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PRIVATIZATION SUBJECT CANNOT BE GOODS OF GENERAL INTEREST (PUBLIC GOODS)

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Abstract. *First of all, the author deals with the problem of public goods in foreign law, that is, theory (French, German, Austrian). He points to the provisions of the Constitution of the Federal Republic of Yugoslavia of 1992 and the Constitution of Serbia of 1990 under which the concept of goods of general interest (public goods) is regulated, such as 1) according to positive law, 2) in view of types constituting a public good, 3) in view of origin of public goods, 4) in view of purpose and use of public goods. Protection of public goods is manifested in the following: 1) obligation of state organs and other organizations administering public goods to maintain the substance of public goods, 2) inalienability of public goods, 3) impossibility of acquiring by presumption of whatever rights to public goods, 4) insusceptibility of the public good things to execution, 5) criminal law protection of the public good things.*

Key Words: *privatization, public domain, protection of public domain*.

I

Pursuant to the Law on Privatization of the Republic of Serbia (38/2001), the subject of privatization is social, that is, state capital in enterprises and other juristic persons unless otherwise stipulated under the special regulations.

However, already in Article 3 paragraph 4 it is stipulated that goods of general interest (that is, public goods) cannot be the subject of privatization, under which

1. natural recourses, and
2. goods of general use

are understood.

Grounded in connection with the goods of general interest (public goods or public domain) are administrative law relations; which further mean that a public goods institute is a public law institute.

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II

In the theory of law of western states there is no a unique understanding concerning the property belonging to a state and other public law bodies (public domain).

(1) **French Law**[1] differentiates two kinds of goods in possession of the public collective bodies: public domain and private domain (domaine public et domaine privé).

Governing **for the private domain** (agricultural land, residential buildings, industrial and trading enterprises, participation of states in economic enterprises etc.) shall be regulations of the civil (property) law and disputes arising from the private domain shall be resolved by the ordinary courts.

Governing **for the public domain** shall be a particular administrative law regime dominating within which is the principle of inalienability of the public domain, but which includes certain regulations on restrictions, criminal law protection, use, etc. unknown to the private (property) law. That is why the disputes arising from the public domain are administrative disputes that shall be resolved by the administrative courts.

However, with regard to the concept and subject covered by the public domain, it should be pointed out that the concept of the public domain in the French law has evolved. Public domain was considered by an older French theory to have covered only those things intended for general use and that private property could not be acquired on their grounds. For example, Proudhon[2] has defined public domain as a set of goods intended for general use. Ducrocq[3] thinks that public domain consists of the goods that due to their nature cannot be the subjects of private property. Berthelémy has pointed out the idea on reducing public domain to the goods that due to their nature are intended for general use, as well as those goods declared as such in view of their character (military premises, objects of art in museums, etc.).

The latest French theory[4] also takes the purpose of things of the public domain for general use as a criterion of the public domain concept, but supplements it including the things intended for public services as those of the public domain. Therefore, recent French authors think that public domain includes all real and movable properties intended either for general use (public roads, seacoasts, waterways), or to public services (railroads, military premises, administration buildings, inventory required by the government organs for performances of services).

Discussions are being lead in the French theory of law on what things, out of things intended for public services, have the characteristic of public domain. There is an extensive and restrictive theory[5]. According to the former, all properties intended for public

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[1] See Laubadère de André: Traité élémentaire de droit administratif, 1952, Paris, p. 720 and further. Hauriou Maurice: Précis de droit administratif et de droit public., 1933, Paris, p. 781 and further; Bonnard Roger: Précis de droit administratif, 1940, Paris. Waline Marcel: Manuel élémentaire de droit administratif, 1951, Paris, p. 506 and further.

[2] Proudhon: Traité du domaine, I, 241, (quoted after Laubadère).

[3] Ducrocq: Droit administratif, 7 édit. IV 95 (quoted after Laubadère).

[4] M. Hauriou: op. cit., p. 781 and further. R. Bonnard, op. cit. p. 547 and further; M. Waline, op. cit. p. 506 and further; Rolland, op. cit., p. 347 and further; de Laubadère, op. cir., p. 724 and further.

[5] De Laubadère, op. cit. p. 728.

services make the public domain. The latter tends to restrict the scope of the public domain only to the properties intended for public services, those that are of the decisive role for that public service. According to Jèze, that a thing could be within the public domain, it is necessary that it should be intended for the public service, that undoubtedly is a public service and that it has a deciding role in performing that public service (thus, for example, according to Jèze, barracks are not the public domain, because those are soldiers the role of which is deciding for the public service of national defence). According to Waline, constituting the public domain are those properties that cannot be replaced and the possession of which is indispensable for the public service.

Laubadère suggests a compromise solution. According to him, the extensive theory may be accepted for real property, but it cannot be applied to movable things. He thinks it logical the regime of private (property) law to be, in principle, introduced for movable things. Exceptionally, out of the movable things only those should have the characteristic of the public domain, which necessarily should be ascribed a particular protection. Here, a view point of M. Waline on the things that cannot be replaced (for example, rare pieces of art, rare archival documents and the like) could be accepted.

(2) **In German law**[6], three kinds of properties in possession of a state are differentiated.

a) financial or fiscal property (Finanzvermögen) covering mines, securities, factories, forests, etc. Using financial properties the state provides necessary financial resources. Valid for things that make financial properties shall be property law regime.

b) Administrative property (Verwaltungsvermögen) including things that are necessary to the state organs for performance of public services (belonging to these properties are administration buildings, barracks, customs warehouses, state stores, etc.). As for the things that make the administrative property, partially valid shall be public law regime and partially property law regime (See Jellinek, op. cit. p. 486).

c) Public things or public property (Öffentiliche Sachen)[7] for which the public law regime is valid. Belonging to these things are: public roads with bridges, public waters, ports, seacoast, air space, graveyards, etc.

However, Forsthoff differentiates two basic categories of properties that are in possession of the state:[8] 1. – financial property and 2. – public property.

a) Under the **financial property** a property in possession of the state or a particular holder of the public power is understood, available to the subjects of the property in a similar way like subjects of private property according to the civil law regulations. This property serves the public administration in a direct way: not through direct exploitation and usage, but through incomes they yield and which contribute financing of the public administration. Understood under such property are: domains, forests, state-owned factories, state bathing beaches, securities, participation in the economic enterprises capital, etc.

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[6] W. Jellinek: Verwaltungsrecht, Berlin, 1928, p. 487; Fleiner Fritz: Institutionen des deutchen Verwaltungsrechts, Tübingen, 1928.

[7] Otto Mayer, Deutches Verwaltungsrecht, II, Band. pp. 1-35.

[8] Dr. Forsthoff: Lehrbuch des Verwaltungsrechts, 1958, pp. 326-328.

b) **Public good**, however, make things belonging to the state or to the public power holders, and which serve directly to the public administration needs. Within this category two particular groups of things can be distinguished such as:

1) things that may de used by all individuals in a certain way, that is, things in the general use; and,

2) things that make the administration property, that is, administration public property; these things serve the administration to implement its objectives and tasks.

Considered as things in the general use shall be public roads, streets, squares, parks, waterways, seacoast and similar premises.

Considered as things that make the administration public property shall be the means used by the administration (administration buildings, schools, fortifications, barracks, drill sites, accompanying equipment such as machines, inventory, etc.).

(3) **Austrian law theory**[9] differentiates 1. – financial and 2. – administration property. The administration property is further divided into two kinds of things: a) some are intended for the organs to perform state services: those are "res publicae" (administration buildings, military fortifications, war materials, etc.) b) other things are in the general use "res quae in publico usu habentur" (public roads, rivers, etc.). Both for one and for the other kind a public law regime is valid until they serve the proper intention. Therefore, they lose the characteristic of the public things (public good) upon cessation of the intention they have been given that characteristic for.

3) Our opinion is that we should use the term "public good" in our law. Although, the term "public good" has not yet penetrated into the positive law and for the moment being it is only a subject of treatment in the theory of law. Regulated under the positive law is only one form of the public good – good in the general use.

III

I – The subject on the public good has not been regulated under the unique federal regulations. Certain provisions on the public good were contained in the pre-war legislature on waters.[10] Certain provisions on the public property were also contained in the legislature of the Socialist Federal Republic of Yugoslavia.

In view of scarce provisions of the positive law, the theory of law has tried to more clearly determine the concept of public good.[11] However, our theory of law is not uniform in determining the concept of public good.

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[9] See, for example, Herrnritt: Grundleheren, des Verwaltungsrechts, Tübingen, 1921, p. 377 and further.

[10] Serbia has rather early codified the legislature on waters. Namely, the Law on Waters and Its Use was passed as early as 1878 and certain questions relative to the administration and use of water as a public good were regulated. Regulated under the provisions of the aforementioned Law were: questions of the legal nature of water, use of water, authorizations of organs, as well as ceratin questions that were regulated under the transitional provisions. It was in 1891 that the Council of Croatia passed a Statute on Water Law that was wider than the Law on Waters and Their Use of Serbia because it covers 187 paragraphs. In addition, for the performance of this Statute detailed regulation were passed as well. Certain questions from the law on waters were also regulated under the Law of the Kingdom of Yugoslavia on the Use of Water Powers of 1931, which, among other things, standardized the position of water as the public good.

[11] Dr. Dr. Ivo Krbek: Pravo jugoslavenske javne uprave, Book III, 1962, p. 131; Dr. Andrija Gams: Osnovi

According to one viewpoint[12], public good includes both the things that cannot at all be a civil law property and the things that may be.

According to another viewpoint[13], public good is mainly reduced to the goods of general use.

We think that the latter viewpoint reduces the concept of public good too much, namely only to the general use good. Therefore, it seems that the concept of public good may be more widely understood to include a greater number of things than the concept of good in general use does (for example, things of military public good, museum items, archival documents and other).

The concept of public good has emerged in our law on the grounds of differentiating social property into two categories:

- one category of the social property consists of the things in the economic commerce at the same time being merchandise as well. These things are mainly basic facilities and the fixed assets of the economic enterprises.

- the other category of the social property consists of the things not in the economic turnover, and therefore they are not merchandise. This category of things is called *public good* valid for which shall be administrative law regulations.

Since 1989, when property pluralism was introduced in Yugoslavia, the public good regime may include parts of the social and state-owned property, as well as parts of the mixed, co-operative and private property if a specific legal regime is in effect for those parts of the property (Article 60 paragraph 2 of the Constitution of Serbia).

However, a mention should be made here that the public good category is not a unique one and that within this category things may be differentiated for which the very same legal regime is not in effect. Therefore, differentiated within the public good theory, in view of the purpose and usage of the public good things, as well as in view of the possibility of disposing of the public good things, may be: 1. – a good of general use, that is, things intended for the general use and 2. – things intended for the needs of certain state organs, that is, institutions of social activities.

a) A good of general use, that is, things intended for the use of all, shall include: roads, rivers, lakes, air space, costal sea and seacoasts, streets, squares, parks, etc.

b) Things intended for state organs shall include objects (real properties, buildings and certain movable things) belonging to the administration and military goods as well as objects in the capacity of monuments of culture managed by the state organs or organizations.

Therefore, designated as public good may be the things that serve the use of all or the needs of a narrower community being exempt from the civil law commerce. Among the things that make public good there are such things that, in view of their physical features and structure, belong for its nature to the public goods category. However, also belonging to public good are those things that for their nature may be within the civil law economic

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stvarnog prava, Book III, 1961, pp. 127-131; see also paper "Javno dobro" in the magazine "Pravni život" No. 3/53; Ante Turina: Morsko javno dobro – magazine "Naša stvarnost" No. 9-12/62; Dr. Nikola Vorgić, paper "Pribežno vodno pravo" – "Pravni život" No. 5/63; Natural water flowing (neighbouring relations), "Naša stvarnost" No. 7-8/63 and Dr. Mihajlo Mitić, O nadležnosti za rešavanje spora o vodama iz reka i potoka, Pravni život No. 3-4/58.

[12] Dr. Andrija Gams: Osnovi stvarnog prava, 1961, p. 128.

[13] Dr. Ivo Krbek, Pravo jugoslavenske javne uprave, Book II, p. 131.

commerce, but are exempt from the economic commerce under a normative or any other act. Such things have the public good character until the purpose stipulated under the normative or any other legal act shall be in effect.

II – A mention should be made here of the Law on Property of the Federal Republic of Yugoslavia (Službeni list SRJ No. 4/93) under which the contents of the administrative public property of the federal state are stipulated. According to this Law (Article 5) "the property of FRY shall serve to implement the competences of FRY; and the property of FRY may also be used to perform economic and other activities in the country and abroad for the purpose of gaining profit, that is, income pursuant to the federal laws under which those activities are being stipulated" (paragraphs 1 and 2). Paragraph 3 prescribes that acquisition of income from the property from paragraph 2 shall be attained by leasing, sales, placement of money resources and securities on the money and capital market and in any other way (paragraph 3); the Federal Government (paragraph 4) shall decide on the use and disposition of the property in the sense of paragraphs 2 and 3. Professor Z. Tomić holds the view[14] that the Law did not take into account the need to separate the rights from their object, because the concepts of the property and the property mass were mixed up. According to the aforementioned regulation, three constitutive elements of the property of FRY can be singled out such as: a) **things** (immovable and movable); b) **money resources** (provided by the FRY budget) and money resources (used by the National Bank of Yugoslavia in keeping with the federal law). Under **securities** are understood those securities of which FRY shall have the right to dispose of and those issued by FRY. Understood under **other property rights** are (according to the aforementioned law) the industrial property rights (patent rights, licence rights, right to model, sample and stamp) and other property rights stipulated under the federal law.

According to the Constitution of FRY of 1992 (Article 73) owned by the state shall be the following groups of goods:

1) natural resources;

2) goods in general use, but that these goods may exceptionally be privately-owned as well;

3) agricultural land (it may be privately- or in any other form owned;

4) forests and forest land (may be privately- or in any other form owned within the limits stipulated under the law;

5) city construction land (it may be privately- or in any other form owned);

6) real properties and other means used by the federal organs and organizations, organs and organizations of the member republics and the units of local self-government and organizations performing public services. Since public services may also be performed by private enterprises and citizens – individuals, that is why a conclusion should be drawn that owned by the state are only the goods of state organizations performing public services. Those are, in fact, organizations which perform public services, the founder of which is the state or the local self-government unit.

Provided under the **Constitution of the Republic of Serbia** (Article 60) is, first, that the natural resources and goods in general use as well as those of general interest and the

[14] See paper of Z. Tomić: "O državnoj imovini i državnoj svojini u pravu SRJ"; Anali Pravnog fakulteta u Beogradu. No. 2-3/1996.

city construction land shall be state- or socially-owned. Certain goods in general use may also be privately-owned. We hold the view that the new Constitution of Serbia will also provide for a provision under which the natural resources may also be made concessions to foreign companies (for example, the copper mine in Bor was a concession given to a French company prior to 1941).

The rights to use goods of general interest and the city construction land may be won under the conditions stipulated according to the law (paragraph 3). The fact shall not be ruled out that under the new Constitution of Serbia the possibility will be provided for the city construction land, under the law prescribed conditions, to be privately-owned as well.

The property over the things of particular cultural, scientific and artistic or historical importance, or of importance for the environmental protection, may be, based upon the law, limited along with a compensation in case of general interest.

Finally, a mention of the provision of Article 60 paragraph 5 of the Constitution of Serbia should also be made according to which protection, use, improvement and management of properties of general interest shall be accomplished under the conditions and in the way provided by law.

When the **public services means** are in question, they, according to the **Law of the Republic of Serbia on Public Enterprises and on Performance of Activities of General Interest (25/2000)**, may be in all form of possession. Namely, public enterprises perform activities of general interest, and the activity of general interest may be performed by other forms of enterprises, part of an enterprise and an entrepreneur in keeping with the federal law which stipulates the legal position of an enterprise, the law under which the legal position of an entrepreneur is regulated and the law under which activities of general interest are regulated, when entrusted by a competent organ to perform those activities (Article 3).

In connection with the division of public goods, that division may be carried out in view of various criteria taken as sa basis when performing division of things that make public good.

1) Division Based on Positive Law

Understood as public good in our law, and in view of the cited regulations, shall be:

(1) **natural resources** (state-owned mines, state-owned forests, state-owned agricultural land and the like);

(2) **goods serving general use**, use of all persons, such as navigable rivers, lakes, roads, squares, parks, coastal sea, seacoasts, museums, galleries, libraries, zoos, monuments of culture, air space, etc., graveyards can also be included here to a wider sense (Article 60 of the Constitution of Serbia).

(3) **buildings and other real properties** entrusted to be managed by the state organs, which are directly intended for operation and performance of services of these organs – **administrative public good**. For example, included here are buildings located in which are offices of state organs (assembly, government, administrative organs, courts, public prosecutor's office, and other), prisons, warehouses (for example, customs warehouse and the like). Also included here are real properties indispensable for performance of official jobs of state organs;

(4) **buildings and real properties** as well as other objects necessary to military units and for national defence – military public good (military fortifications, military defence

equipment, military drill cites and proving grounds, barracks, military airports, arms and other military weapons and the like).

2. Division Based upon the Types of Objects Making Public Good

From the objects type point of view that make public good, the following categories can be differentiated: 1) natural resources, 2) land public good, 3) water public good, 4) sea public good, 5) air public good, 6) buildings and 7) movable things.

1) **Natural Resources**

2) **Land public good** covering public roads with bridges, (see Law of the Republic of Serbia on Public Roads – 46/91, 52/91, 42/98), streets squares, parks, graveyards and the like with accompanying facilities as well as the military public good (military fortifications, drill sites, etc.).

3) **Water public good** covering natural waterways serving inland navigation with accompanying facilities such as ports of inland navigation and the like. Also, rivers that are not navigable and without raft travelling. Therefore, included into the water public good are natural water currents, natural lakes, natural springs, public wells and public fountains.

The water public good also covers running water beds, water and river banks, that is, natural lakes water.

Also belonging to the water public good are ports of inland navigation, which make land water space with built banks, piers, necessary free space, plants and other objects intended for ships docking, passengers going aboard and landing and goods loading and unloading, goods putting into storage and other handling, as well as ships supply, repair and protection against bad weather, under the same conditions as the public roads having in mind the fact the operative banks are fixed assets (see Federal Law on Waters Regime – 59/93 and the Law of the Republic of Serbia on Waters – 46/91, 53/91, 54/96).

4) **Sea public good** includes certain parts of the sea with the sea-bed, seacoast, together with certain accompanying facilities (ports, terrains, installations required for navigation maintenance, etc.). Therefore, falling into the sea public good[15] are:

Coastal sea. Pursuant to the law on the coastal sea, outer sea belt and epicontinental belt ("Yugoslav Official Register" Nos. 49/87, 57/89) and the Federal Law on Sea and Inland Navigation (22/77, 13/82, 30/85) the coastal sea of the Federal Republic of Yugoslavia include internal sea waters and the territorial sea.[16] Precisely defined under the law is what is covered by the internal sea waters. The coastal state shall have full sovereignty over the internal sea waters.

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[15] In French law, Bonnard, op. cit., p. 538, holds a view that the territorial sea width is, in principle, 3 nautical miles. However, according to Laubadère, territorial sea (sea belt of three miles beginning from the coast) is not deemed by the judicial practice as a public domain, but only subjugated to the police supervision – see op. cit., p. 726.

[16] On the sea public good, see Dr. Milan Bartoš: Medjunarodno pravo, Book II, Beograd, published by Kultura; Ante Turina, Morsko javno dobro, "Naša zakonitost", No. 9-17/62; Regulation of the Kingdom of Yugoslavia, having the power of a law on the sea public good - "Službene novine" of March 10, 1939. According to Article 4 of the previous Basic Law on Waters (13/65), coastal sea is a good in general use. See also previous Law of Croatia on Sea and Water Good, Ports and Piers (19/74, 39/75, 17/77, 18/81). See the Law of Montenegro on the Sea Good (14/92).

According to our law, the territorial sea covers a sea belt of 10 nautical miles towards the open sea, counting from the border of the internal sea waters. Sovereignty of the coastal state over these parts of sea is limited by permitting passage of foreign ships.

Not belonging to the public good is a part of the sea belt to the width of 2 nautical miles outside the territorial sea over which a competent organ of FRY has certain supervisory rights. In addition to the coastal sea, certain parts of the sea-bed below the coastal sea are considered, in our view, a public domain.[17]

Under certain conditions epicontinental belt as well.[18]

Since the coastal state has sovereignty over the coastal sea, it is a positive fact that that state has also sovereignty over the sea-bed below the coastal sea. Therefore, the sea-bed below the coastal sea must also be a component part of the sea public good. Epicontinetal belt covers the sea-bed and the underground beyond the territorial sea to a certain distance from the coast.[19]

Pursuant to Article 20 of the former Law on the Coastal Sea, Outer Sea Belt and Epicontinetal Belt of Yugoslavia and the federal Law on the Maritime and Inland Navigation (12/98), 44/99, 74/99), the epicontinetal belt covers the sea-bed and underground of submarine space beyond the outer border of the territorial sea to the depth of 200 m even over that border to the line where the depth of water over the sea-bed permits exploitation of natural resources of the sea-bed and the underground. Over the epicontinetal belt, Yugoslavia exercises sovereign rights referring to the exploration and exploitation of natural resources of that belt. Under the Geneva Convention on Epicontinetal Belt concluded in 1958, the scope of the epicontinetal belt and the scope of the power of the coastal state were stipulated:

a) according to this Convention, the coastal state exercises sovereign rights over the epicontinental belt for the purpose of exploring its natural resources;

b) sea coasts; they are deemed to cover the border of the coast along the sea the widht of which reaches the point to which extends the highest tide during the year and the highest waves during the winter, respectively;

c) sea ports (with facilities at the sea coast); they are deemed a public gooed under the same conditions as those for public roads and ports of the inland navigation;

d) lighthouses and other installations indispensable for navigation maintence (coastal devices). The greatest part of these coastal devices are covered by the concept "sea coast" and "sea port", because of which included here would be only those devices which are not covered by the concept "sea coast" and "sea port".

5) **Air public good** covers air public space above a state territory. Earlier, that air space was considered to belong to certain land owners such as an accompanying right of property on the land. Sometimes it was considered as res nulius as well, upon which the

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[17] According to Article 2 of the Law of S.R. Slovenia on ... of watres – "Uradni list NRS" No. 39/60 the coastal sea-bed was considered as a water land, which is a public good.

[18] See A. Turina, op. cit., p. 454.

[19] On the epicontinetal belt, see Dr. M. Bartoš, Medjunarodno javno pravo, Book II, pp. 219-235; A. Turina, op. cit., p. 539; de Laubadère, op. cit., p. 726.

state exercised certain supervisory rights. In French law, the air space above the state territory is considered public good.[20]

Also included here would be airports, understood under which is necessary land and water space with take-off and landing runways, hangars, devices and instrumentation and other premises for airplanes take-off and landing, receipt and dispatch of airplanes, passengers and goods (Article 1 of the earlier Law on Use of Airports – "Službeni list SFRJ" No. 12/64 and the Law of the Republic of Serbia on Airports – 28/75). Airports are deemed public good under the same conditions as those for public roads, seaports and piers of inland navigation. An airport may be open for air traffic or for inland and international air traffic.

Airplanes flight in the air space of FRY, their take-off and landing on the territory of FRY are regulated under the Law on Air Traffic ("Službeni list SRJ" Nos. 12/98, 5/99, 44/99).

6) **Buildings**. Included in good are buildings of administrative public good (housed in which are state organs) and buildings of military public good (barracks and other military buildings).

7) **Movable things**. Those are things within a military public good (weapons, vehicles and other), that is, things belonging to institutions of social activities indispensable for performance of social activities (rare books in libraries, archival documents, pieces of art in museums, pictures in galleries, etc.); for example, stipulated in Article 1 of the earlier General Law on Protection of Monuments of Culture and Natural Rarities ("Službeni list FNRJ" No. 81/46) was that scientific and aesthetic value of movable cultural and historical, artistic and ethnographic monuments were property of all people. According to the laws of Republics on the protection of monuments of culture, also deemed monuments of culture are movable things, which are, due to their scientific, technical or other cultural values, as the cultural goods, of special importance for the social community. Now in effect in the Republic of Serbia is a Law on Cultural Goods (71/94). See also the Law of Montenegro on Protection of Monuments of Culture (4/91).

3. Division in View of the Way of Creation of Public Goods

In view of the way of creation of public goods, they may be divided into: a) natural public goods and b) artificial public goods.

The first group includes public goods which acquire those characteristics based on their natural structure, their natural features (sea, water and air public good), while the other group includes those public goods which, as a rule, acquire those characteristics based on the legal act of a state organ (for example, public roads, artificial lakes, movable cultural domains and other).

4. Division in View of Intention and Usage of Things of Public Good

In view of intention and usage of things public goods may be divided into: 1) public goods of general use, that is, things intended for general use; 2) things intended for state organs and a specified social service (see on certain categories of things above with the concept of public good).

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[20] Bonnard, op. cit., p. 539; Laubadére, op. cit., p. 726.

V

1. In connection with the legal nature of rights the public collectivities hold over a public good, there are two views in French law:[21]

Earlier French law writers held the view that public domain could not be considered as adminsitrative property. All over the 19th century predominant was the idea that the things of public domain were not in private possession nor in any other possession. Proudhon, the French law writer, rejected the idea on property because it represented an exclusive right. Of the same view were French writers Ducrocq and Berthélemiy according to whom public domain consists of things that cannot be the object of property. The things of public domain are inalienable. These writers recognize only the right of the state administration to protect and supervize it.[22]

Also, French lawers Duguit and Jèze reject the idea of property. According to them, adoption of this idea would mean unjustified penetration of civil law theory ideas and concepts into the public law. Moreover, the idea on property appears as useless because the rights of a state on a public domain can be explained by the idea of intention.

Another French law writers, beginning from Hauriou, advocate the idea on administrative (administrative law) property on public domain.[23] State administration is the owner of its public domain. The idea on the administrative (administrative law) property, according to these writers, is indispensable because of solving many problems that arise in connection with the public domain, and this idea was consecrated by the judical practice. Holder of this property is a territorial public collectivity such as: state, department or community.

2. As for our law, according to one view, the things of public good, being in principle out of commerce, are not subject to civil law, but administrative law regime. Therefore, public law, that is, administrative law property over the things of the public domain is in question. Holder of the adminsitrative law (public law) property over the things is a state or other public body in the interests of whose members those public goods are being used. According to this view, if, for example, barracs or any other military premises, are in question, federation shall be taken as a holder of the property; property holder over the national parks shall be the corresponding public law organization; over the public sqaures the property holder shall be the city, that is, community.[24]

Accoding to the second view, the things of public good constitute a social property and it is the adminstrative law regime that shall be in effect of public good. Therefore, public good is a specific kind of the social property because of which the whole society must be taken as the subject of that property. The state organs administering the things of the public domain shall not have the property law authorities, but only administrative law authorities over those things.[25]

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[21] De Laubadère, op. cit., p. 793 and further.

[22] De Laubadère, op. cit., p. 734.

[23] M. Hauriou, op. cit., p. 781 and further; R. Bonnard, op. cit., p. 549 and further; De Laubadère, op. cit., p. 734; L. Rolland, op. cit., p. 532 and further.

[24] Dr. Andrija Gams, Osnovi stvarnog prava, 1961, pp. 120 and 130.

[25] Dr. Spajić, Priroda prava i upravljanje opštenarodnom imovinom, "Narodna uprava", 3/52, p. 35.

The third view has emerged upon introducing political and property pluralism into Yugoslav law (1989 and 1991). In view of that, under the public good may be understood the things in social or state property or in any other form of property (mixed, private or co-operative) under the conditions that those things are out of the civil law commerce and that they are subject to a specific administrative law regime (see Article 60 of the Constitution of Serbia).

We think that this third view, as regards the newly-created social and legal changes in this country, is the most righteous.

In connection with the legal nature of public good, a conclusion should be drawn that all things that make public good have no the same legal regime. As we have already pointed out, the legal regime in effect for goods of general use is not the same as the legal regime in effect for the rest things that make public good. However, the same legal regime is not also valid for all things that make a good of general use, that is, public good intended for the use of all. In principle, valid for the public roads, airports, seaports and piers is the public good legal regime, if those objects are a social property.

As for the question of the public good legal nature, one more question could be raised: is it necessary that all the things making public good should be owned only by juridical persons or considered as a public domain could also be those things that are property of individuals? We think that things that make public good can also be in possession of individuals. For example, some most valuable art painting possessed by an individual may be declared a cultural property, and as such to fall under the public good regime. In such case, the individual cannot freely dispose of the art painting, but only within the regulations of the Law on Cultural Goods of the Republic. Therefore, an art painting cannot be a piece of fully free civil law commerce.

VI

In view of the character and intention of public good, the things of public good shall be under a specific protection. Protection of public good shall reflect in the following: 1) obligation of the state organs and other organizations administering public good to maintain the substance of public good; 2) inalienability of public good and impossibility of acquisition by presumption under whatever rights to public good; 3) insusceptibility of the things of public good to execution, and 4) criminal law protection.

a) Obligation to Maintain Public Good

Organizations and organs administering public good shall be obliged to maintain public good in such a condition that it shall be responsive to its purpose. Therefore, if public good administered by state organs, that is, other public law bodies (autonomous provinces, cities, communities) is in question, they must provide necessary means for maintenance of that public good. The very same obligation exists for institutions of social activities administering public good. An organ, that is, organization administering public good, must take care that the substance of public good shall remain intact and that public good may serve its purpose.

b) Inalienability of Public Good and Impossibility of Acquiring any Rights to Public Good

1. – From the fact that the things of public good are not, in principle, in the commerce and that administrative law regime is valid for them, other legal consequences result, such as inalienability and impossibility of acquiring by presumption any rights to public good.

2. – The inalienability principle of public good is connected with a specific purpose of public good. Therefore, this property shall last only over the public good purpose duration period, that is, over the period while all the things have the capacity of public good. That is why the inalienability comes from declaring things public good and disappears with the cessation of that feature. Because of that one can say that here relative, but not absolute inalienability is in question.

Legal consequences of public good inalienability principle consist in prohibition of alienating public good on the whole, that is, certain things that constitute public good or its accompanying things. Therefore, all legal affairs, the purpose of which is alienation of things that constitute public good are null and void. In spite of all that, this principle suffers certain limitations in view of things that have a character of a public cultural good, since those things can be alienated under the conditions from the laws of the Republics (see, The Law of Serbia on Cultural Goods – 6/90).

However, the principle of inalienability of public good shall not be offended in case if an administrative law transfer is being carried out, under a decision of the competent organ, from one socio-political community, that is organization, to another socio-political community or organization maintaining the basic purpose of public good. Here, alienation of public good is not in question, but an administrative law transfer, i.e., "change of a domain between the public law persons", according to M. Hauriou. The administrative law transfer can be carried out by administrative or normative acts of state organs.

3. – Also arising from the principle on inalienability of things that constitute public good is a principle on impossibility of acquisition by presumption of whatever rights to public good. [26]

The principle of public good inalienability and impossibility of acquisition by presumption of whatever rights to public good refers both to a public domain on the whole and to its certain parts. Therefore, neither rights of property character can be acquired to public goods nor there can exist such property-legal limitations.

These principles protect public good from partial seizure as well.[27]

c) Public Goods are not Subject to Forcible Execution

Also arising from public good capacity and its purpose is the principle according to which public goods are not subject to forcible execution. This principle has come to the fore

[26] Article 1 of the Law of Serbia on Public Roads ("Službeni glasnik", No. 45/89) stipulates that property rignts cannot be acquired over the public roads.

[27] Hauriou observes inalienability of a public good and impossibility of acquiring whatever rignts to a public good from the "square meter" point of view (op. cit., p. 791). According to him, it is impossible for anyone to momentarily usurp tho whole seacoast or a whole road, but there is a possibility of partial usurpation, usurpation of several square meters of the seacoast or road, so that it is necessary to protect a public good from such partial occupation of a public good.

in Article 126 of former Basic Law on Budgets ("Službeni list FNRJ" No. 13/56), according to which execution towards a budget-financed socio-political community and institution could be allowed only on its budget resources and resources of budget funds. Therefore, execution could not be effected over real estates, buildings, inventory and other things administered by the state organs and institutions and which constitute public good.

Our view is that this principle is valid for things that constitute public good administered either by the state organs or a working and other organization.

d) Criminal Law Protection of Public Good

1. Criminal law protection of public good is not stipulated under one regulation. Provisions on it are scattered in a greater number of regulations. Sanctions are mainly of administrative law and criminal law character. It goes without saying that a sanction may be included in the compensation of a damage.

Measures taken against the persons who do not observe the provisions on proper use and utilization of public good consist of: 1) imposing an offence fine; 2) as well as imposing an appropriate penalty fine.

2. Also available to the public good administering organ is a complaint for compensation of a damage if there are legal grounds for that.

According to the verdict pronounced by the Federal Supreme Court GZ. 125/62 up to December 22, 1962, ("Zbirka sudskih odluka", Book VII, Volume 3, 1962) somebody can be tried in the administrative criminal proceedings for compensation of a damage caused by grazing a cattle upon a land belonging to a public road. This does not exclude competence of a court to try somebody in the proceedings for compensation of a damage.

PREDMET PRIVATIZACIJE NE MOGU BITI DOBRA OD OPŠTEG INTERESA (JAVNA DOBRA)

Slavoljub Popović

Autor najpre razmatra problem javnih dobara u stranom pravu odnosno teoriji (francuskom, nemačkom i austrijskom). Ukazuje se na odredbe Ustava SRJ iz 1992. godine i Ustava Srbije iz 1990. godine koje regulišu pojam dobara od opšteg interesa (javnih dobara). Potom se vrši podela dobara od opšteg interesa, i to: 1) prema pozitivnom pravu; 2) s obzirom na vrste objekata koji čine javno dobro; 3) s obzirom na način postanka javnih dobara, 4) s obzirom na namenu i korišćenje javnog dobra. Zaštita javnih dobara manifestuje se u sledećem: 1) u obavezi državnih organa i drugih organizacija koje upravljaju javnim dobrom da održavaju supstancu javnog dobra; 2) u neotuđivosti javnog dobra; 3) u nemogućnosti sticanja održajem bilo kakvih prava na javnom dobru; 4) u nepodložnosti stvari javnog dobra izvršenju; 5) u kazneno-pravnoj zaštiti stvari javnog dobra.

Ključne reči: *privatizacija, javna dobra, zaštita javnih dobara.*