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THE PUBLIC DOMAIN AND THE PRIVATE DOMAIN: MYTHS AND SHADOWS

José Luís Bonifácio Ramos[1]

[1] *Professor, Faculty of Law, University of Lisbon, Portugal*

Abstract

In effect, the dichotomy between the public and the private domains of the state once again draws the attention of doctrine, both public as well as private, not only due to the continual controversies caused by the regime, the juridical effects and nature of dominion but also, and above all, arising from the recent legislative reforms and proto-reforms with ranges and consequences that require grasping and deciphering. We here refer in particular to Decree Law no. 280/2007 of 7 August, of the Legal Regime for Public Immovable Property as well as the draft law on Public Dominion Properties, publicly unveiled by portuguese government officials on 27 October 2008.

Keywords: Public Dominion Properties, legislative reforms, Roman law, ager publicus

1. General Considerations

In effect, the dichotomy between the public and the private domains of the state once again draws the attention of doctrine, both public as well as private, not only due to the continual controversies caused by the regime, the juridical effects and nature of dominion but also, and above all, arising from the recent legislative reforms and proto-reforms with ranges and consequences that require grasping and deciphering. We here refer in particular to Decree Law no. 280/2007 of 7 August, of the Legal Regime for Public Immovable Property as well as the draft law on Public Dominion Properties, publicly unveiled by portuguese government officials on 27 October 2008.

However, in order to clarify the aforementioned questions, we shall first seek to expand on some of the preceding aspects that may condition whatever the conclusions we subsequently reach. Hence, we aim to advance with clarification on the origins and evolution of *dominium* as well as the respective legal models proposed in order to effectively define public dominion in relationship to the other institutes that require equally clear differentiation at risk of subverting the discussion, twisting the analysis and essentially biasing the conclusions we shall strive to reach.

2. The Erroneous Equivalence of the Public Domain to Other Institutes

In accordance with the goals set out above, and within the scope of avoiding imprecisions and dispelling mystifications about the object of dominion, we shall first clarify its origins. This should furthermore demonstrate the erroneous basis of the attempt to make the public domain equivalent to other institutes that differ in many aspects and are clearly and radically displaced from public dominion.

As indeed commonly accepted, some doctrinal approaches have sought to identify the origins of public domain in Antiquity, in particular in Roman Law[1]. However, this does not constitute our opinion. Indeed, even when accepting the public domain as public property in the meaning attributed by various different authors, or perceiving the public domain as restricted ownership, we have in either case the greatest of difficulties in accepting a conclusion from either source. In our perspective, dominion was not even recognised in Roman Law as, throughout those periods, the laws simply and completely ignored the dichotomy between public and private property or even the need for the application of any dominion beyond private ownership.

[1] 'Accordingly, Paul-George-Emile Baillère, *Du Domaine de l'État à Rome et dans l'Ancien Droit*: *Des Biens qui Composent de Domaine Public, de la Délimitation de Conflit entre les Juridictions Civile et Administrative en Droit Français,* Paris, 1882, pp. 15 and fol.; Henri Barckhausen, "Etude sur la Théorie Générale du Domaine Public" in *Révue de Droit Public et de la Science Politique en France et à l'Etranger*, no. 9, 1902, pp. 404 and fol.; Raymond Saleilles, "Le Domaine Public à Rome" in *Nouvelle Révue Historique de Droit*, no.13, 1889, pp. 499 and fol.. In the Portuguese case, Ana Raquel Moniz, O *Domínio Público: O Critério e o Regime Jurídico da Dominialidade*, Coimbra, 2005, pp. 17 and fol..

To this end, with the objective of demonstrating that just stated, we reviewed the orientations that sought to define dominion in Roman Law to demonstrate the effective absence of that essential dichotomy or even any domain displaced from private ownership. In practice, despite an incipient idea of Roman public power, this does not serve to provide similarities between dominion and some Roman institutes, specifically the *ager publicus*, the public goods, those beyond commerce[2] or the actually property of the tax authorities. Therefore, we shall explicitly detail how the similarities and, in some cases, the equivalences end up as either erroneous or lacking in substantiation.

Hence, as regards the *ager publicus*, the terrain conquered on the Italian peninsula beyond the dominion of the city of Rome, we should here highlight how the respective ownership was attributed to the *populus Romanus*. However, while ownership went to the population, private individuals were awarded the rights of benefit so that they might undertake the agricultural or pastoral activities on which their own diet and subsistence depended. Indeed, following the appropriation of *ager publicus* by the Populus, following Roman conquest, the ager could no longer be delivered by concessions to private interests and might instead be auctioned off through means of public bidding or for the purchase and sale of staples by whoever wished to acquire the right. As regards the first means of alienation, the *ager privatus vectigalisque*, land sold at a public auction by the respective questor or pretor would see the acquirer obtain the right to benefit from the terrain through payment of a rent, the *vectival* as well as the scope for transferring their right on the *ager publicus*, whether through mortis causa succession or through any other act of *inter vivos* transmission[3].

As regards purchase and sale, this refers especially to the *ager quaestiorius* under the terms of which the property was sold to private interests by questors and, despite the sale, retaining the need to pay rent to the latter. While it may be affirmed for both cases that the private citizens did not 'acquire the ownership of the property[4], we would in good faith highlight the aspect of dealing with a form of ownership, deriving from sale or public auction, which may in turn be subsequently transferred, whether by *inter vivos* or by *mortis causa*, without any fixed limitations. To this end, the conclusion has to be that the private rights under *ager publicus* do not retain the same precariousness as otherwise applicable to dominion. Furthermore, in the case of *ager privates vectigalisque*, the *ager publicus* also changes, and to the extent of being denominated *ager privates*, thereby conveying the radical alteration experienced in the condition of *ager publicus*[5]. In other situations, we encounter the persistence of the public ownership title but with an effective scope for private individuals to make definitive usage of parcels of the *ager publicus.*

As regards objects beyond the commercial scope, *res extra commercium*, this sought to emphasise non-ownership in accordance with justifications of a theological nature, subdivided into the following categories: matters regulated by the terms of divine law, res extra *commercium divini iuris*, and those regulated by the norms of human law, *res extra commercium humani iuris*[6]. However, despite the deploying of these categories in distinctive understandings[7], this understands those objects under divine protection, *res divini iuris*, as falling beyond the scope of juridical interactions among private parties for such reason and further subdivided into *res sacrae*, *res religiosae* and *res sanctae*.

Nevertheless, while the sacred objects *(res sacrae)* respected the superior beings *(dio superii)* and consisted of temples, lands with a scared vocation, altars and objects of worship, objects consecrated *(consecratae)* by a pontiff[8]; the religious objects (*res religiosae)*, objects without any need for consecration[9] including tombs, relics, corpses, saintly objects while *res sanctae* referred to the walls, gateways and entrances of cities and also to the boundary divisions of fields under cultivation.

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[2] On various occasions, scholars of Roman Law equate public objects and those outside the scope of commerce, *res extra commercium*. Cf. Eduardo Elguera, Mario Russomano, *Curso de Derechos Reales en el Derecho Romano*, Buenos Aires 1969, p. 15

[3] This is recognised by the doctrine. Cf. Eduardo Volterra, *Istituzioni di Diritto Privalo Romano,* Rome, 1961, pp. 368 and fol.. António dos Santos Justo, *Direito Privado Romano: Direitos Reais*, Coimbra, 1997, pp. 139 and fol..

[4] Cf. Eduardo Volterra, *Istituzioni*... Op. cit., pp. 332-3.

[5] Max Kaser highlights the private nature of rights over this *ager* to the point of maintaining that the acquirer acquires the full scope of the property given that the *vectigal* represents the pretext for the transfer of ownership of the property. *Römisches Privatrecht,* Munich, 1992, Port. Tran., p. 142. Adopting a similar stance, Francesco de Martino emphasises the perpetuity and irrevocability of the *ager privates vectigalisque* in order to maintain that the respective juridical nature may only be that of a real right attributed to a private party: Cf. "Della Proprietà" in *Commentario de Codice Civile*, coord. by A. Scialoja and G. Branta, 4th ed., Rome, 1976, pp. 215-6.

[6] The theological grounding in support of res entry commercium divini iuris stemmed from the view that the Gods were beings with similar needs to those of man and hence objects should remain in the ownership of the Gods. Cf. Franz Kaufmann, *Die Stellung des Privaterechtssubjeks zur extra commercium des corpus juris civillis: Ein Beitrat zur Lehre der Extracommercialität*, Bonn, 1887, p. 20

[7] Raul Ventura highlights the aspect of the expressions *ius divinis* and *ius humanum* that suggests different acceptances in keeping with the perspective of the source and the norm for the respective object with the latter longer standing than the former. Cf. *História do Direito Romano*, Vol. 1, Lisbon, 1951, p- 10.

[8] *'Sacrae sunt quae diis surperis consecratae sunt, religiosae quae dis Manibus relictae sunt.* Cf. Gaius, *Institutas* II, 4.

Furthermore, the *res sanctae* were not subject to protection due to being of divine ownership but rather because they were under the protection of the Gods in order to protect the inviolable nature of these respective properties. We would nevertheless highlight that the sacred objects might not retain this quality for long periods of time. In a second phase, which some authors place as still during the times of the Republic, the sacred objects might be shorn of their divine ownership through means of *profanatio* or the *evocatio deorum*[10] and thereby become an object for regular conveyance. Furthermore, while resting on different assumptions, we also encounter aspects related to the *transmissibility of res religiosae.* We need only consider the transmission of tombs and burial sites through *inter vivos* or *mortis causa* acts[11] in order to identity how the classification of *res divinis iuris* may also contain the effective scope for transmission.

The objects falling into *the res humani iuris* category were withdrawn from juridical consideration not exactly for reasons of a religious or a teleological order but rather as the means to foster the common good, thereby distinguishing the respective sub-categories of *res communis omnium, res publicae* and *res universitatis.* As regards the *res communis omnium,* within the scope of which came the air, running war, the sea and its coasts[12] the respective nature and that with a physical constitution that prevented appropriation but enabled benefits to all of the community[13]. As regards *res publicae,* this legal regime was not mono-focused as, alongside the *res publicae* underpinning the ownership of the People of Rome, there was the *res publicae* in the ownership of the city of Rome as well as the state itself. Under these terms, while the former group of *res publicae* was not eligible for alienation, remaining beyond any legal transacting, as was the case with the streets, the squares and the rivers, which was not the case with the other group of *res publicae* that held the precise specific vocation of producing income so as to assist the state in meeting the costs of advancing the public interest[14]. In the *res universitatis* category, which may be differentiated through contrasting with *res publicae*[15], there are objects designed for public usage, specifically the theatre and the stadia[16], which might equally be separate from the set of public objects as be merged into them[17].

Under dominion, there are no justifications of a theological order and, in these same cases, those goods might be, as already seen, detached from divine ownership and establish objects subject to common transmission. In relation to the category of *res humani iuris,* this needs to highlight how the domain goods do not contain any feature or physical characteristic that prevents their appropriation nor do these domain goods display a vocation for the production of revenues as a means of helping the state meet its expenditure costs.

As regards Fiscal assets, this should, in turn, highlight how, in a first phase, *Fiscus* referred to the wicker basket that transported public funding during the reign of Augustus, with the Fiscal then understood as the set of monetary resources belonging to the treasury and necessary for the payment of the defence and administration of the state, including the payment of state salaries, public construction projects, the postal and provisioning services[18]. While certain that there was a broad acceptance of fiscal goods, which would be as much confused with *patrimonium Caesaris* as opposed to it, it nevertheless remains true that the Fiscal was always established on money[19], hence the inaccuracy in seeking to equate the regime attributable to the Fiscal, the fiscal patrimony, with that of dominion. Furthermore, even in the Middle Ages, with a growing blurring between Fiscal assets and the

[9] *Religiosum vero nossa voluntate facimus mortuum infierentes in locum nostrum, si modo eius mortui funus ad nos pertineat*. CF. Gaius, *Institutas,* II, *6.*

[10] Cf. Amalie Weidner, *Kulturgüter als extra commercium in internationalen Sachenrecht,* Berlin, 2001, p. 16

[11] This represents a perspective advocated by Contardo Ferrini, "De iure sepulcrorum apud Romanos, in *Opere di Contardo Ferrini*, Vol. IV, Milan, 1930, pp. 3 and fol..

[12] *Et quiden naturali iure communia sunt omnium haec:* aer et aqua profluens et mare et per hoc litora marís.. Cf. Inst, § 1, 2.1.

[13] Cf. Pietro Bonfante, *Corso di Diritto Romano*: *La Proprietà*, vol. 11, Rome, 1926, p. 43.

[14] Cf. Heinrich Wappäus, *Zur Lehre von den dem rechtsverkehr entzogenen Sachen nach römischen und heutigen Recht*, Gottingen, 1867, p. 21.

[15] Giuseppe Branca considers that the autonomy of *res universitatis* towards *res publicae* requires justifying in the negative sense. In this perspective, it would be the res that, not belonging to all men, did not also belong either to the state or to any private interest but rather to the city; this was designated res universitatis as an antonym of *res publicae*. Cf. *Le Cose Extra Patrimonium Human Iuris*, Bologna, 1946, p. 206

[16] *Universitatis sunt, non singulorum, veluti quae in civitbaibus sunt, ut theatao,stadia et similia et si qua alia sunt comunun ia civitatum*. D. f6 § 1 of div. Rer. 1, 8.

[17] As regards the autonomisation of res universitatis, Charles Maynz also comes out in favour. Cf. Cours de Droit Romain, Vol. I, Brussels, p. 438. On the contrary, accepting the integration of *res universitatis* into the public scope, Giannetto Longo, *Diritto Romano*, Vol. IV, Rome, 1941, pp. 57-8.

[18] Cf. Filippo Maranca, "Fiscus" in *Nuovo Digesto Italinno,* Vol. VI, Milan, 1969, p. 24

[19] Cf. Juan Nougés. "Ordenación Sistemátiva del Derecho Financeiro y Tributario Actual y Derecho Fiscal Romano" in *Derecho Administrativo Histórico,* coord. by Antonio Buján, Santiago de Compostela, 2005, pp. 103 and fol..

property of the King, brought about by the transformation of public income into the private earnings of the liege and a rising lack of differentiation between ownership and sovereignty[20], it would thus seem absolute inappropriate to make the aforementioned equivalence. Hence, once again here, there is no parallelism or similarity either with the public domain or with the private domain.

3. The Origins of Dominion

While, due to the reasoning set out above, we are not able to concur with those that locate the origins of dominion in Roman Law, we are also unable to agree with the excessive understanding that swings towards placing the origins of the public and private domains as occurring in the 19th century[21].

From our perspective, we consider that the origins of dominion occur at the point in time when the property of the King becomes detached from that of the Crown and that of the State, and no longer with any mutual overlaps as prevailed under the feudal regime and extending to some periods under absolute monarchy. With the blurring imposition of legal limits on the aforementioned properties, there emerges the core issue to dominion, the public domain, or the domain of the crown, in opposition to the private property owned by the monarchy.

Dominion *qua tale* was posited in French law when seeking to prevent the national wealth from dissipating[22] through means of the approval of important legal diplomas, specifically the two *Ordonnances:* the *Ordonnance* of Moulins, in 1566, and the *Ordonnance* of Blois in 1579 alongside the Edict issued in l683[23]. While we may still encourage other antecedents[24], we would propose the *Ordonnance* of 1566, approved in Moulins, during the reign of Charles IX, as well as other complementary diplomas, those instruments determining the non-alienability of the Crown's domain, converting this status into a genuine principle of a constitutional status. However, this did not mean that the principle of dominion inalienability did not contain exceptions. Indeed, ascertaining this needs only to verify the *Ordonnance* of Moulins to grasp how the adoption of this principle implied, from the outset, the correlating consecration of these exceptions, specifically those brought about by the costs of war or the founding of estates and awarding of favours[25], thereby allowing for, under certain circumstances, the transmissibility of such dominion properties.

The principle of inalienability and the diverse exceptions, which both the *Ordonnance* of Moulins and the other complementary diplomas always provided for, drove a doctrinal reflection about the legal nature of royal property and on the differences between the patrimony of the King and the patrimony of the Crown. Correspondingly, Choppin, based on a study of the *Ordonnance* of Moulins, advanced with the separation of the properties that belonged to the monarch as the King of France, from those that belonged to the monarch as a person, in keeping with his family's respective, successive inheritances[26]. Thus, the first group corresponded to those assets making up the dominion goods and, in accordance with their inalienability, monarchs were to conserve them just as they had received them from their predecessors given that they were not the effective owners but only their guardians and conservators on behalf of the state[27]. Furthermore, Loyseau had already earlier considered that certain goods could not belong to anybody as they held a vocation for community utilisation, thereby justifying how the sovereign should act as the guardian or the police over the rights of property and the Crown[28].

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[20] Cf. Georges Blondel, "Éludes sur les Droits Régaliens et la Constitution de Roncaglia" in *Mélanges Paul Fabre*, Paris, 1902, pp. 238 and fol.; Otto Brunner, Land und Herrschaft: Grunfragen der territorialen Verfassungsgesichte Österreichs in Mittelalter, 5th ed., Vienna, 1965, pp. 167 and fol..

[21] Jean Dufau, based on the concept of a public domain subject to the rules of Public Law and a private domain subject to the rules of Private Law, maintains that the distinctive characteristics of dominion can only be traced back as far as the 19th century. Cf. *Le Domaine Public*, Vol. I, Paris, 1986, pp. 23-4.

[22] Marcel Waline considers that the core purpose of the legislators in that period was to avoid the King squandering the assets of the Crown, also termed the assets of the Nation. Indeed, as there was no parliamentary institution that might caution on royal expenditure, they deemed that the most appropriate measure was to proclaim the inalienable status of such property. Cf. *Les Mutations Dominiales: Étude des Rapports des Administrations Publiques à l'occasion de leurs domaines publics respectifs,* Paris, 1925, pp. 32-3.

[23] The Edict of 1683 explicitly confirmed the property of the Crown over the islands, over the windmills, the fishing rights, tolls or rights on canals and navigable rivers

[24] This would include the Ordonnance of 19 July 1318 by Philip the Tall and the edict by Francis I on 30 June 1539.

[25] Article 1 of the Ordonnance of Moulis states the following: "*Le domaine de notre Couronne ne peut être aléné qu'en deux cas seulement: l'un pour apanage des puisnez mâles de la maison de France, auquel cas il y a recours à nostre Couronne por leur décès sans mâle estat et condition qu'était ledit domaine lors de la concession de l'apanage, nonobstant toute disposition, possession, acte exprès ou taisible, fait ou intervenu pendant l'apanage, l'autre, pour l'aliénation à deniers constants pour la nécessité de la guerre* (...)".

[26] Cf. René Choppin, *Traité du Domaine de la Couronne*, Vol. I, Paris, 1613, pp. l5 and fol..

[27] Cf. René Choppin, *Traité*... op. cit., Vol. II. pp. 7 and fol..

[28] Charles Loyseau, *Traité des Seigneuries*, Vol. 111, Paris, 1608, pp. 56 and fol..

Subsequently, analysing the regime enacted for roads and thoroughfares, Loyseau proposed that these means of communication did not belong to the Crown with the monarch due only to ensure their appropriate maintenance and management.[29] Domat later differentiated between two categories of property: those acquired by monarchs in their capacity as sovereign and therefore falling within the scope of sovereign domain; and those that are their own property irrespective of their title or position as sovereign, hence the private domain of the Crown. In theoretically establishing this distinction, he highlighted the differences in these categories in defending how, under the former — properties integrated into the sovereign domain, also referred to as dominion properties — contained three types of assets: the properties acquired as the sovereign, specifically through armed conquest; the rights integrated into financing the state; other royal rights, e.g. the rights of confiscation, the rights of appropriation over the goods of deceased foreign citizens, the rights of disinheritance, the rights of bastards, the rights to issue currency[30]. Such rights, in principle, inalienable, might be dominion properties by their very nature (rivers, streams, lakes) or by their purpose (churches, cemeteries) but in no cases were they susceptible of generating incomes of significant amounts[31] nor did they fall within the scope of sovereign ownership as the Crown only exercised the right of supervision and policing.

Lefévre la Planche equally dismissed royal ownership over dominion goods, configuring the monarch as the administrator or guardian of a domain, bound, as any loanee, to hand over the properties to whoever is designated as their replacementg[32]. Hence, the King held possession of the dominion in an identical fashion to his ownership of the Crown within the exclusive purpose of protecting it and bestowing it on their descendants. Furthermore, even those inalienable rights by their very nature remained subject to successive alienations despite running counter to the law in certain cases[33].

In the wake of the French Revolution, a *Comité des Domaines* was established with the key mission of evaluating the application of these dominion properties and, above all, to draft legislation on the legal regime for the domain of the Crown[34]. Following the conclusion of the assessment of the structural vectors of dominion[35], taking into account the economic difficulties then experienced by the Kingdom, the need to approve a series of different measures to offset the hardships experienced, and exactly at the cost of the dominion properties[36], coupled with the need to re-evaluate the non-transmissibility in keeping with the new political situation[37], the *Comité* put forward draft legislation on this matter, the *Code de la Législation Dominiale*, which received parliamentary approval before the end of 1790[38]. This Code included important aspects helping in better clarifying the dichotomy between public dominion and private dominion. Firstly, in addition to the terminology issues, given that this

[29] Charles Loyseau, *De l'abus des justices de village, Oeuvres*, 1666, p. *35*.
[30] Cf. Jean Domai, *Les Loix Civiles dans leur Ordre Naturel, Le Droit Public et le Legum Delectus*, Vol. I, Paris, 1755, p. 38.
[31] Within the king's domain, Jean Domat distinguishes an enormous bulk of properties capable of generating major sources of revenue. Cf. *Les Loix Civiles dans leur Ordre Naturel, Le Droit Public et le Legum Delectus* Vol. 1, Paris, 1755, p. 148.
[32] Cf. Lefevre de la Planche, *Traité du Domaine*, Vol. III, Paris, 1732, p, 362.
[33] Cf. Lefevre de la Planche, *Traité du Domaine*, Vol. I, op. cit. p, 7
[34] The *Comité* met for the first time on 15 October 1789, then electing Parent de Chassey as its president and with Barrére de Vieuzac e Geodfroy serving as secretary. Subsequently, a session held on 7 April 1790 set out how its main objectives included the following tasks: establishing the domains of the Crown, studying the alienated dominion properties, whatever their ownership, specifically through commitments made of a feudal type, by donation or by exchange; listing the dominion properties eligible for sale, drafting legislation on dominion properties; examining the management of dominion properties, specifically the forests, gathering the documents necessary for any complaints about exchange and sales of dominion properties. Cf. *Archives Parlementaires*, 1st Series, Vol. XII, pp. 564 and fol...
[35] The first report, produced by Enjubault de la Roche, following a deliberation that completing a study on the origins of dominion was essential, highlighted how, ever since Hugh Capet, there had been authorisation for the King to dispose of his domains without any expectation of reversion. Under the reign of Charles IX, the aforementioned Ordonnance of Moulins emphasised how civil law did not enact any prohibition on alienation, which was determined by Constitutional Law. Later, and despite recognition that the acts in violation of the *Ordonnance* were deemed ineffective, there was acceptance of the scope for, casuistically, in keeping with the circumstances prevailing, considering good faith, recognising certain domain transactions. Furthermore, this also inquired into the best solutions to adopt in the future. Hence, there was recognition that the inalienable status favoured the social interest and highlighting how this might be maintained or eliminated on the mere grounds of quantitative calculation. Cf. *Archives Parlementaires*, 1st Series, Vol, X, pp. 46 and fol..
[36] Taking into account the economic difficulties, a Decree was passed on 19 December 1789, which enabled, under the terms of article 2, the alienation of the dominion properties of the Crown, with the exception of the forests, the royal palaces, the domains of the Clergy, in order to obtain a determined monetary sum.
[37] Barrére de Vieuzac wrote another report that recognised the weakening of the principle of dominion inalienability following the alienations of the domain properties that in the meantime, took place. For such reason, this maintained that inalienability should be inherent to dominion. Subsequently, Enjubault de la Roche presented another report detailing the major difference between dominion under the Ancien Régime, where there was the characteristic principle of the inalienability of the Crown dominion that attributed to monarchs the role of dominion guardians, and the situation resulting from the meeting of the Estates General that, symbolising the Nation, took on full ownership of the dominion properties with all the inherent consequences. *Archives Parlementaires*, 1st Series, Vol. XX, pp. 316 and fol..
[38] This diploma became referred to as the Dominion Decree of 22 November - 1 December 1790

replaced the expression *dominion of the Crown*, with *national dominion,* this should here highlight how the notion of dominion in this Code closely resembles that formulated before and would culminate in the works of the Comité[39]. Thus, there was no innovation going on here. Secondly, the inalienability of dominion, the object of the known exceptions, saw its scope and importance reduced because while there was concern over the likelihood of the monarch alienating those dominion properties, there was also the understanding that the Nation might freely make use of them in keeping with its position as the effective owner. Hence, the Code set out a broad scope of permission for transmission and to this requiring authorisation by the Parliament followed by ratification by the King'[40]. This correspondingly highlighted the extent of such permission that the only exceptions arose from royal rights and ownership of the national woods and forests[41].

The preparations for the *Code Civil* reached the conclusion that this should not approach dominion but, instead, that task should be the responsibility of a full time Administrative Law Code or an actual *Code Dominial* that would not be revocable[42]. Nevertheless, the position that the *Code Civil* should remain reserved for property susceptible to private ownership did not prevail. Due to this, there were important consequences for the dichotomy between ownership and sovereignty^[43], with the *Code Civil* enacting certain precepts about dominion even while not having overturned the *Code Dominial.* Indeed, it was precisely due to the objective of not revoking this that the *Code Civil* did not adopt any concept for the public domain and conveying its acceptance of the orientation handed down by the *Code Dominial.* Therefore, while attributing the dominion properties to the state that the *Code Dominial* bestowed on the Nation[44], the *Code Civil* listed the goods that should be integrated into the public dominion[45] so as to differentiate them from the other properties subject to ownership and private appropriation and thereby making it clear that the regime for the transmission of dominion properties fundamentally remained that established in the *Code Dominial.*

4. The Evolution of Dominion

Dominion was subsequently to undergo a profound evolution. This becomes clear from the outset in the work of Pardessus when this author recognised how dominion properties, by their nature as goods consecrated to the usage and service of members of a community, could not therefore either be alienated or encumbered with liabilities in contrast with the national dominion that could serve as loan collateral or be disposed of, thus constituting an object under private ownership following the State's obtention of the respective income deriving from the alienation[46].

Among the administrativists, the dominant opinion was not very different. On this issue, Bonnin, equating the public domain and state dominion, perceived public property as something inherent to the allocation for public usage, designated as property of all and for all[47]. Additionally, this called into question the inalienability of dominion goods on the theoretical grounds of the sale of the specific public domain and regarding the susceptibility of establishing private property out of dominion property[48]. In a similar stance, Cormenin did not only accept the identification between the dominion properties and the properties of the state but also recognised their potential for prescription, thus confirming the latitude to alienate dominion properties without any restrictions and irreversibly[49]. Taking into account these jurisprudent opinions, this becomes understandable as the civilists persisted along the path of identifying the national dominion and the public dominion and even the dominion assigned to specific purposes and private usages. In compliance, Toullier agreed with this identification and accepted that certain

[39] Article 1 determines that the national dominion extended to *"toutes les propriétés foncières et de tous les droits réels ou mixtes qui appartiennent à la nation, soit qu'eIle en ait la possession et la jouissance actuelle, soit qu'elle ait seulement le droit d'y rentrer par voie de rachat, droit de réversion ou autrement."*

[40] Article 8 stipulated, at a particular stage, the following: *"Les domaines nationaux et les droits qui en dépendent (...) peuvent être aliénés à titre perpétuel et incommutable, en vertu d'un décret formel du Corps Législatif, sactionné par le roi, en observant les formalités prescrites pour la validité de ces sortes d'aliénations".*

[41] Article 12 prescribed the following: "*Les grandes masses de bois et forêts nationales demeurent exceptés de la vente et de l'aliénation permise ou ordonnée par le présent décret* (...)".

[42] On this issue, evaluating the preparatory works for the French Code Civil as regards dominion, Maurice Monteil, *De la Dominialité Publique: Étude Historique et Juridique*, Paris, 1902, pp. 212 and fol.. Robert Pelloux, *Le Problème du Domaine Public: Evolution et solutions actuelles*, Paris, 1932, pp. 80 and fol..

[43] Cf. Maurice Monteil, *De la Dominialité...* op. cit., pp. 219 and fol..

[44] Article 538 determines the following: "*Les chemins, routes et rues à la charge de l'État, les fleuves et rivières navigables ou flottables, les rivages, lais et relais de la mer, les ports, les havres, les rades, et généralement toutes les portions du territoire français que ne sont pas susceptibles d'une propriété privée, sont considérés comme des dépendance du domaine public".*

[45] In addition to article 538 cited, see the articles 539, 540, 541 and 542.

[46] Cf. J. M. Pardessus, *Traité des Servitudes*, Vol. I, Paris, 1806, pp. 182 and fol..

[47] Cf. Charles-Jean Bonnin, *Principes d'Administration Publique*, Vol. I, Paris, 1812, p. 451.

[48] Cf. Charles-Jean Bonnin, *Principes*... op. cit., pp. 455 and fol..

[49] Cf. Louis Marie Cormenin, *Questions de Droit Administratif*, Vol. 1., Paris, 1823, p. 131.

dominion properties were susceptible to becoming private property alongside others not susceptible to any such appropriation[50].

The Duranton work also falls within the auspices of this group given its identification of national properties and dominion properties and, above all, for its acceptance of the eligibility for transmission of certain dominion goods in keeping with how the recipient represented the decisive criteria and not the respective nature or even the ownership.[51]

Afterwards, the contribution made by Proudhon triggered significant developments in the doctrine in putting forward a somewhat innovative understanding. According to this author, dominion conveyed the idea of the power that any man wielded over objects and differentiating across three different levels or stages: the sovereign dominion, the public dominion and the private dominion[52]. Hence, while the sovereign dominion represented the sovereign power enabling government of the State; the public dominion meant the power encharged to rule and administer those goods designed for the usage of all and with the private dominion the power of the individual to benefit and hold his own properties"[53]. Therefore, the public dominion could not be in the ownership of any person and nor of the State itself. The community was then to assume dominion ownership and a prefiguration of public power, with the State as its mandatary in accordance with how the allocation of the dominion properties to a specific community required such action[54]. Proudhon defended that public dominion differed from private dominion as regards properties that did not belong to anybody and therefore configuring a protected dominion to the extent that the private dominion or that of ownership were domains with a vocation for immediate profit to the benefit of the owner[55], taking into account the interpretation applied to certain precepts in the *Code Civil*[56]. As regards the eligibility for transmission, he highlighted how dominion properties still remained inalienable while ever allocated to public services. However, whenever the authority determined the end of a public service that affected a dominion property, its inalienable characteristic would terminate because it would no longer be necessary[57].

The ideas of Proudhon on the distinction between the public and private dominions of the state did not only make a significant advance to the doctrinal literature[58] but also received significant incorporation into the prevailing jurisprudence[59] as well as in some legislation during the second half of the 19th century[60]. Furthermore,

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[50] While certain dominion properties, by their nature, such as navigable rivers, ports and estuaries are not susceptible as private property, other dominion properties would be appropriable and might change their ownership through any means of transmission, whether onerous or free of charge. However, within this group, the properties susceptible to private property, Toullier further subdivided those properties deployed in commerce, and properties that are beyond such commerce, specifically the thoroughfares, roads, public buildings, churches and fortresses. *Le Droit Civil Français Suivant l'Ordre du Code* Vol. llI, no 36 and fol..

[51] Alexandre Duranton divided property dominions into three categories, recognising that the destination of certain properties imposed their commercialisation given this was the best interpretation of some of the precepts in the French Civil Code, especially articles 2226 and 2227. Cf. *Cours de Droit Suivant le Code Civil*, Vol. IV, 2nd ed., Paris 1828, pp. 151 and fol..

[52] Jean-Baptiste Proudhon, *Le Traité du Domaine Public*, 2nd ed., Vol. I, Paris, 1843, p. 63.

[53] Jean-Baptiste Proudhon, *Le Traité*..., op. cit., pp. 63-4

[54] Jean-Baptiste Proudhon, *Le Traité*... op. cit., pp. 241 and fol..

[55] Within the objective of ensuring the correspondence between his doctrinal construction and the established Law, Jean-Baptiste Proudhon understood that it would be a gross error to attempt to confuse the public dominion with that of the State. Hence, he highlighted that the State dominion included properties that would return significant earnings, for example the national forests and other properties from which the Government might extract earnings of relevance to the Crown, a dominion of property. The objects integrated into the public dominion were therefore placed, by legal determination, beyond the scope of commercial trade. Le Traité... op. cit., pp. 243 and fol..

[56] The most significant case would be the interpretation of article 539 through highlighting how the precept contained a serious error when stating that escheat properties belonged to the public dominion. To this end, the properties to be thereby attributed to the State domain need to be subject to the applicable rules for property. In order to corroborate his opinion, he made recourse to the original edition of the Code, which included the expression "*appartiennent à la nation"* instead of the later version *"appartiennent au domaine public*".

[57] Proudhon proposed a range of examples to illustrate his thinking. In one, he put forward the hypothesis of the Government determining the termination of the allocation of a fortress, through the act of a public authority, to demonstrate that both the fortress and the surrounding lands would then become subject to dominion alienability. *Le Traité*..., op. cit., p. 251.

[58] C. Demolombe accepted the terminology of Proudhon, specifically as regards the private State dominion, without any discussion. Cf. *Traité de la Distinction des Biens*, Vol.ǂI, 1866, Paris. pp. 258 and fol.; Gaudry took up the distinction made by Proudhon in order to reflect on the nature of the State's powers over the public dominion that, in his perspective, was a protective ownership that enabled all to benefit from dominion. Cf. *Traité du Domaine*, Vol. I, Paris, 1852, pp. 45 and fol.; Théophile Ducrocq compared the right to property with the domain of the State in order to demonstrate the differences between both categories and, above all, the justice of this dichotomy. *Cours de Droit Administratif* Vol. III, Paris, 1881, pp. 74 and fol.; subsequently, Edouard Maguéro took on defining the differences existing between properties belonging to the State's dominion and the properties making up the public domain. Cf. *Dictionnaire des Domaines*, Paris, 1899, pp. 46 and fol..

[59] Within this framework, Maurice Monteil maintained that, following the publication of the work of Proudhon, it became common in French jurisprudence to distinguish between the public dominion and the State dominion as if dealing with

we also need to recognise how, by that point in history, the issues around dominion had already spread well beyond French borders as the Italian, German, Austrian and even the Spanish legal systems did not ignore dominion related issues. Hence, the positions of Proudhon were also the supports for broad and deep reflection whether by civilists or by international public law specialists.

However, the author that had the greatest impact on the doctrinal debate prevailing towards the end of the 19th century and in the early 20th century was Otto Mayer who triggered an epistemological break with the former understanding that perceived private property as submitted to the restrictions of public law. According to his position, public property, understood as a synonym for the public dominion, experience a modified property status, transported into public law based on which the objects in the service of the government belong to the state[61]. Consequently, the State would have first imposed on the Fiscal, holder of the res, the objective of serving as the public dominion destination, requiring it to consent to public usage or the exercising of the private right of usage over dominion properties and, at a subsequent phase, after the disappearance of the Fiscal, the State took on the ownership of public goods through its ownership of the public dominion[62]. This dominion theory, also designated as the theory of public property, generated enormous repercussions and culminated in the development and deepening of administrative law. In addition, that development represented, in the expressive words of Merli, the transformation and pillaging of diverse private institutions[63]. Thus, the understanding that this theory shaped the design of a monist model, a property model that rejected the applicability of private law and the corresponding subjection of any eventual litigation to the civil courts.

The repercussions of Mayer's ideas, as detailed above, and consequently the orientations of the monist model on which it was based, did not come to exactly influence the German and Austrian legal systems[64], but, on the contrary, French law, the very birthplace of dominion. Perhaps Hauriou stands out as the leading and most loyal interpreter of the ideas of Mayer, of the monist model itself and the notion of private property in rejecting the division between private property and the juridical servitude that would encumber it and on the contrary proposing the concept of a uniform and special property, the public domain without any subjection to the rules of the Civil Code but rather bound by the determinations of specific legislation[65]. This author thus insisted on the inalienability and the imprescriptible nature of dominion[66] even while contributing to another doctrinal development[67] in defending how the relationship between the State and its dominion properties could not be a relationship of supervision given that the public dominion was subject to administrative property and the goods assigned to a public utility[68].

In an apparently contradictory fashion, French law saw the dominion model, in the monist acceptance, register the greatest fragilities. This needs only to take into account the idea that the very inalienability of dominion goods was in the main overwhelmed by French doctrine itself. Furthermore, even after the monist reformulation, as defended by Mayer and revisited by Hauriou, the inalienable dimension was promptly and consistently rejected both by the jurisprudence and by the writings of renowned authors. This is here clearly reflected in the early formulation by Waline when ruling on the contradictory nature between alienability and the historical tradition of French dominion that was furthermore rejected by the *Code Civil*, and, above all, how this was non-applicable to any juridical regime eligible for regulating dominion properties[69].

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something definitively defined without any need for demonstration or justification. To this end, he referred to decisions taken both by courts of first instance and by appeal courts in which this postulate was accepted without any consideration. Cf. *Dominiailité*... op. cit., pp. 264 and fol..

[60] This perceives that the law of 16 June 1851 on the constitution of property in Algeria would have been paradigmatic in the reception of this distinction. Cf, on this issue, Robert Pelloux, *Le Problème*... op. cit., p. 127.

[61] Cf. Otto Mayer, *Le Droit Administratif Allemand*, Vol. III, Paris, 1905, pp. 111 and fol..

[62] Cf. Otto Mayer, *Le Droit*... op. cit., pp. 98 and fol..

[63] Cf. Franz Merli, Öffentliche Nutzungsrechte und Geneingebrauch, Vienna, 1995, pp. 29-30.

[64] The majority of Germanic doctrine rejected the figure of public property and the consequent dominion in preferring to remain loyal to the dualist model of private property restrictions alongside restrictions on public utility. Cf. Georg Jellinek, *System der subjektiven öffentlichen Rechte*, 2nd ed., Tübingen, 1905, pp. 213 and fol.; Teodor Maunz, *Hauptprobleme des öffentlichen Sachenrechts*, Munich, 1933, pp. 132 and fol.; Franz Becker, *Grundzüge des öffentlichen Rechts*, 6th ed., Munich, 1995, pp. 167 and fol.; Franz Merli, *Öffentliche*... op. bit., pp. 54 and fol., Thomas von Danwitz, Otto Depenheuer, Christoph Engel, *Bericht zur Lage des Eigentums*, Berlin, 2002, pp. 6 and fol.; Wilfried Erbguth, "Begriff, Begründung und Einteilung der öffentlichen Sachen" in JURA, 2008, pp. 194 and fol..

[65] Cf. Maurice Hauriou, *Précis de Droit Administratif et de Droit Public*, 9th ed., Paris, 1919, pp. 715 and fol.; Idem, *La Jurisprudence Administrativ*e de 1892 à 1929, Vol. III, Paris, 1929, pp. 218 and fol..

[66] Cf. Maurice Hauriou, *Précis*... op. cit., p. 716.

[67] The ideas of Hauriou caused such repercussions that, according to the illustrative statement by Gustave Peiser, only as from the work of that author did the State become configured as the true holder of the public dominion. Cf. *Droit Administratif*, 10th ed., Paris, 1990, p. 63.

[68] According to Hauriou, the dominion dependencies constitute administrative properties and, for such reason, inalienable and imprescriptible. *Précis*... op. cit., pp. 620 and fol..

[69] Cf. Marcel Waline, *Les Mutations Dominiales*, Paris, 1525, pp. 31 and fol..

This demonstration contributed to advancing the idea that dominion was founded on ownership of the property and the correlating stance that understood allocation as crucial to the dominion statute. In these terms, both properties assigned to a public service and those allocated for public utilisation may classify as dominion properties irrespective of their public ownership or their private ownership. Based on this, Duguit presented the foundations of what became allocation theory as the path to fully grasping the true identity of dominion[70]. Subsequently, Maroger emphasised that which he termed the fundamental norm of allocation within the framework of defending that the public dominion should be reduced to that actually allocated[71]. Furthermore, within the same scope, Laubadère, in accepting the traditional notion of allocation, then proposed recognition of the multiplicity of juridical regimes applicable to the different categories of properties and correspondingly rejecting allocation-servitude and emphasising how allocation underpinned the administrative property in enabling the Administration to impose on a private interest a particular dominion utilisation or the obligations of public service[72]. These obligations, based on allocations, gained recognition under diverse regimes, specifically those for the concession of public services through which private interests might use and exploit dominion goods[73].

Nevertheless, despite the great enthusiasm and support, the theory of allocation underwent a setback on realisation that the theory only poorly copes with the application of dominion legal regimes. This highlighted the contradictions and complexities taking into consideration the purpose of the property and therefore encountering shortcomings in its capacity to characterise a significant set of properties that were, in themselves, unquestionably dominion properties. These difficulties and weaknesses hollowed out the allocation concept. Nevertheless, this did not elicit any search for other criteria and other theories that might appropriately characterise dominion according to which the decline of allocation led to demotivation and even disbelief not only in terms of the theory itself but also as regards the utility, the coherence and the nature of the public dominion.

While the public dominion had already been called into question by Jensse[74], the failing of the theory of allocation very sharply deepened the crisis in dominion. Furthermore, if the identification of difficulties had already been glimpsed with the setback to the theories on royal administrative rights[75], the identification of the lack of any identity to the very dominion concept[76] has indelibly shaped more recent times. Thus, this emphasises how public dominion consists of a mere product of judicial order[77], thereby reflecting its dispersed and anachronic character both in terms of the purposes of its legislative based prescriptions and the multiplicity of jurisprudence decisions[78].

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[70] According to Léon Duguit, ascertaining the ownership of the public dominion did not matter as it was the allocation, based on the usage or benefit of the property, that replaced this facet with advantage to the ownership criteria. Cf. *Traité de Droit Constitutionnel*, Vol. III, 2nd ed., Paris, 1923, pp. 317 and fol..

[71] Cf. Gilbert Maroger, *L'Affectation â 1' Usage Public des Biens des Patrimoines Administratifs*, Paris, 1942, pp. 21 and fol.

[72] Cf. André de Laubadére, "Dominialité publique, Propriété administrative et affectation" in *Révue du Droit Public et de la Science Politique en France et à 1'étranger* in Vol. 70, ' 1950, pp. 19 and fol..

[73] The idea of dominion concession received broad doctrinal consideration. Maurice Hauriou termed the concessionaires as the temporary occupants of the public domain. Cf. *Précis*... op. cit., pp. 712 and fol.; Léon Duguit perceived concessions as dominion based contractual utilisations. Cf. *Traité*... Vol. III, pp. 345 and fol.; Henri Berthélemy defended that contractual concessions represent dominion occupation. Cf. *Traité Élémentaire de Droit Administratif*, 13th ed., Paris, 1933, p. 492; Louis Trotabas maintained that this was a contractual situation in which the concessionaire was, always and under whatever the circumstances, the holder of a genuine subjective right. Cf. *De 1'Utilisation du Domaine Public par les Particuliers*, Paris, 1924, pp. 120 and fol.; Ange Blondeau equally recognised this contractual nature and even to the extent of allowing for the extension of the civil rules to the concession of public services. Cf. *La Concession de Service Public*, Paris: 1929, pp. 211 and fol..

[74] Lucien Jansse maintained there were no criteria imposing on the legislator any corresponding dominion attribution for a particular property. Hence, the attribution of dominion depended exclusively and strictly on the wishes of the legislator. *Les Traits Principaux du Régime des Biens du Domaine Public*, Paris, 1933, pp. 100 and fol..

[75] Cf. Dante Majorana, *La Teoria dei Diritti Pubblici Reali*, Naples, 1910, pp. 13 and fol.; Louis Rigaud, *La Théories des Droits Réels Administratifs*, Paris, 1914, pp. 1 and fol.; Louis Trotabas, *De l'Utilisation du Domaine Public per les Particuliers: Essai de Classification Juridique*, Paris, 1924, pp. 52 and fol.; Roger Bonnard, *Les Droits Publics Subjectifs des Administrés*, Paris, 1932, pp. 6 and fol..

[76] In this perspective, Bourdeau demonstrated how allocation had undergone de-characterisation without ever having achieved the fundamental task for which its vocation had originally emerged; establishing the key criteria for dominion. Cf. *La notion d'affectation dans la théorie du domaine public*, Poitiers, 1980, p. 550 and fol.; Francois Hervouét, following study of the public service regime, concluded that the absence of any dominion allocation, in conjunction with the need for the Administration to promote, sometimes through purpose dedicated acts, the means of fostering the utilisation of the public domain. Cf. L'Utilité de la Notion d'Aménagement Spécial dans la Théorie du Domaine Public" in *Révue du Droit Puhlic et de la Science Politique*, no. 1, 1983, pp. 135 and fol.; Manuel Gros, analysing the interconnections among dedication, allocation and classification, particularly in terms of jurisprudence decisions, highlighted the lack of precision, the shortcomings and the incomplete nature of dominion allocation criteria. Cf. "L'Affectation, Critère Central de la Dominialité Publique" in *Révue du Droit Puhlic et de la Science Politique*, no. 3, 1992, pp. 752 and fol..

[77] Cf. Javier Barcelona Llop, "El Dominio Publico Arqueologico" in *Revista de Administiación Pública*, no. 151, 2000, p. 137.

[78] Cf. Christian Lavialle, "La Constitution de Droits Réels sur le Domaine Public de l'État" in *La Semaine Juiridique*, no. 69, no. 1, 1995, p. 1107.

In addition, this posits an irrefutable constitution of real rights over public and private domain properties[79] according to which it becomes easier to grasp the position of those rejecting dominion on the grounds of inappropriateness and susceptible of conveying an artificial weighting and over-expanded concept of public law and, as a counterbalance, opting to highlight the advantages of juridical orders that remained beyond the scope of domain[80].

5. Dominion and Portuguese Law

5.1 On the Origins of Dominion through to the early 20th century

The distinction between the property or the dominion of the Crown and the property of the King was recognised in Portuguese law and furthermore deemed worthy of legal consecration. One need only to peruse Manueline legislative acts or those of the Phillips. Specifically, the Manueline legislation extended to listing the Royal Rights belonging to El-Rei[81], thereafter determining the means of transmission for the Crown's properties[82]. There was similar content in the Philips era legislation which, in addition to specifying the Royal Rights, established rules for the succession of the Crown's properties[83].

This does not mean that the Royal Rights corresponded only to the Rights of the King or of the Prince, understood as the private property of the monarch. In effect, as Mello Freire stated, the division of objects according to the human law of Roman law could not have been automatically incorporated into Portuguese but, instead, had to be accommodated to the state, to the Portuguese Monarchy[84]. The same author then proceeds to explain why the flowing rivers and ports were royal properties even if with the meaning of commonly shared properties[85]. This furthermore emphasised how the law referred to various properties that did not belong to the King but rather the People as was the case with the one-third levy on agrarian fines[86].

As is well-known, the donation of Crown goods prefigured a particular juridical regime. Consequently, the Crown's properties, those subject to donation, would be, according to the Mental Law, the honorary titles, the tributes, the personal, royal or mixed lien, the secular royal goods[87] which could not be attributed the nature of simple liberality as they remained subject to very specific requirements. Hence, the nature of any donation might be remuneratory and with the King seeking to compensate the recipient or their successors, should such be the case, for the services provided.

With the advent of Liberalism, there took place something similar to the earlier events in France following the Revolution given that the properties of the Crown were deemed *National Assets*, thereby accepting that they might be transacted in order to meet the charges arising from public debt[88]. Immediately afterwards, the 1822 Constitution stipulated that these National Assets were susceptible to alienation in case of need and following due authorisation by the competent Courts[89]. Alternatively, while the 1838 Constitution consecrated the principle of irrevocability of the sale of national assets in the text of its Fundamental Law, this nevertheless allowed for the disposal of such properties whenever with the objective of paying off the national debt[90].

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[79] Cf. Hélene Simonian-Gineste, "L'Avenir du Principe de l'Inaliénabilité du Domaine Public" in *Révue Droit Immobilier*, no. 11, 1989, pp. 174 and fol.; Christine Combe, "Les Droits Réels sur le Domaine Public" in *Droit Administratif*, no. 12, 2001, Paris, pp. 4 and fol.; Christian Lavialle, "Des Rapports entre la Dominialité Publique et le Régime des Fondations" in *Révue de Droit Public et de la Science Politique*, no. 106, 1990, pp. 471 and fol.; Hervé Bastien, "A Quoi Sert le Domaine Public Mobilier?" in *L'Actualité Juridique*, no. 10, 1993, pp. 675 and fol.; Javier Barcelona Llop, "Consideraciones sobre el Dominio Público in *El Derecho Administrativo en el Umbral del Siglo XXI,* Vol. II, Valencia, 2000, pp. 2085 and fol.; Mercedes Benaches, *La Concesión de Dominio Público* Madrid, 1988, pp. 29 and fol.; Ramón Parada, *Derecho Administrativo*, Vol. III, Madrid, 2000, pp. 35 and fol..

[80] Franz Merli, after undertaking a comparative study between the *domaine publique* in the French legislative framework in comparison with the Austrian and German systems, accepted the existence of diverse aspects, extremely negative, resulting from their applications of the dominion regime, and specifically the following: the prevalence of public law to the detriment of private law and inspection by various administrative entities, *Öffentliche*... op. cit., pp. 79 and fol..

[81] Cf. Manueline Legislation, Bk. II, Tit XV

[82] Cf. Manueline Legislation, Bk. II, Tit XVII.

[83] Cf. Philip Legislation, Bk. II, Tit. XXXV

[84] Cf. Pascoal de Mello Freire, *lnstitutiones Juris Civilis Lusitani*, Vol. I, 3rd ed., Lisbon, 1842, trad. port., BMJ, no. 165, 1967, p. 46.

[85] Ibidem, pp. 46-7.

[86] Cf. Philip Legislation, Bk. II, Tit. XXXIII, para. 2.

[87] Cf. José Correia Telles, *Commentario Crítico à Lei da Boa Razão em data de 18 de Agosto de 1769*, Lisbon, 1836, pp. 10 and fol..

[88] *Cf. Articles 2 and following of Decree no. 65 of 25 April 1821.*

[89] Cf. Article 103 of the 1822 Constitution.

[90] Cf. Article 23 of the 1838 Constitution.

This apparent similarity with the constitutional norms did not omit the difference in juridical order from the 1830s, through their juxtaposition with that from the 1820s. This, for example, refers to the 1832 Decree[91] that determined how certain national properties should be attributed the quality of general usage properties while others would be integrated into and available to the public treasury[92]. In fact, this decree led to diverse and valuable properties being incorporated into the National Treasury, specifically the Lezirias, a significant extent of the Serra da Arrâbida coastal hill area. Nevertheless, these were immediately sold off in plots between 1834 and 1836, effectively enabling influential individuals to acquire them for a low price in exchange for their services provided to the "cause of freedom"[93]. Additionally, the Casa do lnfantado (House of the Prince) had been abolished on purpose to prevent Miguel from administrating the lands[94], according to which one portion of the properties was integrated into the National Treasury while the other portion was incorporated into the private patrimony of Queen Maria II. Indeed, as regards the properties belonging to the private patrimony of the Queen, these especially included the palaces of Queluz, of Bemposta, of Alfeite, of Samora Corréa, of Caxias and of Murteira[95]. Some of these, specifically the Palace of Queluz, remained in the private usage of the Queen and her descendants, while others, such as the Palace of Bemposta, were granted under a temporary concession to institutions of public utility[96]. In such cases, this requires highlighting how the concessionaires as the Holders of temporary concessions do not acquire possession in their own right, corresponding to the exercising of the right of ownership by which the utilisation of the private properties of others does not enable their corresponding acquisition through usurpation, that known as acquisitive prescription[97].

In turn, the 1867 Civil Code provided for, under the epigraph *"On the objects that may be subject to appropriation and their different types in relationship to the nature of those same objects or the persons to whom they belong"* in Title 11, of Part II, articles 359 and following, the public domain, in the wake of the doctrine proposed by Coelho da Rocha[98] and those preceding and the determining orientations of Decree no. 3, of 31 December 1864. In effect, article 379 distinguishes among objects, in accordance with the ownership perspective, among public, common and private properties. Indeed, studying the regime stipulated by articles 380 to 382 finds the identification of both *public good* and *public dominion*[99]. Hence, while public goods were appropriated by the State and remained under its administration, private goods were susceptible to ownership and the exclusive dominion of a particular person, whether singular or collective, and correspondingly eligible for transmission under the terms of article 380. Therefore, while there were clearly doctrinal opinions that understand, based on these precepts, dominion properties as absolutely inalienable and imprescriptible[100], with the best interpretation

[91] Cf. the Decree of 13 August 1832.

[92] At a particular stage, article 2 of the cited 1832 Decree states the following: "(...) properties of the nation, taken collectively, are the properties for general and shared usage of the inhabitants such as ports, canals, rivers, roads, bridges, (..,) The goods of the nation, acquired through successive ownership and fiscal execution and not destined for common and shared usage, shall be regulated by the laws of the treasury and shall form part of the available public treasury (...)"

[93] Cf. Oliveira Martins, *Portugal Contemporâneo*, Vol. II, Lisbon, 1953, pp. 203 and fol..

[94] "Under the terms of the Letter of Law of 1789, dated 24 June, it was the responsibility of the King's second son, in this case Miguel, to administer the Casa do Infantado.

[95] Cf. Decree no. 68, published in the *Chronica Consttuicional de Lisboa*, on 20 March 1834.

[96] The Army School, which would later be named the Military Academy, was installed in the Palace of Bemposta under the following terms: "(...) *having Myself formerly considered that stated by My Minister that the Palace of Bemposta, with its respective lands, would serve all the requirements necessary for the appropriate accommodation and regular service of that Institute, and finally always worthy of My Royal Request everything that may contribute towards the literary and scientific progress of My subjects, and especially those that belong to or are destined for the noble master-of-arms: There is therefore the concession of the said Palace, and all its dependencies, to establish the Army School there, with everything necessary for this said purpose, handing over the administration to the respective Ministry, without this nevertheless being deemed as any separation from the domain of the Crown and incorporated again into the National Properties the said Palace, expressly included in the number of those buildings that, under the auspices of article 85 of the Constitutional Charter, were reserved for My usage and that of My heirs and successors*". Cf. the Army Decree no. 58, of 21 December 1850, published in the *Diário do Governo* on 26 December 1850. Subsequently, the Decree of 8 June 1853 confirmed this temporary concession. A similar procedure took place with the Royal Veterinary School, later the Institute of Agronomy and Veterinary, which was also installed on the Bemposta Estate through means of a temporary concession confirmed by Decree published on 9 July 1859.

[97] On the powers of concession holders, for public or private utility, see Luiz da Cunha Gonçalves, *Tratado de Direito Civil*, Vol. III, Coimbra, 1930, pp. 282 and fol..

[98] Cf. *Insituições de Direito Civil Portugez*, 3rd ed., Coimbra, 1852.

[99] This reflects a practically consensual bridge. Cf. specifically, Antônio Teixeira d'Abreu, *Direito Civil Português*, Vol. I, Coimbra, 1898, pp. 137 and fol.; Guilherme Moreira, *Instituições do Direito Civil Português*, Vol. I, Coimbra, 1907, pp. 358 and fol.; Luiz da Cunha Gonçalves, *Tratado*..., cit., pp. 104 and fol.: José Carlos Moreira, *Do Domínio Público*, Coimbra, 1931, pp. 72 and fol..; Cabral de Moncada, *Lições de Direito Civil* Vol. II, 2nd ed., Coimbra, 1955, pp. 97 and fol.; José Tavares, *Os Princípios Fundamentais de Direito Civil*, Vol. I, 2nd ed., pp. 634 and fol.; Jaime de Gouveia, *Direitos Reais*, Lisbon, 1935, pp. 131 and fol.; Manuel de Andrade, *Teoria Geral da Relação Jurídica*, Vol. I, Coimbra, 1992, pp. 279 and fol..

[100] Jaime de Gouveia stands out within this scope after his declaration adopting the positions of Maurice Hauriou. Hence, he insistently defended both the inalienable and imprescriptible facets. Cf. *Direitos*... op. cit., pp. 137 and fol.; furthermore, within

consisting of perceiving these inalienable and imprescriptible characteristics as transitory and limited in time given they remain in effect only for as long as their public dominion assignment[101].

Beyond the public goods, there were the common goods as listed in article 381 as well as the private goods that did not even need stipulating in the Code. In practice, following the establishment of the categories of public and common goods, all the others could only ever be private goods. Furthermore, there was never any problem or doctrinal divergence on this point. Thus, private goods may integrate into the patrimony both of collective persons, specifically the State[102], and singular persons and, in the latter case, of an individual even when exercising functions of a public nature. Hence, the monarch, as a singular person encumbered with representing the State, did not face any obstacle to assuming ownership over the properties received through inheritance whenever such properties were not integrated into public dominion categories or were not covered by an act of expropriation or of confiscation or nationalisation. Such properties would be under private ownership, integrated into the personal patrimony of the monarch and already the target of open attempts at definition as regards the public dominion properties and the private dominion properties of the State[103].

5.2 Dominion in the 20th and early 21st centuries

While this was, in broad brush terms, the legal regime in effect for dominion[104], with the onset of the new century and the subsequent declaration of the Republic, we need to underline how the legislation issued on the banishment of the royal family did not alter this framework given that there was no nationalisation or confiscation of their properties; conversely, the law declared respect for the property of the royal family[105]. Hence, there should necessarily be an understanding that the private property of the deposed monarch remained in his legal sphere and that, following his death, was handed down to his heirs and legates, specifically the House of Bragança, the House of Bragança and Manuel II Foundations[106].

a similar stance as regards the dominion characteristics alluded to, see Jose Carlos Moreira, *Do Domínio*... op. cit., pp. 74 and fol..

[101] Cf. Antõnio Teixeira d' Abreu, *Direito*.., op. cit., pp. 129 and fol.; Cunha Gonçalves: *Tratado*... op. cit., p. 112; José Tavares, *Os Princípios*.., op. cit., p. 634; Guilherme Moreira, *lnstituições*.., op. cit., pp. 359 and fol.; Cabral de Moncada, *Lições*.., op. cit., pp. 97 and fol.; Manuel de Andrade, *Teoria*... op. cit., pp. 290 and fol..

[102] Manuel de Andrnde describes how private possessions may belong to private persons, subject to public law, the State, the local authorities and institutional and other entities. *Teoria*... op. cit., p. 296. Similarly, Guilherme Moreira defended that the patrimonial properties of the State, municipalities and parishes require consideration as private properties given they are engaged in commerce and are potentially susceptible to alienation and prescription. Cf. *Instituições*... op. cit., pp. 371 and fol.; on the purpose of the private dominion of the State, Cunha Gonçalves recognised how dominion is made up of, in addition to the properties assigned to public service, those properties not assigned, hence patrimonial and available while also adding that the administration of the private dominion of the State belonged to the National Treasury, supervised by the Ministry of Finance. *Tratado* … op. cit., p. 157.

[103] Jean-Baptiste Proudhon had already come out favourably on this, cf. *Traité*.., pp. 67 and fol.. Following Proudhon, many others would maintain similar orientations. Cf. Maurice Hauriou, *Précis*... op. cit., pp. 974 and fol..

[104] We should not overlook some of the legislation that came into effect in the meantime, especially the Decree of 1 December 1892 stipulating the organisation of hydraulic services and that introduced important prescriptions for public, private and shared water interests.

[105] The renowned Decree of 15 October 1910, published on 18 October of the same year; determined, while proscribing the royal family, the recognition of all of their legitimate rights, specifically of a property nature. Furthermore, the goods of the former House of Bragança remained entirely the property of Manuel II, as the ultimate administrator of the relationship and with no presumed successor under the terms of article 2 of the Law dated 19 May 1863. This was furthermore also confirmed, by unanimity, in the opinions issued by the Attorney General of the Republic on 17 May 1917. 21 May 1931 and 27 February 1932.

[106] As is known, the deposed king, Manuel II, left in his will, dated 20th September 1915, various properties, goods and assets to a Foundation. Following his death, the surviving queen, Augusta Vitória de Hohenzollene and her mother, Amélia de França e Bragança, declared their renunciation of various rights, specifically rights to benefit, instituted by the will in order to ensure that the Casa de Bragança Foundation would gain full ownership over the various and important properties that had been attributed. Cf. Decree Law no. 23240, 21 November 1933. Later, Augusta Vitória de Hohenzollern bequeathed in her testament all of her goods and assets located in Portugal to the D. Manuel II Foundation. Cf. Decree Law no. 48531, 16 August 1968.

Furthermore, as regards public dominion status, neither the 1911 Constitution nor the 1933 Constitution sought to make any alterations to the already established normative framework with the Estado Novo Constitution providing a non-exhaustive list of properties belonging to the public dominion of the State[107]. A similar situation persisted throughout the following decades given that neither Decree Law no. 31 156, of 3 March 1941, nor Law no. 2 080, of 22 June 1948, nor even the Civil Code of 1966, which did enact the known contradiction between articles 202 and 1304, sought to make any significant alterations to the normative framework in effect. As regards the aforementioned contradiction, this highlights how no. 2 of article 202 would seem to determine that private law is not applicable to properties in the public domain while article 1304 deems that private law does apply to the public domain even if only subsidiarily.

Hence, the development of dominion over the course of the second half of the 20th century and the early years of the 21st century has essentially occurred in terms of the doctrine and the jurisprudence given that the legislator has not set out any framework for dominion and allowing for the sparse, complex, contradictory and deficient regime to prevail. In effect, the dogmatic elaboration occurring in this period was authored by Marcello Caetano who took his inspiration primarily from the theories of Otto Mayer and Maurice Hauriou in his acceptance of the theory of public property as the true core essence of dominion[108]. As regards the tension existing between the two Civil Code precepts referenced above, Marcello Caetano advocated the natural supremacy of article 202, rejecting the attribution of any effectiveness to article 1304 to thereby dispel any applicability of civil law to dominion properties[109].

On the contrary, others refuted such a conclusion leveraged on such an obviously monist conception of the public dominion and instead defending the application of civil law and the consequent subsistence of a dualist model. Within this perspective, José Pedro Fernandes stands out for his defence of the applicability of private law to the public dominion, thus assuming that article 1304 takes on an imperative character even though its effectiveness neither threatened nor rendered the public interest inviable[110].

While the constitutional revision of 1989 added on a precept on public dominion, reflecting the preferences to enshrine the dominion category within the tradition of Portuguese law, specifically the monarchical constitutions and the 1933 Constitution, it also remains the case that this revision stipulated that the dominion good regime was to be defined by ordinary legislation[111]. Hence, the constitutional amendment undertaken by the 1989 constitutional revision did not bring an end to the doctrinal controversy. In effect, while some opted to emphasise the respective monist conceptions, including Gomes Canotilho and Vital Moreira[112], Sousa Franco[113] and Sérvulo Correia[114]; others, for example José Pedro Fernandes, insisted on the dualist perspective[115].

Afterwards, the tension between the monist model and its dualist counterpart remained an issue for the doctrine and inclusively driving the output of important dogmatic densifications. Here, we would point to the work of Menezes Cordeiro that, in our opinion, evolves from a markedly monist stance to adopt a clearly dualist perception. Effectively, while in a first stage there was an understanding of the public dominion as a synonym for public property and thus beyond the scope of Civil Law[116], later, the author proposed civil laws should apply to the actual public domain[117]. On the contrary, others expressed their continued loyalty to the dualist position with Oliveira Ascensão[118] and Carvallio Fernandes[119] among the leading defenders of this orientation.

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[107] Cf. article 49 of the 1933 Constitution

[108] Cf. Marcello Caetano, *Manual de Direito Administrativo*, Vol. II, Coimbra, 1980, pp. gg3 and fol..

[109] Cf. Marcello Caetano, *Manual*... op. cit., pp. 892-3.

[110] Cf. José Pedro Fernandes, "Domínio Público: Mitologia e Realidade" in *Revisita de Direito e de Estudos Sociais*, no. 20, Lisbon, 1975, pp. 48 and fol..

[111] Cf. no. 2 of article 84 in the 1976 Constitution.

[112] Understanding that the dominion formula meant that certain properties would take on a public nature, with the correlating attribution of a legal statute of dominion different to other properties and that these dominion properties would necessarily belong to public entities. Cf. Gomes Canotilho and Vital Moreira, *Constituição da Republica Portuguesa*, 3rd ed., Coimbra, 1993, p. 411.

[113] Sousa Franco further alludes to the tension between Civil Code articles 202 and 1304, as well as the means of implementation, through legal channels, of any gains from dominion properties. However, this author not only understands dominion properties as inalienable and not eligible for lien but he also insists on the exclusive appropriation of dominion properties by the state and local government. Cf. *Finanças Públicas e Direito Financeiro*, 4th ed., Vol. I, Coimbra, 1992, p. 310.

[114] Within this context, we would mention the opinion written on the disposal of a dominion property that Sérvulo Correia produced in 1993 at the request of Salgado Zenha, even while only published at a later date. Indeed, in this opinion, Sérvulo Correia adopted, without a shadow of a doubt, the positions of Marcello Caetano in referring to how public and dominion goods are to be appropriated by collective persons established under Public Law. Cf. "Defesa do Dominio Público" op. cit., p. 449.

[115] In effect, following the Constitutional Revision of 1989, José Pedro Fernandes broadly maintained the positions he had defended in a prior study, stating that, and in summary, the State did not convert into the owner of any dominion properties. Cf. "Domínio Público" in *Dicionário Jurídico da Administração Pública*, Vol. IV, 1991, pp. 173 and fol..

[116] Cf. Menezes Cordeiro, *Direitos Reais*, Vol. I, Lisbon, 1979, p. 180.

[117] Cf. Menezes Cordeiro, *Tratado de Direito Civil Português*, I, Tomb II, Coimbra, 2000, p. 52.

From another perspective, based on the scope for establishing real rights over public dominion properties and, as such, reiterating the dualist position, we here encounter contributions from both public and private law specialists and demonstrating the extent to which the dominion question reaches beyond the narrow borders of the Public Law and Private Law system. Within this framework come the studies by Afonso Queiró[120], Freitas do Amaral[121], Dias Marques[122], Menezes Cordeiro[123], Bonifácio Ramos[124], Jorge Costa Santos[125], Rui Machete[126] and Jorge Bacelar de Gouveia[127].

In addition to this theme, we have to note that, in this new century, we encounter the emergence of more extreme positions in the doctrine dealing with dominion. While Bonifácio Ramos evolved in the sense of taking on a more negative stance than earlier when expressing severe reservations over the subsistence of public dominion[128], Pinto Duarte, on the contrary, affirmed that the question of dominion fell within the scope of Administrative Law and should correspondingly be excluded from the extent of Real Rights[129]. Indeed, as already referenced, this latter opinion does not only antagonise the understanding of other civil law specialists, as is the case with Menezes Cordeiro and Oliveira Ascensão, but also represents a more extreme conclusion than many others adopting administrative law based positions. Even Ana Raquel Moniz, who insisted on the specific nature of the theory of public property and on that she designated as finalist property based on vectors of an institutional and organic nature, never defended, to the best of our knowledge, that dominion was a matter beyond the study of private law[130]. Effectively speaking, after recognising that dominium was not limited to public property, he tried to theorise about a dominium statute, where there would be a rule based on the principles of inalienability, indispensability and inalienability, without prejudice to admitting the applicability of other legal regimes[131].

According to Jorge Miranda and Rui Medeiros, the public domain is a functional concept in which assignment implies the connection of the asset to the public purpose, and ownership may be exercised by a public subject or by a private subject, hence they do not reject the importance of the private assignment of dominion property or, a fortiori, of private law itself[132].

In a somewhat different but not entirely opposite perspective, we have attempted to demonstrate the purpose of studying the discovery of items located in the public maritime and terrestrial domains and the non-viability of absolute inalienability as a defining characteristic of dominion[133].

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[118] Oliveira Ascensão, analysing articles 202 and 1304, refutes the counterbalancing of public property and private property as well as the understanding according to which dominion represents a special category of goods or a special category of property. Cf. *Direito Civil-Reais*, 5th ed., Coimbra, 1993, p. 169.

[119] Cf. Carvalho Fernandes, *Teoria Geral do Direito Civil*, Vol. 1. 2nd ed., Lisbon, 1995, pp. 543 and fol.; Idem, Lições de Direitos Reais, Lisbon, 1999, pp. 185 and fol..

[120] Cf. Afonso Queiró, *Lições de Direito Administrativo*, Vol. II, Coimbra, 1976, pp. 31 and fol.. Additionally, on the lessons, Afonso Queiró published a study, co-authored with José Gabriel Queiró, which expressed a very similar opinion. Cf. "Propriedade Pública e Direitos Reais de Uso Público no Domínio da Circulação Urbana" in *Direito e Justiça*, Vol. IX, 1995, pp. 231 and fol..

[121] Cf. Freitas do Amaral, *A Utilização do Domínio Público pelos Particulares*, Lisbon, 1965, pp. 254 and fol..

[122] Cf. Dias Marques, *Direitos Reais*, Lisbon, 1960, p. 76.

[123] Cf. Menezes Cordeiro, *Tratado*... op. cit., pp. 52 and fol..

[124] Cf. J. L. Bonifácio Ramos, *O Regime e a Natureza Jurídica do Direito dos Recursos Geológicos dos Particulares*, Lisbon, 1994, pp. 123 and fol..

[125] Cf. Jorge Costa Santos, "Sobre a Locação Financeira Pública de Equipamento Militar" in *Estudos Em Homenagem ao Professor Doutor Pedro Soares Martinez*, Vol. II, Coimbra, 2000, pp.604 and fol..

[126] Cf. Rui Machete, "O Domínio Público e a Rede Eléctrica Nacional" in *Revista da Ordem dos Advogados*, no. 161, 2001, pp. 1389 and fol..

[127] Cf. Jorge Bacelar Gouveia, "A Utilização Ilegal do Domínio Publico Hídrico pelos Particulares; O Caso das Construções Clandestinas no Lagoa de Santo André" in *Novos Estudos de Direito Público*, Lisbon, 2002. pp. 345 and fol..

[128] 'Cf. J. L. Bonifácio Ramos, "As Coisas Públicas nos Finais do Século XX" in *Estudos em Homenagem ao Professor Doutor Pedro Soares Martinez*, Vol. II, Coimbra, 2000, pp. 564 and fol..

[129] Cf. Rui Pinto Duarte, *Curso de Direitos Reais*, Cascais, 2002, pp. 31-2.

[130] Although Ana Raquel Moniz stated that dominiality, as the legal status of an object, was generally a public property right, she did not exclude the contribution of Private Law or private interests for the usage and exploitation of dominial assets. Cf. *O Domínio*... op. Cit., pp. 324 and fol.; "Cedências para o Domínio Municipal: Algumas Questões" *in Direito Regional e Local*, no. 4, 2008, pp. 21 and fol..

[131] Cf. Ana Raquel Moniz, *O Domínio*... op. cit., pp. 374 and fol..

[132] While stressing the duality between ownership and use, they point out that no problem arises in relation to the property referred to in Article 84(1)(a) and (b) and that, as regards other dominial property, public ownership may coexist with private property which, because of use, will be subject to legal and public servitude restricting the powers of use, transformation and disposal. In addition, this accepts that, for financial reasons, the dissociation between ownership and use will require recourse to complex financial schemes in which the ownership of the dominial assets will remain in the hands of third parties. Cf. Jorge Miranda and Rui Medeiros, *Constituição Portuguesa Anotada*, Tomb II, Coimbra, 2006, pp. 85-6.

[133] There was a distinction between the absolute inalienability and the relative inalienability of the public domain and, as is clear, only the former could be considered as the dominial characteristic. However, this characteristic is not present in several

Continuing along this chronological approach, we arrive at the study by Ana Raquel Moniz on the public dominion and its concession[134], where she attempts not only to deny the crisis in the public domain and the subsistence of the monist model but is also forced to admit exceptions to the proposed model[135]. Thus, despite wishing to maintain that deemed the regime-rule for dominion, public ownership, there had to be the acceptance that, in exceptional cases, it would not be possible to demand that relationship of public ownership[136], which essentially characterises the very nature of dominion. Taking a very similar stance, Rui Guerra da Fonseca notes that public dominion cannot be fully identified with public ownership and that there is no singular statute for dominion, thereby accepting the scope for the existence of different dominion regimes[137]. However, rather than the consequences of the difficulties experienced by the "corset" imposed by the monist model, he declares the constitutional consecration of public dominion seeks to guarantee non-alienability at its core[138].

Therefore, and in summary, we may say that the confrontation between the monist and dualist models remains very much on the agenda and far from obtaining any solution able to quell this exacerbated dialogue. Nevertheless, while still lacking any definitive solutions, we do have the recent legislative reforms contributing to rendering these positions still more extreme and, especially, to clearly conveying the fragilities, the deficiencies and the multiple and complex contradictions of a dominion that, in our opinion, appears irrelevant and totally outdated.

5.3 The Recent Legislative Reforms

Prior to taking up any definitive position on this issue, we should analyse, even if only briefly, legislation enacted in 2007, Decree Law no. 280/2007 of 7 August, and draft legislation, the draft General Regime Law for Public Dominion Properties which, despite receiving approval by the Council of Ministers in 2008, would end up never getting published and correspondingly never entering into effect given that, at the time of writing, September 2009, we are approaching the end of the legislative session.

Let us advance in stages. We therefore take up the 2007 legislation as the legal regime applicable to the public dominion and the private dominion of the state which displayed a lack of unity and great complexity due to the successive, obscure and contradictory juridical stipulations applicable with the legislator thus approving a new regime susceptible to covering all the dominion properties of the national State, the Autonomous Regions and the local government authorities – the aforementioned Decree Law no. 280/2007, of 7 August. Indeed, as the law states in its own respective preamble, the need to substitute the vast and dispersed legislation in effect, seeking to meet the understandable concerns over simplifying and systematising the law to enable a more accessible and transparent regime for public real estate properties. Accordingly, Decree Law article 128 determined the revocation of an impressive and almost endless list of legal provisions. This list spans the following:

a) Royal Charter of 13 July 1863;
b) Decree-Law no. 23 465, of 18 January l934;
c) Decree-Law no. 24 489 of 13 September 1934;
d) Decree-Law no. 25 547, of 27 June 1935;
e) Decree-Law no. 31 156 of 3 March 1941;
f) Decree-Law no. 34 050 of 21 October 1944;
g) Decree-Law no. 34 565, of 2 May 1945;
h) Law no. 2 030 of 22 June 1948;
i) Decree-Law no. 45 133 of 13 July 1963;
j) Decree-Law no. 97/70 of 13 March;
k) Decree-Law no. 27/79 of 22 February;
l) Decree-Law no. 507-A /79 of 24 December;
m) Council of Ministers' Resolution no. 20/83 of 31 January;
n) Decree-Law no. 309/89 of 19 September;

dominion property legal regimes, in particular for archaeological and cultural assets. Cf. J. L. Bonifácio Ramos, *O Achamento de Bens Culturais Subaquáticos*, Lisbon, 2008, pp. 567 and fol..

[134] Cf. Ana Raquel Moniz, "Contrato Público e Domínio Público" in *Estudos de Contratação Pública*, Vol. I, coord. by Pedro Gonçalves, Coimbra, 2008, pp. 831 and fol..

[135] After understanding dominial concession either as an instrument for fostering dynamic practices in the public domain or as a means of extracting profitability from the dominion properties, Ana Raquel Moniz fails to adapt the model to the demands and particularities of the different dominial regimes studied. Cf. "*Contrato*..." in op. cit., pp. 834 and fol..

[136] Thus, she admits cases of absence of any public property relationship between the Administration and the dominial assets, accepting, at least in cases of military public domain and cultural public domain, that the ownership of those dominion properties may pertain to private individuals. Cf. "*Contrato*..." in op. cit., pp. 838-9.

[137] Cf. Rui Guerra da Fonseca, *Comentário à Constituição Portuguesa*, coord. by Paulo Otero, Vol. II, Coimbra. 2008. p. 301.

[138] We believe that the necessary demonstration has not been made. Cf. Rui Guerra da Fonseca, *Comentário*... op. cit., pp. 301 and fol..

o) Decree-Law no. 228/95 of 11 September;
p) Decree-Law no. 115/2000, of 4 July;
q) Regulatory Order no. 27-A/2001, of 31 May;
r) Decree-Law no. 199/2004, of 18 August (articles 1 to 6).

In addition to this broad swathe of revocations, the law insists on enshrining the principles of inalienability, indispensability and non-seizability[139]. This seems to stem from the idea that it suffices to safeguard such principles by means of legislation. In addition to the sui generis provisions, in an attempt to protect those principles, the Decree-Law states that the ownership of immovable properties belongs to the State, the Autonomous Regions and the local authorities that thereby hold, within the scope of such duties, the powers of inspection, administration, supervision and defence in accordance with the aforementioned law and other applicable legislation[140]. In this way, this prescribes minimum rules[141] over common usage, private utilisation and exploitation of the dominion, thus seeming to completely ignore the intense doctrinal debate on the methods of usage and exploitation of dominion properties [142].

In addition to these exiguous and deficient provisions on public dominion properties, the diploma contains certain rules applicable to the State's private dominion, particularly as regards the acquisition, whether onerous or free of charge, of rental and financial leasing of rights to building, leasing, sale or exchange, to property registration and inventorying[143]. This aspect furthermore highlights how the facts subject to registration relating to State-owned real estate, under both public and private dominion, must be registered in favour of the Portuguese State under the terms of Article 45. Consequently, in order to bring about this aim, the Directorate-General of the Treasury and Finances had already requested the drafting of provisional lists that, after the expiry of the period for lodging complaints, would be converted into definitive lists under the terms of the aforementioned Decree-Law Articles 46 and 47. Indeed, there is something surprising and subtle about this system which, at first sight, seems appropriate. In fact, the definitive lists would constitute, according to Article 48, sufficient grounds for the purposes of registry and registration of properties in favour of the State and public institutes.

In summary, in a misleading way, this legislation allows for, in the State's private dominion, that the simple public administrative act of listing of real estate properties represents sufficient cause, in its own right, to justify a property registration in favour of the State or another public entity, of a right in rem to the usage of that asset which did not formerly belong to the State or to another public entity. This becomes all the more surprising as this does not encounter any correspondence or similarity in the legal regime of acquisition through registration, as occurs under the strict terms of Articles 291 of the Civil Code and 17(2) of the Land Registration Code. In effect, Article 48 of the above-mentioned Decree-Law enshrines something quite "original". Thus, if there are no factual, substantiating grounds, in particular the purchase of a property by a bona fide third party, this enables the Administration to approve a simple list of real estate properties and invoke the corresponding ownership so that, dating from the corresponding publication, albeit provisional, it then becomes feasible to proceed with the registration of the property in favour of the State even when under other ownership. This is a highly original "expedient" to say the least! In our opinion, this represents a crude mechanism that allows for the confiscation of any real estate properties in the ownership of private individuals, avoiding any recourse to the demanding and costly procedure of expropriation for public usage.

Therefore, the aforementioned Article 48, in addition to constituting a genuine means of confiscating property assets, represents a clear violation of the principle of private property, and therefore prefigures material unconstitutionality given its violation of Article 62 of the Constitution of the Portuguese Republic, which not only guarantees the right to private property and its transmission, in life or by death, but also determines that requisitioning and expropriation for public usage can only be carried out on the basis of the law and upon payment of due compensation. In fact, the "formula" in Article 48 establishes a new exception that thereby subverts the constitutional protection of the right to private property ownership with all the inherent consequences.

[139] Cf. articles 18, 19 and 20 of the Decree-Law.
[140] Cf. article 15.
[141] As for common use, this distinguishes between ordinary common use and extraordinary common use, as for private use, this establishes that private individuals can acquire dominion rights by licence or concession and as for exploitation this admits the transfer of management and exploitation powers over dominion assets, in a total of eight of the Decree-Law articles. Cf. articles 25 to 30.
[142] In fact, even Ana Raquel Moniz, who is not very critical about the solutions included in the legal diploma, recognises that such contractual modalities are not the only ones, but only the most relevant, raising several other questions to which there is no answer, notably the rights and duties attached to dominion concessions. For this reason, she stresses the need to approve, at a later date, a general regime to regulate public law commercial instruments. Cf. "*Contrato...*" in op. cit., pp. 839 and fol..
[143] *Cf. Articles 31 and fol..*

When considering the goods and possessions that remained the property of the king and his successors, thus, his personal patrimony, whose ownership was respected following the declaration of the Republic, we find that, even after the advent of stable democracy, the ratification of the Convention of Human Rights and European Union membership, in 2007 the Portuguese state decided to embark on the surreptitious confiscation of goods whose ownership had previously been respected both by the revolutionary exaggerations of Liberalism as well as by the instability following the coup d'état of the Republic or by the nationalising follies of the PREC (post-revolution governing council).

We may only emphasise that the confiscation herein denounced, took place, not in the 19th or 20th centuries but in 2007, already into the 21st century, would also seem to have been the most relevant desideratum of the Decree-Law here under analysis, at least as far as the private domain is concerned. Let us note the following: before publishing the Decree-Law itself, the Government approved Ministerial Order no. 647/2007, of 25th July, to authorise the "transfer" of several buildings, including a section of Quinta da Bemposta, which had been temporarily granted to the then Royal Veterinary School, later the Agronomy and Veterinary Institute, to the ownership of the state under the Institute of Financial Management and Infrastructures of Justice. And this circle is squared in the following terms: after Decree-Law 280/2007 came into force, on 8 September 2007, the Administration determined, on 19 September, by Ministerial Order no. 930/2007-SETF, the composition of the provisional list of goods in the State's private dominion. On consulting that provisional list, we find it includes the aforementioned private property of the former monarchs, which had been passed on to their respective heirs and which had never before been part of the public or private dominion of the State. In fact, we unsurprisingly encounter Quinta da Murteira and Quinta da Bemposta on the aforementioned list with the latter euphemistically designated as an "urban building previously allocated to the Faculty of Veterinary Medicine".

Should there be any doubt as to the nature of the "ingenious" confiscatory mechanism deployed by the aforementioned Decree-Law, we would stress that up until September 2007, when the decree-law came into effect, there was no registration of ownership in favour of the State or any other public entity for the Quinta da Murtosa and Quinta da Bemposta plots in question. Without the "expedient" applied by that diploma, in particular the aforementioned precept, coupled with the convenient publication of property lists, there would be no "justification" for the State to claim ownership of those properties. Therefore, one may conclude as to how useful the new regime of State private dominion has been for State interests. In effect, the terms of Decree-Law 280/2007 "enabled" something that had hitherto not been possible — the registration of state ownership of properties never before either owned by the State or registered in its name. The goods had never been acquired, expropriated or nationalised by the State or any other public entity. Therefore, the ingenious and surreptitious "expedient" allowed the State to "acquire" something that it had never owned and still belonged to someone else.

In the same framework, as regards the intensity of royal confiscation, the State, when faced with legitimate complaints about the aforementioned provisional list of assets, simply hastened to publish, on 8 January 2008, a definitive list of the private property assets of the Portuguese State under the terms of Notice 2451/2008, Official Gazette, II Series, of 31 January. There was, therefore, a need to consummate the property confiscation as soon as was feasible.

It is therefore important to emphasise how any registration completed according to these processes may constitute opposition by the holder of the right against the owner and grantor of the right constituting, due to the factuality described, a clear inversion of the title of ownership. Such an inversion of the title naturally legitimises competent appeals claims, filed by the legitimate owners against the State or against any entity the State may eventually alienate those assets to.

In summary, we have a vague and moonlit Decree-Law as far as public domain is concerned and, simultaneously, an advantageous confiscatory "expedient" as regards the private dominion. Moreover, should there remain any doubts as to the shortcomings of that diploma, we may underline that it was the Government itself that, in October 2008, i.e., just over one year on from Decree-Law no. 280/2007 entering into effect, decided to promote the public presentation of another Draft Law on the Public Dominion Properties Regime with the set purpose of repealing the useless and vague section of the 2007 diploma. Effectively, the same Government that had approved the dominion regime of 2007 was, one year later, forced to propose a new legal regime that sought to revoke a substantial proportion of that diploma, more precisely, chapter II of Decree Law no. 280/2007 of 7 August.

Study of the governmental proposal also reveals some interesting and surprising "legislative solutions". Let us see! The Proposal starts off, immediately in the Explanatory Memorandum, by stating: "Hitherto, there has been no law in the national legal system which, considering the public dominion as a central institute of administrative law, provides it with global and integrated legislative consideration (...). The absence of such a statute is a cause of increased complexity for the interpreter, who is hence forced to oscillate between deploying the rules applicable to specific types of dominion property and invoking doctrinally established principles, with certain dangers to legal security and hindering the delineation of an autonomous legal-administrative institute, endowed with its own regime".

One reads, rereads and still cannot believe! Did the 2007 diploma not pursue such a desideratum? In truth, if we look at the preamble of Decree-Law no. 280/2007, we immediately encounter the stated need to promote "(...)

"(...) for the first time, the general and common provisions applicable to immovable property in the public dominion of the State, Autonomous Regions and local authorities (...)". Does the 2008 legislator simply seek to ignore the vacuity of the 2007 regime, "pretending" that it never existed? This would indeed be an enormous mystification! Only any such "pretence" cannot subsist in the proposed regime. I am aware of the need to stipulate, as seems obvious, a repeal clause declaring, expressis verbis, the immediate repeal of Chapter II of Decree-Law 280/2007[144] when the new legal regime comes into effect.

The Draft Law is replete with other legal curiosities. We shall only indicate those which in our opinion, seem the most extraordinary in relation to those matters that have drawn our attention here, in particular the non-alienability of ownership and changes to ownership. Let us therefore go through the perplexities raised with regard to only these two issues. However, this choice in no way means we are in agreement with the remainder of the text, which is furthermore both very unfortunate and extremely contradictory.

In conclusion, before indicating the legal prescriptions included in the Draft Law that correspondingly gain our attention, we should mention the extraordinary proclamation made by a government official at its public presentation, in declaring the public dominion could not only strive for the preservation of property but must also constitute "an instrument in the service of economic policy and that must therefore be adapted to the demands of the market[145]. The radical and absolute contradiction between the aims set out by the government official and the immovable and dogmatic constraints of the explanation, which still remains entangled in the dirigiste and conservative lines of dominiality, would seem clear. However, this must also acknowledge that, as regards the regime of dominion property exploitation, autonomy is attributed to the concession contract and even acknowledging how the concessionaire enjoys a right in rem to buildings, facilities and fixed installations, built for exercising the activity provided for under the concession.

While the contradictions extend through comparing the statements of the government official and the explanatory memorandum, we need only to look at the articles to account for the countless perplexities that any interpretation will raise should the Law enter into force. For example, the auspices of Article 7, with the heading "inalienability", suffice to convey how that principle, deemed a cornerstone for certain advocates of dominion, immediately allows for a clear exception. In fact, Article 7, which prescribes that public domain properties fall beyond the scope of private legal commerce and cannot be the object of transfer by private law instruments, provides for the scope of transfer by instruments of private law, as an exception, under Article 5(3). Moreover, should the exception in Article 5(3) seek to restrict this to the verification of successive cumulative conditions, within the terms of a military public decree, we never know what successive interpretations may be capable of proposing or whether, prior to the definitive version, the Government will not yet change these cumulative conditions. If so, a simple pretext, invoking "sacred" reasons of public interest, would be enough to justify non-subjection to the inalienability of ownership under the terms of Article 5, paragraph 3, sub-paragraph c).

In addition to the principle of inalienability, coupled with an exception or several exceptions, we must also underline the assignment and the correlating removal from the dominion, which allows, as is known, the reversion of dominion goods[146]. Once again, dominion inalienability is clearly called into question and even risks entering the realm of fiction. In addition to reversion, there is another provision, Article 21, which provides for the abolition of the integration into the public domain whenever the property loses its characteristics required by the legal classification or is withdrawn, determining the correlating integration into the holder's *private dominion*. In addition to this precept, there are others, specifically articles 22 and following, which also contribute to establishing exceptions to an apparent dominion of inalienability, which the legislator strives to denominate as a principle and to which certain doctrine is still very much attached. Moreover, this does not even seem to require any elaborate doctrinal theorising on removing dominion to demonstrate how this undermines inalienability. Hence, paragraph b) of no. 5 of article 24 cannot be clearer in its prescription that the act of removal should feature as the effect produced in conjunction with the subsequent integration into the *private dominion* of the owner.

[144] *Cf. Article 96 of the Draft Law*.
[145] Cf. the intervention of the Secretary of State for Treasury and Finance in the presentation the draft of the Proposed Law on the General Regime of Public Domain Assets, which took place in Lisbon, on 27 October 2008.
[146] Cf. articles 13 and 18 of the Draft Law.

The suffocation of inalienability does not end here. We may consider the mutations in dominion prescribed within to serve as the Draft Legislation represents a lost opportunity given that this is inconsequential to the purposes set out and fails to substantiate the structural principles therein announced. Should there be any doubt, study the regimes for private usage and exploitation of dominion properties[147] where there is a symptomatic contradiction of purposes and failure to achieve objectives. Effectively, this does not only stipulate that the private usage concession holders gain powers of construction and transformation over the dominion[148] but also accepts ownership of the real rights on the constructions carried out in the public dominion, with such construction eligible for *inter vivos* or *mortis causa* transmission[149] as is indeed recognised *expressis verbis* that the dominion properties may be the object of real rights held by other entities beyond the State, the Autonomous Regions and the local authorities[150].

As regards the exploitation of goods in the public dominion, this stipulates that the concessioner, the public entity, holds the obligation to deliver the dominion assets subject to exploitation, the permission for the concessionaire to benefit from the public dominion goods covered by the concession without infringing on the other rights and obligations handed down whether by law or by contract[151]. Furthermore, this also rendered great complexity to the powers of the concessionaire exploiting goods in the public dominion, specifically as regards the powers for authorising their common usage, licensing and granting the private usage of dominion goods while only limited by the impossibility of the concessionaire being able to themselves authorise the removal or transfer of dominion[152]. However, this bears little relevance in terms of protecting dominion properties. The public authorities would simply have to authorise this. We may be quite certain that should such legislation come into effect, this would be very easy! In fact, the concessionaire is responsible for taking the initiative in expropriation proceedings for assets or the rights necessary to exploiting the goods in the public dominion, acting, we should emphasise, *on behalf of the concession granter*[153]. Hence, the concessionaire acts in the name of the State, the Autonomous Regions or the local authorities. This all very clearly reiterates that which stems from an acquired fact: the advanced bankruptcy of dominion inalienability.

6. Conclusions

Due to the developments in dominion, we consider that we have underpinned the view that this institution derives from 16th century French law, specifically the *Ordonnance de Moulins* that converted prescriptions on the inalienability of the Crown's dominion into a principle of a constitutional nature. However, this does not imply that this principle did not contain exceptions and with the French Revolution subsequently calling into question this inalienable status given that the Nation might make recourse to dominion properties in keeping with its status as the true holder of ownership

At a later data, this scope of transmission became limited to the circumstances of the dominion properties under allocation to public services and so that not even the rise and fall of the monist dominion model, which so greatly influenced French law, made any contribution towards the principle of dominion inalienability. Hence, we may grasp the increasingly severe criticism of dominion in keeping with the assumption they constitute real rights, of a private nature, over public domain assets.

As regards Portuguese Law, despite the natural adaptation of French Administrative Law during the 19th and 20th centuries, it also remains true that this incorporated transformations so as to shape the acceptance of private usage and the exploitation of dominion properties, conveying how the advent of contemporary times finally ended up reaching the scope of dominion. However, Decree-Law No 280/2007 and the 2008 Draft Law represented a severe blow to this evolution as they sought to prescribe veritable enormities that can only ever contribute to deepening the crisis in dominion.

In addition to the unfortunate public property regime incorporated into Decree-Law no. 280/2007 and the 2008 Draft Law, we encounter a "formula" for the state confiscation of privately owned assets. For such reason, these highly unusual dominion solutions reinforce, and to a great extent, the arguments of those standing counter to dominion as a unitary regime for the usage of property in the public interest and therefore correspondingly cast an even deeper shadow over the usefulness of this legal regime, especially when also taking into account the deficiencies and contradictions of the alleged characteristics, as well as the shortcomings, of the principles of dominion.

[147] *Cf. Articles 31 and fol. of the Draft Law.*
[148] *Cf. Articles 47 and fol. of the Draft Law.*
[149] *Cf. Articles 67 and 68 and fol. of the Draft Law.*
[150] *Cf. Articles 70 and fol. of the Draft Law.*
[151] *Cf. Articles 57 and fol. of the Draft Law.*
[152] *Cf. Articles 58 and fol. of the Draft Law.*
[153] *Cf. Articles 60 and fol. of the Draft Law.*