

REAL ESTATE EVIDENCE: A NEW INSTITUTION OF ADMINISTRATIVE LAW

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Abstract in original language

Din multe puncte de vedere, evidența proprietăților este o operațiune de drept civil, mai ales și prin faptul că doctrina și jurisprudența dreptului privat o tratează cu prioritate.

Cu toate acestea, dreptul public – și mai ales dreptul administrativ ar trebui să analizeze mai mult această direcție de cercetare, deoarece această operațiune este în principal administrativă, și textul nostru va căuta să demonstreze această afirmație.

Key words in original language

Public property, public law, administrative law, evidence of properties, new institutions in public law.

Abstract

Real estate evidence is study only by civil law. It is true, they must study this area, because property right is the main institution of civil law – of course, of private law – and real estate evidence means, mostly, evidence of properties and of its component.

But our question is : why public law don't want to study this domain?

We consider that is mandatory for administrative law to study this institution, and our text will try to explain our opinion.

Key words

Public property, public law, administrative law, evidence of properties, new institutions in public law.

In doctrine of public law in every state we can find a lot of institutions, and all of them are analyzed by specialists in one part or in two, separated : general part and special part.

Understanding this, we can find constitutional law as an object with only one part, administrative law with two parts (in this way it actions French law), penal law with two very separated parts, financial law with one part (but there are authors which prefer to describe this object in two separated parts), etc.

So, in a lot of libraries of universities we can find : Penal law, general part and Penal law, special part ; Public finance law and Fiscal law – as part of Financial law ; Public international law and International Organizations as parts of the same branch / public international law.

In public law there are a vertebral column : constitutional law and administrative law. In fact, those braches of law represents state's pillars, but with different roles in social life.

Constitutional law creates state and represent in fact that solid base for action in relations with its own citizens and states. In fact, we can say and demonstrate that in the moment when a simple and very primitive form of social organization of life appeared on earth constitutional law appeared too. It was created in fact whole kind of relations existed in a normal state, at minimum area.

But is very important to notice another branch of law, with a special importance in creation of public law : administrative law. In fact, administrative law represent if we try to describe public law system as a human body that vertebral column, because head¹ is represented by constitutional law.

Administrative law is one of the most important braches of law because it represents that base for of public law. It cannot be denied strong influence of different kind of law (like civil procedure law for a good part of administrative procedure), but in the same time the biggest part of principles of public law are settled in administrative dispositions.

In this part of law, doctrine analyzes whole specific concepts devised in general part of administrative law and special part of it. For example, French doctrine of public law – in fact, of administrative law recognize this not only in a theoretical separation, but also in book's titles :

Gustave Peiser – Droit administratif general, Dalloz, Paris, 2008 is the last book appeared in France with this separation made in title, but inside of big treaties of administrative law (like book which are written by professor Waline, Auby, Morand Deviller, etc) we can find this strong separation.

Administrative law and administrative doctrine in fact is a symbiosis between reality and human wishes, because some teachers or some politicians create or propose new concepts in public law², but reality (Parliament of Government adopt those kinds of measures which can be fulfilled by public administration or which can develop).

Those proposals are adopted in every year, because is part of political game to create new laws or to try to improve the existing ones, and is a sine qua non condition for teachers and researchers to suggest different ways of changing former laws or to create a new framework for public affaires.

Administrative law explains for the first time relations between state powers, and in the same time it determines their attributions in juridical practice. So, its content describes chief of state, government, parliament, ministries, institution with autonomy by the government, governmental institutions in territory. This represents in fact general part of administrative law.

Second part is called special. Inside this part researchers have much more possibilities to analyze more carefully few aspects of administrative law (for example someone prefer to write more pages about public servants and another one prefer much more to describe public services).

¹ Brain, precisely.

² It represent that human wish

Inside of this part, everyone has much more liberty of writing, because in general part is the same thing for everyone – national administration's institutions are present in every state and it cannot be ignored.

It is very important to note that in general part of administrative law those institutions remains almost eternal, with the same life duration like state³ ; dimensions are established by Constitution, fundamental law who settled whole state construction. Constitution represent in the same time that law of principles, because inside of it there are a good part of national law system – as a consequence, if in front of court of justice it cannot be brought a special law, judges are obliged to solve the case after law principle, which are settled (not all, but a good part of them) in Constitution⁴.

So, as a consequence of this, we can identify a close relation between constitutional law and administrative law, because for a good part of them there are the same laws which must be explained by researchers : the same laws cannot product different general interpretation.

In fact, there is something different only if we analyze the accent : constitutional law try to understand which are relations between state powers, between state powers and citizens and to describe which are the national law principles (and in the same time to create a relation between religion and law).

Administrative law is more pragmatic, because in this special law branch there is a more important interest for procedures, for that specific way of functioning. So, as a consequence, administrative law books are bigger then constitutional ones, and it try to realize that image of administrative procedures which are used daily (and in special occasion) by central institutions.

This represent the head and first part of vertebral column of public law – in this direction constitutional law and administrative law represent one entity : first is more targeted to principles , second to practice⁵.

Public law system is presented – as a social perception – more dangerous for the citizens. Because of its punishments public law is not popular in jurist worlds too. But, despite of this, citizens respect much more a state where punishment is assured with strong forces then a weak state which is not able to enforce its legitimist strength⁶.

Like we underline before, public law cannot exist isolated, law system appear as a whole ring with mutual influences – it cannot be public law without private law (for example private economy pays money for state – as a consequence of public law, but private economy means especially civil law and commercial law).

The second big branch is represented by private law.

³ So, creation of a supranational state brings in administrative law doctrine new concepts and new juridical institutions.

⁴ E. Balan : *Institutiile administrative / Administrative institutions*, ed. C.H. Beck, Bucharest, 2008, pg. 26.

⁵ In fact in administrative law definitions we can find an expression : “to organize law fulfilling and to fulfill the law” – for this watch E. Balan – *Institutiile*, op. cit., pg 28 .

⁶ Because law cannot be separated by the society, it is quite easy to analyze a very important book for political sciences : Machiavelli – *Il principe / The prince*.

Private law is based in fact by the civil law, and its principles are the oldest known and respect in law faculties – because in every law faculty it is a special course called Roman (Private Latin) law⁷.

Private law is compose by civil law, as a fundamental branch and another kinds of law – commercial law, private international law, intellectual property law, transport law, energy law, etc. All of them are issued by civil law, and principles of civil law represent principles for all those kinds of laws.

In civil law we can find a lot of law institution : civil law act, patrimony, prescription – with those two special branches⁸, civil person, juridical person, public property, property right, general theory of obligations, guarantees, special contracts, successions.

In a good part of countries where French civil law doctrine represents a base, we can find in one part of civil law theory a very important institution : real estate evidence – real estate publicity (la publicite immobiliere⁹).

Evidence of properties is one of the most important civil law institution.

This assertion is not necessary to be demonstrated, because in civil law a good part of contracts are based by this institution. Researches analyzing this part of civil law theory underline in their treaties importance of real estate evidence for theory and practice of civil contracts.

For this specialists there are two separated parts of properties evidence : evidence of mobile goods and evidence of real estate goods (buildings and simple land).

Mobile goods evidence is not so simple to realize, because of normal limits of goods. In fact, mobile goods can have big dimensions – for example a truck is very big, but a ring is very small and it can be very easily lost. But in jewelry area there are a lot of small pieces, with a high financial value, which can be lost much easily then a ring – human intelligence and human art is unlimited.

Mobile goods can have a high level because of human work – is very small price for a cloth / tissue , but, after few days or months of painting, it can be evaluated to millions of Euros, and the consequences for juridical life are very important.

We cannot do a special evidence for mobile goods (very cheap ones, like a cloth not-painted), but we will do for sure (because is a problem of state patrimony) an evidence of very important art objects¹⁰.

⁷ With very important jurists like Papinianus, Ulpianus, Sabinus, etc. In the same time Corpus juris civilis – magnus libri of Justinianus represent a fundamental book for modern private law.

⁸ Extinctive prescription and Acquisitive prescription.

⁹ In French language.

¹⁰ E. Balan : Dreptul administrativ al bunurilor / Administrative law of goods, ed. C.H. Beck, Bucharest, 2007, pg. 63

In this case, there is a question of opportunity : because state will determine which kind of mobile goods are very important, and which kinds of mobile goods can represent (if are fulfilled few special conditions) such an importance who will justify an official evidence.

So, in national legislation is very important to create a standard : which goods are important, even they are mobile, and which one cannot be considered like this. For example some mobile goods like bullets and pistols or any kind of weapons are mobile, but because of their importance they are registered by state authorities – so, in this was it was realized a completely evidence of a whole category of mobile goods.

In last years state realize (it tries to) an evidence of mobile goods guarantees, because despite of their dimensions or value, this kind of guarantees are very frequent, and its importance is high. In fact, every human being try first to be obliged only to pay mobile goods as contract guarantees, because real estate can produce much easier tragedy in normal life of humans (in they loose their important properties – buildings and land – it become more or less “second hand citizens”).

Real estate is considered in every state more important then mobile goods property. Its social influence is so big, that in every country we will find (during whole history) reformists who had adopted measures to improve situation of real estate and to solve unequal proportions between rich and poor people.

Understanding this importance, governments and parliaments create a system of evidence for this kind of properties – what it was important was not only to know who’s the owner of every land and building in a state, but also to be able to adopt new public policies.

That means that public administration realize this evidence with few purposes:

1. to obtain a correct image of land and buildings owners inside the country. This thing is fundamental for example for establishing taxes an to have a better image of different social phenomenon – like migration inside of the country¹¹, like poverty level, etc.
2. to create a new image for political policies and strategy. In fact, for create an efficient policy at national level, you need (as a member of government) to have first a correct image of real economical possibilities of your citizens. For this you need a correct evidence of goods, especially of real estate.

In the same time for every citizen is very important to make agreements knowing very well the real situation for properties. In fact, without this trust, a good part of commercial life will disappear, because no one will try to invest his money in a business without receiving that assurance of property.

This process – to assure right of property is called in civil law doctrine to assure static security of civil circuit.

But this institution, of real estate evidence is study only by civil law. It is true, they must study this area, because property right is the main institution of civil law – of course, of

¹¹ For example, if state organize an efficient evidence of real estate it can observe in few years – watching selling of land and houses – which provinces are richer (because it will be a pressure there to construct new houses) and from where people want to disappear (because of poverty).

private law – and real estate evidence means, mostly, evidence of properties and of its component (usus, fructus, abusus¹²).

But our question is : why public law don't want to study this domain?

We consider that is mandatory for administrative law to study this because :

- real estate evidence is made by state authorities ;
- real estate evidence is made by state authorities using an administrative procedure ;
- real estate evidence is mandatory for all citizens and juridical persons which are owners of this kind of goods ;
- real estate evidence is made with special administrative purposes : to establish tax bases, to have a clear map of territory¹³, to establish electoral circumscription, etc.

For this we must underline again principles of real estate evidence, as civil law doctrine settled them :

1. Principle of general publicity – there is assured by this kind of evidence for whole real estate good ;
2. Principle of neutrality – this evidence is neutral, and public administration must be neutral too ;
3. Principle of absolutely evidence – because this evidence is made by the state, and state had always (absolute presumption) correct documents in every business ;
4. Principle of legality – this is a fundamental principle for every branch of law, so, it was obvious that it will be meet here too.

Those principles are established by civil law doctrine, but they are fundamental – from contain and expression to public (administrative) law.

There are another principles which are more to civil law then to public law:

- a. principle of relativity – it speaks about persons involved in this evidence which have an interest in this area ;
- b. principles of priority – in civil law, but in the same it will be mandatory for public administration, that person who register first its property right it will be recognize as real and legal owner of good
- c. principle of specialization – it speaks about good and person – only that person who's owner of a good can do this and only for this good.

¹² Juridical attributes of property right (in Latin language in text).

¹³ For military purposes.

Maybe it will be a little reticence for teachers of public law (administrative law in fact) to study much more this institution (which is main object for civil law by tradition¹⁴), but we believe that is time for us, researchers in public law to discover a new direction for public law and to develop much more this part of administrative procedures.

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¹⁴ For this tradition watch : M. Nicolae : *Tratat de publicitate imobiliara / Real estate evidence treaty*, ed. Universul Juridic, Bucharest, 2006.