forestry educational units.
In regard to the constitutional provision, according to which the assets assigned, used or resulted from infringements can confiscated, from its analyze we can conclude that it is about the assets which are in the same time the object of the safety measure of special confiscation regulated by art. 118 from the Penal Code and which, without being a punishment, represent a sanction of penal law from the legal point of view. As between the constitutional text and the text from the Penal Code there are differences of typing, it is questioned to what extent are today the penal norms incident in the matter of special confiscation. In this respect, in the legal literature it was expressed the opinion – that we share – according to which the synthetic typing of the constitutional text practically covers all hypothesis foreseen by art. 118 let. a) – e) from the Penal Code. On the other hand, from the fact that art.44 par.(9) from the Constitution does not contain any reference to the hypothesis foreseen by art.118 let. f) from the Penal Code, we should not conclude that it is not possible to confiscate the assets which possession is forbidden by the law. But, in such a case, the constitutional reason of confiscation is constituted by the dispositions of the fundamental law foreseen by art. 44 par. (8), which allow the confiscation of the assets obtained illegally, as well as those from art.53 which allow the

restriction of the exercise of ownership in certain cases determined by the law. The only essential difference between the constitutional text and the text from the Penal Code, with consequences in the area of assets which may be the object of confiscation, is that, while the constitutional norm [art. 44, par. (9)] refers to "assets … resulted from infringements", the norm foreseen by art. 118, let. a) from the Penal Code refers to the "assets resulted from the commission of the action foreseen by the penal law". From this point of view, we find out that the compilation of the constitutional text is quasi identical to the corresponding text from the penal norm from the previous Penal Code, where the characterization of the things subjected to confiscation was conditioned by the existence of an illegal action. The change made by the present Penal Code that replaced the term of "illegal action" with the "action foreseen by the penal law" was rightfully appreciated as unimportant because "in the system of the previous penal code were considered as illegal actions even the facts foreseen by the penal law in this respect existing a cause of exclusion for the penal responsibility". But in the present regulation of the penal code, the difference of compilation between the constitutional text and the text foreseen by art.118, let. a) from the Penal Code has as consequence the impossibility to confiscate the assets obtained pursuant an action foreseen by the penal law, but which due to one of the causes foreseen in art. 44-51 from the Penal Code they lost their penal character. Therefore, are taken out from the incidence of the special confiscation assets that can be obtained by persons who are not penal responsible, but which once they are issued or used, they become, most of the time, dangerous, as for example, false coins or false paper currency, falsified stamps, falsified or altered food or drinks, etc.

That is why, in order to eliminate the risk which may result from such circumstances, we consider that de lege ferenda would be wise to revise the way that regulates the measure of special confiscation from the present penal code.

In relation to the constitutional disposition and the regulation of the penal code, the assets resulted from a penal action cannot be the object of confiscation, if the respective action is not an infringement. Besides all these, the assets legally obtained cannot be confiscated, if they had not been assigned or used for the commission of illegal actions or contraventions. We consider that, *de lege ferenda* should modify the text of art. 44 par. (8) from the Constitution and, relatively, the penal legislation to allow the application by way of exception of the punishment to confiscate someone's fortune. In this respect we take into consideration the fact that no legal norm should protect the fortune of those who committed severe actions against national security, as well as illegal actions of treason or espionage, but to who cannot be imprisoned because they succeeded to escape on the territory of foreign power in favor of which they committed the illegal activity.

Applying the confiscation of fortune, as a complementary punishment and in the same time optional in case of those trialed in contumacy for the commitment of some extremely severe illegal actions should be, in these cases, the only concrete way of repression disposed by the state. The entirely exceptional character of the punishment, as well as the existence of certain legal antecedents in countries recognized as states governed by the rule of law is, in our opinion, the arguments which guarantee the existence and the exercise of the ownership.

The subject of the thesis also imposed the analysis of the jurisprudence of E.C.H.R. regarding the deprivation of property for a cause of public utility.

Also, in approaching the subject of the thesis it was absolutely necessary to study the

constitutional jurisprudence of some European states regarding the right to public and private property. Thus, I analyzed the constitutional jurisprudence from France, Germany, Italy, Austria, Greece, Spain, Belgium, Scandinavian countries.
Regarding the exercise of ownership upon the assets from **the private domain** the conclusion is that *nowadays there is not a frame-law to regulate the granting procedure for free usage, the rules for using the asset, the termination of use and the resolution of litigations. De lege ferenda*, this fact *may be obtained by a law to modify and complete the Law no 213/1998, our proposal being that the assignment for free usage to be made by the conclusion of an agreement approved by an unilateral administrative act by the general manager of the asset (the Government, the county council, the local council, depending on the case), the contracting parties being the régie or public institution that actually manage the asset and the institution of public utility*.
When the contract has as object an asset from the **public domain** of the state or administrative-territorial units it becomes an administrative agreement. We appreciate that this type of contract has *the following essential characteristics*: a) the contract is concluded between public establishments and public use establishments; b) the contract has as object an asset of public property; c) the litigations concerning the contract are in the competence of administrative court being included in the category nominated by art. 2 let. c) from the Law no 554/2004 and namely "the valorization of the public property assets".
For lege ferenda we propose that the possibility to lease the private domain assets to be regulated only by exceptional character in order to apply the principle according to which to assets from the private domain of the state and territorial-administrative units are applied a legal regime of common law, except when the law foresees otherwise. In the present regulation, we notice that, paradoxically, the exception becomes a rule. Thus, the lease, although is not a procedure specific to common law, can be used anytime by the local or county council, in the conditions of the Law no 215/2001, for the assets from their private domain. As a general rule, the assets from the private domain of the state and territorial-administrative units should make the object of the same contracts concluded by the particulars, being subjected to the same prescriptions as the particulars' assets. The lease of the assets from the private domain should intervene, only as an exceptional case, when this fact is requested by the satisfaction of social interests in better conditions, as it happens for the lease of the lands belonging to the private domain of the state or the territorial-administrative units, destined for constructions, foreseen by the Law no 50/1991. The regulation of the procedure to terminate, execute and cease the lease of the assets from the private domain should be done by an organic law because, according to art. 73 par (3) let. m) from the revised Constitution, the general legal regime of property is established by organic law.
We appreciate that this paper will help any reader for a better understanding of the aspects regarding the public and private property of the state and territorial-administrative units, as two fundamental elements of the concept of administrative phenomenon.