

**PUBLIC PROPERTY AND PUBLIC CONTRACTS:
LIMITS OF PRIVATE INTERVENTION
IN PUBLIC ADMINISTRATION**

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Abstract

Our text speaks about one of modern tendencies in public administration: private intervention in quotidian activities of entities which are obliged by law to fulfill all social necessities. For understand better this idea we shall examine first private intervention in dictatorship; second part try to determine few principles of this operation in democracy. Because 1990-ies brought democracy in the middle of political discourses, finally we shall examine a little what is political correct in our area.

Key words

democracy, dictatorship, public property, private intervention, contracts, administrative acts, limits of intervention

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1. Private intervention in dictatorial regime

Our text speaks about one of modern tendencies in public administration: private intervention in quotidian activities of entities which are obliged by law to fulfill all social necessities (with

one condition, to be recognized by law; without this recognition, it will be only legitimized interest).

In fact, this entity is public administration, notion understood as a system able and obliged in the same time to register social needs of the people, but in the same time with immense duties to fulfill them.

As a supreme confirmation we gave examples not from the democratic states, because in those places democracy and responsibility are concepts not only understood, but in the same time they had entered in social mental – in an articulate democracy those rights and obligations are incontestable values – no one try to contradict that.

But in dictatorial states there is a problem: supreme rule of public administration is not to serve citizens, it must serve only political power. In the same time if there is a real dictatorship in fulfilling social needs state adopt a hyper-centralization.

Public administration in dictatorships is only an instrument – but in the same time this political control have two effects: one is in public services direction and one is private property area.

In fact, public services is a completely state affair – because to fulfill all social needs in this kind of state must be under political control – in reality, political leaders (and only their closed group, without citizen's control) can establish which are “really social needs”¹ and in what proportion those social needs can be recognized and solved by state intervention.

Dictatorship means centralization – public services are controlled by state, and no administrative actions can be enterprise out of supreme state rules. State in this case is the only one actor able to fulfill social needs – even if state try to concession a public service to a private investor, this investor is 100% controlled by state.²

¹ Using word “really” is a very good technique to manipulate people. More in P. Wierbitcki – Structura minciunii / Lie structure, ed. Nemira, Bucharest, 1995, pg. 34 – 35.

² In dictatorships it was sometimes a practice, not in fulfilling public services, but in a few industries: state control, but private investors (most of the time foreigners); if those investors tried to pass from those directives, state replace them with an administrative decision (as legal instrument). This practice was between 1945 – 1989 in Romania, but not only in my country.

Second direction is property. In fact, this system use only one concept trying to define this institution – property is second domain as importance for dictatorial state³ (first is represented by an ensemble of measures who assure supreme purpose for leaders – keep the power forever) which put in the centre a notion very known in administrative (and for extension in public law): public interest, most of the time this concept is joined with national interest.

So, as a result, all properties from a dictatorial state belongs to state – not straight, but in reality state is the only one owner of goods.

This idea can be a surprise, but in fact, is not. Dictatorship represent in fact total control of borders with army and police, as a legitimate force holder. In the same time, those institutions are in every country the strongest institution, because they are only one law subject able to adopt a regulation and in the same time to implement and to assure that regulation against every violation.⁴

So, when in one state appear a dictatorial regime it means that army and police can assure application of every rule, and if political power decide changes in state's property structure, they will fulfill it – so, this control of force institutions is translate into one conclusion – dictatorial state is real owner in a country.

There are some differences between ruling wing on that dictatorship (the most understandable example is Afghanistan between 1970 – 2001, all leaders trying to impose their variant of state's vision: more or less left / right, but all of them choose when they lead the country only violent measures to implement their strategies – and political visions, of course).

In fact, if right wing rule the country, property right is not abolished – every one can keep its properties – problem appear when state try to manifest their characteristic against few owners – they can be expropriate every time, in every conditions and state can receive ownership of those goods.

³ V. Zamfirescu – Gisca lui Stalin / Stalin goose, ed. Roza vinturilor, Bucharest, 1997, pg. 62

⁴ One of those examples was given by Romanian political change of 1989. On that moment a lot of politicians called population to go to the streets to defend the revolution with necked hands, but a Kalashnikov bullet can pierce 12 men in the same time (that's why in those days almost 1/3 deaths – something around 500 / was killed by soldiers who shoot against real enemies infiltrated in the middle of innocent population).

In the same time state can decide which is “correct owner” of a good – of course, only a member of their group. So, if citizens accept rules and don’t create problems, they can keep their properties, but all the time is a Damocles sword up to their necked – if state decide that another person must be owner, they will loose that – in tat moment property right from a real right become an eventual right.⁵

In a left dictatorship property right is a victim – all the time owners are target of political campaign – “they are guilty because they are” – that means a leftist vision set in the middle of the society state and only the state.

Is very important to underline this centralism – if we try to make natural difference between those systems we shall not find state the center of all social activities (and, of course, ruling political power as a supreme detainer – state and society being a prisoner) – we’ll discover as an answer state position to private property: if they protect it, we have right wing dictatorship, if it try to abolish – left one.

Why we analyzed those differences?

First, because in world it cannot be democracy as this notion is understood in Europe – reason for those affirmation is given by numerous differences between societies (religion, traditions, different languages, history).⁶ Globalization is not the perfect medicine for everything, especially for those problems, and its speed can cover for a while important aspects of misunderstandings, but not always and not for ever.⁷

So, as a consequence, we must understand that is possible to exist different forms of democracy – more then that, those traditions can create social conflicts if we try to create a mix between old ones (sometimes hundreds of years of application back of them) and new concepts – trying to be political corrects.

⁵ In fact this is the essence of dictatorship – all rights are eventual, only the obligations are always sure.

⁶ Full of hate and deaths – and they cannot be forgot.

⁷ This is a reason for analyze with more responsibility human creation – as Babel Tower (in a few articles in Romanian geopolitics European Union is compare with this – because in Romanian geopolitics religion is very important and is never forgot in analyses).

Dictatorship is bad, of course, there are a lot of injustices in this world, but sometimes to change those realities is need to start a war, and in this disputes you know how you start, but never how you finish.

In this way we can analyze woman situation in Islam world: she is not on the first position, and is difficult to believe that men are happy to let superior position – but who can imagine a war between men and women in Islam? First problem is from where will take women those weapons (in Islamic countries women don't make military service).

Equality between men and women is normal in democratic Europe, but in a lot of societies (and most of them with millions of peoples)⁸ situation is settled on another coordinates – only force (able to destruct memory and life) can create another society, where all people are equal.⁹

Returning to our subject, in this societies private intervention in property domain are minimum – in fact state create framework for all interventions (in fact, in only a right wing dictatorship it can be a private intervention for fulfill public services, in left one is impossible to exist).

More then that, private intervention in a communist state (prototype for left wing) is reduce so much that even normal acts with small properties let by state are, sometimes forbidden: for example in Romania Law no. 4 and Law no. 5 from 1973 forbidden transfer of properties by inter vivos acts, being permitted only mortis causa acts. In this way, private intervention in public administration's life become almost impossible, communist system trying to restrict normal life - and to create perfect machines, as Orwell underlined in his novel 1984.

In fact, those disposition was an expression of Constitution – fundamental law proclaimed in every communist state in preamble or in the first articles that property belongs to workers and peasants, and state is an expression of this alliance. For this state will administrate all goods –

⁸ Pakistan has more then 100 million people and with a good army, for example (because in this society men domination is more obvious; in Indonesia is more then 200 millions, etc.

⁹ In this point we can speak about global policeman and its “political correct vision to world and countries” – more geopolitics then administrative law.

and in a society where all members are from the same category a single human being is not exist – perfect crushing machine had been created.¹⁰

As conclusion, we must underline connection between different kinds of dictatorial regime – even they respect private property, reality is simple: all rights are only eventual – anytime an administrative decision changing good's faith. This character is growth by total control of justice – administrative complaints, even they can exist in positive law is impossible to be defeat because they are an expression of ruling class – and ruling class in a dictatorship never wrong.

2. Private intervention in democratic regime.

Democracy is understand in this text as a correspondence between moral and law; this agreement is understand and respect by whole society and all citizens – creating in this way law domination – in fact, single common thing between European countries¹¹ is respect for law – whole history, traditions and mentalities separate them.

In 1990 it had been assured democracy (in our study we shall consider starting point of democracy moment of 1 January 1990, when legal year started) and from this year we can discuss private intervention in public administration – because debate¹² is more important in eastern states then is western part of continent.

But in 1990 (and 1991 too) in political debate it was made an affirmation – western world won cold war,¹³ so, winners impose their system (and their peace). For them supreme value was (in economy) preeminence of private property. More difficulties appeared because in western world was not a unique command – so, if whole democratic system proclaimed its victory, inside winners it was (and it is too) a lot of differences: from a state with almost totally private economy (U.S.A.) to another one with a strong public sector inside – France.

¹⁰ In this way is Romanian Constitution from 1948 – in preamble (single Romanian Constitution with a preamble) and in art. 6; Constitution of Romania from 1952 in art. 8 and Romanian Constitution from 1965 in art. 9.

¹¹ In our opinion.

¹² Debate present in whole world (and when in big economies are elections many analyzes try to guess intentions of candidates in this direction – now the main subject is French president Sarkozy).

¹³ In recent books of strategy specialist is underline that communism won mind war, but it lost economic war. Author's list is too long to be presented here (and this conclusion was adopted after few incidents with pipe-lines in Europe).

Between those countries we found two countries with different problems: first state had in 1960'ies – 1970'ies a strong public sector¹⁴ but in those years it change to a more aggressive private intervention in public services (United Kingdom); second, a strong economy was forced to pay a big amount of money to reconstruct former part of country occupied in 1945 (Germany).

So, in former communist countries it was manifested a strong pressure: ruling role of private economy, less state intervention in economy. It was normal to start again private enterprises, and it was normal that state should reduce its presence in economy.

But this operation had been joined by another phenomena: it was a strong action against former state monopolies which was replace with firms from western Europe. In that moment a good part of population, educated in a different style during communist rule wonder if democracy means only replacing state's ownership with another one (because this changing was joined by apparition of a new problem, unknown in communism (officially): unemployment.

This question brought a lot of problems in reality, because some efficient left campaign helped former communists to retake power after first years of defensive¹⁵, but they didn't stop too much this direction. Population accepted this considering nationality of those firms (after many years of communist exploitation with not so many positive things returned western "occupation" was accepted).

During all that years private intervention grown in economy, and it entered in fulfilling of public services too: in this moment it was necessary to adopt a distinction: in what area state must keep its control and where it can be allowed another presence.

Because a good part of intellectuality adopt new liberalism in economy, public services sphere (fulfilled by public administration) was restricted only to what it was strictly necessary to function as a main public purposes: to protect citizens (so – army, police and justice) and to

¹⁴ Keynes influence, of course.

¹⁵ S. Kuloglu describe this problem very well in *Se intorc rosii? / Reds are coming back*, ed Cavaliotti, Bucharest, 1996.

promote some interest in a few economy domains (for example, in whole pipe-line legislation we find this domain as strategic and a strong public presence there).

But those areas was not enough for modern intellectuals – neo-liberals, most of them (only one criteria is established for recognize them: partisans of United State’s policy – more republicans then democrats) try to create in eastern Europe a replica of American system – and they forget about fundamental differences who oppose those continents – leitmotiv of 1990-ies was only one expression: privatize, privatize, privatize.

And in eastern Europe privatization¹⁶ was made: a lot of people become owner of enterprises which function in all social areas – public services lost their character from the communist times – to be fulfilled by state. Privatization was made with national owners, but in the same time with foreigners – most of them was from western Europe (former Europe) of United States and Canada.

No problem we can say – that’s first years after epochal changes of 1989. In the same time, for almost peoples it was obvious another fact: Soviet Union presence become less important , and it’s place in world economy was taken by few western European states.

Another consequence it appears in public law: if communist system had crushed, is normal to replace its principles with new ones: the most important principle in our area in proportionality principle – it establish criteria for public administration to choose between one or another possibilities – translate in “public contracts language”: proportionality principle decide if public authorities will fulfill themselves an administrative action or they will negotiate with a private entity for realize this purpose¹⁷.

In a dictatorship proportionality principle was not existed – it was only one thing – ruling party wish and execution of its order. Democracy establish for the first time a control – and social contract between public administration, society and private investors was respected: this was winning public moral in public services satisfaction. All this was possible respecting another unwritten convention: private enterprises can be only from old democracies or form

¹⁶ In our text privatization means: a) to sell former public enterprises and b) to create new private one.

¹⁷ E. Balan: *Institutiile de drept public / Public law institutions*, ed. All Beck, Bucharest, 2003, pg. 24 - 25

from liberate states, but not from former Soviet Union (and a good part of new democratic years appears this gentlemen agreement seems strong like steel).

This agreement was much stronger in consideration of European Union – for entrance in this “club” former communist countries must be “very opened” to “former Europe¹⁸” investments and investors. That means if those countries manifest a special interest to a special direction, they must receive “free way” to take it – all citizens of “new Europe” understand this and they accept this sacrifice.

In the same time was decisions adopted by Bruxelles “authorities” – to grow concurrence inside Europe economy – they tried to be a govern, but without a special force able to assure respect of their decisions. All that thing was on a time when Russia was weak and it wasn’t able to exercise an efficient opposition. As a conclusion – is 100% democracy and law principles are 100% respected.

But president Yeltsin was replace by a young and healthy men – law men, who know all argues specific of this job. In next years, those skills had been exercised in commercials negotiations – from oil and gas selling to western Europe to difficult talks for entrance in World Trade Organization.

Which is the consequence? Russia become more aggressive in promoting its interest, and its presence in European economy is stronger (for example Gazprom is present in Germany not only as energetic investor, but in social phenomenon too¹⁹). What is important in Russian strategy? Their “passion” for energetic public service, trying to buy pipe-lines and to control national firms working in this domain.

Reaction? Every state try to protect its interest, but this protection enter in strong contradictions with Bruxelles “regulations”. Alarmed, even bureaucrats from Belgian capital was forced to adopt a different position – but this position is in contradiction with all principles brought by democracy.

¹⁸ As president Bush jr. named those states.

¹⁹ They sponsor Schalke 04 Genselkirchen, as a single example given here.

Problem: public services are now fulfilled by another entities than national state, but there is a continuous danger: that state had been replaced by another state – so, what is changed is only state, but not the public fulfilling, in fact. More dangerous is because for state who sell / concession this public service that new owner is a private entity (controlled by another state) or a foreign investor, who must be protect as national ones too.

And all those problems are a result of a privatization – because this concept was “sold” in 1990-ies as a miraculous medicine for economy, and small states (good part of them divided – not only politically, but territorially too) are too weak to oppose.

So, where is the limit of private investors in public services (and public contracts)? Which is that rule able to stop in every moment private intervention (private intervention consequence of privatization)? This question is more important because in last years even country of neo-liberalism adopt few measures for protect their investors when a Chinese firm tried to buy a huge American oil operator?

In our opinion this answer is a consequence of remaining and existing in same form²⁰ of three concepts, who figure in all Constitutions: sovereign, independence and national interest.

Sovereign and independence characters are only one, their content was fixed hundred of years ago. National interest cannot be replace with a communitarian one, despite all beautiful words who promote that new construction. In reality, not all new concepts are good and not all old things must be changed. Public contracts are always conditioned by respect of those notions, in this way being established limits of private intervention in public administration’s activity.

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[3] Wierbitcki, P.: *Structura minciunii / Lie structure*. Bucharest, ed. Nemira, 1995, 251 pages, ISBN 973-9177-64-6.

²⁰ Despite a lot of annalists who said that those concepts are transformed today.

[4] Zamfirescu, V.: *Gisca lui Stalin / Stalin goose*. Bucharest, ed. Roza vinturilor, 1997, 250 pages, ISBN 973-8069-20-3.

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