Particular aspects on the exercise of rights on the public property domain

CĂTĂLINA DINU

ABSTRACT

The study aims to exemplify certain situations regulated by legal provisions that recognize certain citizens' rights over the public domain and their faulty application. Either the legal provisions are interpreted by the competent public authorities to the detriment of the beneficiary, or the way of expressing the legislator does not lead to a unitary agreement in practice. By this analysis we try to determine a bridge between these provisions and the applicable principles of law, exemplifying the situation of assigning a free parking place on the public domain, nominally, to persons with disabilities and the situation of assigning a churchyard to special categories of persons.

KEYWORDS: *public domain, local administrative authority, parking place, place of eternity.*

1. Introduction

The criterion of the declaration of the law is the main way of including some goods in the public property. The goods that are exclusively the object of public property must be established by law, in accordance with the constitutional provisions. The declaration of the law is "the first and main criterion of public domain".

Unlike the private domain, the public domain contains a much narrower sphere of goods, which are not found in the civil circuit, and which, according to the law or by their nature, are of general use or interest.

The goods that belong to the public domain have the following characteristics: they are inalienable, imprescriptible and unsaleable, these are in fact the legal characters of the property right.

The inalienability of the public domain has an exceptional character, but also a relative and temporary character.

Public domain goods re-enter the civil circuit, when they are no longer for public use, so, according to art. 864 of the Civil Code, "the public property right is extinguished if the good has been lost or passed into the private domain, if it has ceased use or public interest, respecting the conditions provided by law ".

In France, the theory of public domination was invoked by the jurisprudence taking in view a lato sensu interpretation, being recognized the so-called theory of global

dominance, under the auspices of which it was stated that the lands, buildings and works carried out in a complex ensemble belonging to the public domain, also belong to them. , in the public domain. Seen as an extension of the principle of accesorium sequitur principalem, the theory of global public domain has been criticized, as the public domain was delimited by too sensitive borders, perceived as a "hypertrophy of the field of the public domain".

We could appreciate that, on the contrary, given the special legislation adopted in our country, we are facing a hypotrophy of the public domain. In this regard, we recall the situation regulated by Law no. 247/2005 regarding the restitution in kind in full of buildings taken abusively during the communist period, regardless of the legal regime of the goods subject to retrocession. The adverse effect was the diminution of the public domain of the state or of the administrative-territorial units, speaking even of the violation of art. 44 of the Romanian Constitution, by disregarding the state property right, the law operating "an expropriation of the state". These aspects formed the object of the exception of unconstitutionality of the provisions of art. 24 paragraphs (1^1), (1), (2) and (3) of Law no. according to the provisions of the Law of the Land Fund no. 18/1991 and of the Law no. 169/1997 (published in the Official Gazette of Romania, Part I, no. 415 of June 17, 2009). By the Decision no. 652 of April 28, 2009, the Constitutional Court admitted the exception of unconstitutionality and ruled that the criticized legal texts violate the provisions of art. 16 of the Romanian Constitution, republished, and a discrimination between the Romanian citizens is instituted by favouring those whose forest lands are declared, according to the law, protected natural areas, being given the opportunity to opt for the allocation of an equivalent area from the state-owned forest fund. Art. 24 paragraph (1^2) of Law no. 1/2000 also inserts the obligation of the beneficiary owner of the retrocession to keep the destination and to ensure the administration through authorized forest structures. The court found, in relation to the former owner's right to opt for the form of restitution of property rights, that he "enjoys greater protection of his property, while the state may suffer a significant loss of assets." As a result, the Court considered that the prejudice of the state's public property right by thus attaining the right of disposition as a prerogative of the public property right is undeniable.

A more recent example is the one regulated by a sinuous succession of normative acts that regulate the legal situation of pastures in our country.

From Anglo-Saxon sources, European law does not regulate the delimitation between the public domain and the private domain of the administrative-territorial units. In the jurisprudence of the European Court of Justice, however, the sphere of public property assets was delimited by that of private property assets from the patrimony of civil law subjects.

The use in the Romanian legislation, either of the notion of "public domain" or that of "public property", determined the doctrine to define the two phrases and to establish the relationship between them.

In a definition, the public domain is the totality of those goods, "public or private, which by nature or by the express provision of the law must be preserved and

transmitted to future generations, representing values intended to be used in the public interest, directly or through a public service. and subject to an administrative regime respectively to a mixed regime, in which the power regime is decisive, being in the property or, as the case may be, in the protection of public law persons". According to this theory, the notion of public domain has a broader meaning than that of public property, in its sphere also entering private property, which, due to their value, must be protected in order to be passed on to "future generations".

According to the repealed provisions of art. 3 paragraph (1) of the Law no. 213/1998, regarding the goods of public property, with the subsequent modifications and completions, "the public domain is made up of the goods provided in art. 135 para. (4) of the Constitution, of those set out in the annex that forms an integral part of this law and of any other goods that, according to the law or by their nature, are of public interest or use and are acquired by the state or by the administrative-territorial units by the ways provided by law ". Also, according to the former and also the actual legislation, represented by Law no. 215/2001 of the local public administration, respectively The Administrative Code, belong to the public domain of local or county interest the goods that, according to the law or by their nature, are of use or of public interest and are not declared by law of use or of national public interest. Art. 858 paragraph (1) of the Romanian Civil Code takes over the constitutional provisions.

2. Theoretical and practical aspects regarding the free allocation of a parking space in the public domain

Persons with locomotor disabilities, classified as disabled, residing in a locality where the parking situation is regulated, who have a personal car adapted to the physical condition, have the right to request the local public administration to personalize/permanent a place parking near the house.

Persons with disabilities benefit in this regard from the protection of the law, and the right thus recognized is exercised over a parking place in the public domain of the administrative-territorial unit, either concessioned or in the administration of a service of the authority.

According to art. 65 paragraph (5) of Law no. 448/2006, republished, with the subsequent modifications and completions, in the parking spaces of the public domain and as close as possible to the domicile, their administrator distributes free parking places to the disabled persons who requested and need such parking, and according to art. 56 of the Methodological Norms for the application of the provisions of Law no. 448/2006, the National Authority for Persons with Disabilities ascertains the contraventions and applies the legal sanctions *ex officio* or notified by any other person.

According to art. 21 of the HCL no. 251/2005 regarding the approval of the Regulation of organization and functioning of the parking system in the municipality of Brașov, republished, with the subsequent modifications and completions, the provisions of art. 65 paragraph (5) of Law no. 448/2006 are exactly resumed.

On the other hand, Brasov City Hall assigns the parking lots also based on the provisions of art. 38 of the HCL no. 927/2006 regarding the approval of the *Regulation for the allocation and use of parking places in the residential parking lots of Brasov Municipality, republished*, according to which, in the parking lots which are located in the historical area, delimited according to the General Urbanistic Plan of The municipality of Brasov, approved by H.C.L. no. 144/2011, parking subscriptions are issued at a fee of 156 lei/year for the natural persons domiciled in this area, car owners registered at the home address and without parking possibilities in the yard.

Taking into account the above aspects, we consider it necessary to corroborate the art. 21 of the HCL no. 251/2005 and the art. 38 of the HCL no. 927/2006, by virtue of the principle of law the *specialia generalibus derogant*, considering that, according to the provisions of the Law no. 448/2006, the category of persons with disabilities has a special legal right to allocate free parking places - by virtue of their quality as persons with disabilities - if they fulfill both conditions regulated by law, namely, the submission of a request in this meaning and the need for such parking.

In addition, in order to avoid a misinterpretation of the regulations HCL no. 251/2005 and HCL no. 927/2006 regarding the different categories of parking and regulated subscriptions, the following questions are raised: what is the legal basis according to which the parking areas in zone 0 are classified as public car parks; the legal provisions on which the allocation of a parking place is based for the benefit of persons with disabilities, respectively if in the area bordering the petitioner's domicile, there are *unnamed* parking places, but *signaled* for the purpose of their exclusive destination for persons with disabilities and on which, as well, persons with disabilities domiciled in that area could use them accordingly.

These aspects must be analyzed from the perspective of the fact that the local authorities consider that the legal provisions are respected by giving a beneficiary a free parking subscription, but not with a *designated* parking place, the justification coming from the fact that if the person resides in the old center of to the city, *no nominal* parking space is allowed (nominal parking places are specific to the residential ones), all of these places being assigned as public parking. The delimitation of the old area from the rest of the areas is based on criteria of specificity of the area (of houses), relief, street structure, this being exempted from the attribution of the residential parking lots. This exception leads to a differentiated regime of application of the special legislation of persons with disabilities between different areas of the same administrative-territorial unit, so that, in the historical area, persons with disabilities benefit from a free parking subscription, but not from a nominated parking place, while in the urbanized area, the same category of persons has both free subscription, but also nominal/residential parking space. The only way provided by the concessionaire of the parks on the public domain of the Municipality of Brașov, so implicitly those of the historical area of the city, to customize the public parking places is to rent the parking, by applying a license plate with the registration number of the vehicle, with 18 lei/day, situation in which the tax exemption or gratuity does

not apply. Basically, this possibility is used by the legal entities that carry out their activity in these public areas.

Therefore, even if the parking place is located in the vicinity of the applicant's home, it has the character of public paid parking, the place marked and signaled correspondingly for persons with physical disabilities mentioned, has a public character and works according to the principle of "first-come, first-served", it cannot be assigned with the exclusive right.

Are the provisions of art. 65 of Law no. 448/2006 regarding the protection and promotion of persons with disabilities complied with the conditions of not granting a designated parking place to persons with disabilities? Or is it enough to mark certain public car parks with the distinctive signs of this category of people?

Nor does the National Authority for Persons with Disabilities adopt a coherent point of view in this situation described above, which specifies that, at the request of persons with disabilities who need parking places, the administrator has the obligation to identify and distribute parking places free of charge, as close as possible to their domicile, and any provision contrary to other regulations is devoid of legal basis, Law no. 448/2006 having a special law character. Therefore, no distinction is made between nominal and public parking, with the emphasis on *no fee*. However, the very etymology of the verb “to repartition” leads us to a literal interpretation, to an attribution *intuitu personae. Is the recognition of a free right to a parking place, by issuing a parking permit for the historical area, by the City Hall of Brasov Municipality or not sufficient to meet the requirements of the law?*

Each resident, with or without a handicap is allowed parking on any vacant lot. However, residents with disabilities can also park either on public parking marked spots and either on the marked separately for the handicap places. In this regard, the arrangement of a public parking place right in front of the applicant's house, properly marked and marked for the disabled it would be a guarantee of compliance with the law.

3. Theoretical and practical aspects regarding the assignment of a place of eternity, free of charge, on the public domain

Another sort of similar situation, but a clearer example of the non-application of the law by the local public administration authorities, is the provisions for another category of persons, namely, *Law no. 189/2000 regarding the approval of Ordinance no. 105 of August 30, 1999 regarding the granting of rights to persons persecuted by the regimes established in Romania, starting from September 6, 1940 to March 6, 1945, for ethnic reasons*. More precisely, the right to a free place of eternity assigned on the public domain of the administrative-territorial unit is interpreted differently.

According to the provisions of art. 1 of the HCL no. 580/2005, republished by the HCL no. 587/2012, the City Hall of Braşov Municipality assigned to this category of persons, without payment, a place of eternity in the Municipal Cemetery of Brasov.

However, the actual distribution took place "only at the time of the death of these persons, based on the prior nominal approval, through which a place of eternity is granted free of charge". *Do these provisions of the decision of the Local Council add limitations to the law regarding the free allocation of a place of eternity, regulated by Law no. 189/2000, through the prohibition of its acquisition during life?*

The applicable legal framework, in force at the date of issuing the Local Council decisions, was the following:

1. Art. 17 of the Law no. 44/1994 regulated the right of veterans and war widows to be provided free of charge burial places in military and civilian cemeteries or incineration, as the case may be;

2. Art. 5 paragraph (1) letter h) of the Law no. 341/2004 regulated the right of the fighters who contributed to the victory of the Romanian Revolution of December 1989 to the attribution in the property, without payment, of the place of eternity. Also, according to art. 35 of the Methodological Norms for the application of Law no. 341/2004, in applying the provisions of art. 5 paragraph (1) letter h) of Law no. 341/2004, the attribution in property, without payment, of the place of eternity, is made, at the request of the beneficiaries, without requesting fulfillment of additional conditions, the right of ownership over the place of eternity is assigned within the cemeteries under the administration of mayors or parishes, and the requests addressed to grant the right provided (...) is solved within the limit of the availability of spaces (…);

3. Art. 6 letter h) of the Decree-Law no. 118/1990 regulated in favor of the persons persecuted for political reasons by the dictatorship established from March 6, 1945, as well as those deported abroad or constituted prisoners, granting, upon request, free of charge, of a place of eternity;

4. Art. 5 letter h) of the Law no. 189/2000 regulates the right of the persons persecuted by the regimes established in Romania, starting from September 6, 940 until March 6, 1945, for ethnic reasons when granting, on request, free of charge, a place of eternity. The rights granted to the categories of persons listed above are also currently regulated, as well as the modifications and completions that the legislation in the field has undergone without affecting the right to assign a place of eternity.

However, the HCL no. 580/2005, including in its republished form, imposed, in addition to the prior approval of the free assignment of a place of forever, the condition that the distribution takes place "only at the time of death" of the persons concerned. Therefore, a differentiation is created between the phrase of the *free assignment of a place of eternity* and that of *the previous nominal award* – both being in fact identical, but a new criterion is added, not found in the legal regulations, namely, that of the distribution *only at the moment of death*.

Also, by amending HCL no. 580/2005 following the adoption of HCL no. 587/2012 and its correlation with HCL no. 283/2012 regarding the approval of the free assignment of burial places for war veterans widows, *a distinct legal regime* between the different categories of beneficiaries of the above mentioned legislation was addded. Thus, art. 1 of the HCL no. 580/2005 has been modified in the sense: “it is

approved that the distribution of the places of everlasting/burial, which is assigned free of charge, in the special plots of the Municipal Cemetery of Brasov, located in the street Dimitrie Anghel no. 21, to the persons who benefit from this right, according to the legal provisions, to be performed by SC RIAL SRL Braşov, only at the time of the death of these persons, based on the prior nominal approval, by which the place of eternity is granted free of charge*, with the exception of the beneficiaries of Law no. 44/1994 on war veterans and some rights of invalids and widows of war,* with subsequent amendments and completions and HCL no. 283/2012 ".

We mention that the above mentioned legal regime is also found in HCL no. 283/2012, according to which "the war veterans' widows benefit free of charge for the burial place where the predeceased spouse is buried or for a place of burial adjacent to his side, in the extent to which this is possible". Therefore, the category of persons provided by Law no. 44/1994 (ie, widows of war veterans), benefit from this possibility, being in a situation like the petitioners - beneficiaries of Law no. 189/2000.

The administrative acts have not been the subject of an action in administrative litigation since now, and compared to the provision in the local council decision regarding the fact that the place of eternity is assigned at the time of death, it was considered that *this paragraph does not lead to the illegality of the act as long as* the law does not provide for the exact moment of the award.

As a result, in the described situation, a differentiated recognition of the right to the assignment of a place of eternity for various categories of beneficiaries of several normative acts is highlighted, as we have shown above.

Therefore, for the identity of reason and for respecting the principle of equality before the law, it was necessary to elaborate a new regulation, at the local level of the municipality of Brasov, namely, an identical legal regime applicable to the categories of beneficiaries of the special legislation to which the right is recognized the free assignment of a place of eternity.

This change was made by repealing the decision of the Local Council of the Municipality of Braşov and by according a place of eternity during life time of the solicitant. The burial place is distributed by the Administration of the Municipal Cemetery from Dimitrie Anghel str. no. 19-21, based on the awarding address issued by the City Hall of Brasov, *both during the beneficiary's life and at the time of death.*

4. Conclusion and implications

Regarding the situations submitted to the scientific research presented, we find that sometimes, between the will of the legislator and the interpretation by the administrative authorities, there is a discrepancy that risks *distorting the spirit of the legal provisions applied*, *from their initial purpose.* In these situations, for a unitary interpretation, a determining role is played by the national authorities with competences in the legislated field (for example, the National Authority of Persons with Disabilities) or, in the case where such a specialized authority does not exist, the Prefect must check rigorously the legality of the normative acts adopted by the local

councils. Also, the People's Advocate Institution, the autonomous central authority, can carry out actions, pursuant to art. 4 of Law no. 544/2004, by promoting an action in the administrative litigation.

At the same time, we consider that these cases are just examples that should be confined to the principle of good administration, by ensuring a sound application of the law and by the adequate provision of a public service by the authorities of the public administration.

REFERENCES

1. Apostol Tofan, D., 2018, *Administrative Law*, tome.I, 4th edition, Bucharest, Romania: C.H. Beck Publishing House.
2. Bălan, E.; Iftene, C.; Văcărelu, M., 2016, *Ownership and the public domain: perspectives and developments in the administrative space*, Bucharest, Romania: Wolters Kluwer Publishing House.
3. Slabu, E., 2018, *Good administration in the European administrative area*, Bucharest, Romania: C.H. Beck Publishing House.
4. The Information Bulletin of the People's Advocate Institution.

ABOUT THE AUTHOR

Cătălina Dinu, PhD., University Lecturer at Transilvania University of Brasov.

Email: catalina.matei@unitbv.ro