Property and the Public Domain

José Luís Bonifácio Ramos
Professor at Faculty of Law
Lisbon

Abstract:

To a certain extent, the core objective of this current study is to demystify the equivalence between property and the public domain advocated, with a certain insistence, by one particular doctrinal approach. Correspondingly, this involves studying the evolution in domain and the diversity in the ways of capitalising on public domain assets within the scope of grasping the scope of domanial ownership and, in compliance, the differences as regards the right to property.

Keywords: *Dominium;* Public Domain; Property; Public Goods.

Summary: 1. General Considerations; 2. The Undetermined Nature of *Dominium*; 3. Domanial Plurality; 4. Public Property; 5. Capitalising on Public or Domanial Goods; 6. Domanial Usage Rights; 7. Domanial Ownership; 8. Conclusions.

1 General Considerations

This study serves to highlight the importance of domain related issues in general and usages of the public domain in particular. In effect, the usage of the public domain has elicited various controversies that require untangling. Furthermore, in our opinion, we should also appreciate the different means of benefitting from or otherwise using the public goods stemming from domanial assets. This comes in addition to distinguishing among the different juridical terms, with their respective distinctive meanings that are, on occasion, subject to confusion or other undifferentiated usage. This scientific article accordingly seeks, even if only briefly, to distinguish between ownership, property and appropriation.

2. The Indeterminacy of Dominium

The concept of *dominium* has been subject to various perspectives as regards its origins and meaning. Specifically, this refers to the idea, somewhat forced, of making the meaning of public domain correspond to the *dominium* featuring in some Roman law texts. And this even extends to identifying this with property. We are not of that opinion. We would not only prefer to be receptive to the scope of this term, without any pre-assumptions, but also seek to return to the sources and thereby extract conclusions. As would seem obvious, this never involves citing any doctrine that perceives a particular interpretation in order to therefore validate conclusions susceptible to integrating into a particular agenda or ideological orientation.

Standing out among the Romanist sources, there is the centrality of the dichotomy between *actiones in personam* and *actiones in rem* as well as a series of classifications attributed to material objects. Furthermore, according to Gaio, the central classification was designed to pit *res extra patrimonium divini iuris* against *res extra patrimonium humani iuris*[1]. Hence, from this point onwards, this highlights the diverse and important subclasses. Correspondingly, while the first category divides into religious and saintly objects, the second identified the following subcategories: common, public and communal objects. Nevertheless, it would be ingenuous to assume that these distinctive features, as a direct consequence, provide for any juridical appropriation of material objects with some identity and unity.

We inclusively encounter how these common objects, *res communes omnium*, despite their respective denomination and consistency indicating their insusceptibility to individual appropriation, some authors signpost their utilisation by the community[2] and even a correlative individual usage of small parcels[3].

[1] "*Summa itaque rerum divisio in duos articulos diducitur: nam aliae sunt divini iuris, aliae humani*". Cf. Gaio, *Institutiones*, II, 2.

[2] BONFANTE, Pietro, *Corso di Diritto Romano*, Vol. II, Rome, 1926, p. 43.

[3] Vittorio Scialoja highlights the scope for some common goods, such as the sea, being open to usage by individuals, on an individual basis, for sailing, fishing and undertaking other compatible activities. Cf. *Teoria della Proprietà nel Diritto Romano*, Vol. I, Rome, 1933, p. 127.

Furthermore, as regards public goods, whether *res publica* or *rei publicae*, we also do not perceive any generic inappropriateness to the contrary of certain pre-assumptions or aprioristic idea that above all resonated in the 19th century[4]. We do not even identify ownership by the state[5] or any *populus* over a set of goods[6]. Instead, we encounter a plurality of goods without any unity corresponding to an applicable juridical regime[7]. Furthermore, the reference to *populus* neither indicated singular ownership as, in the Roman epoch, it was still to be ascertained that such might be configured as an autonomous and genuine juridical subject[8].

Logically, the enthusiasm of the 19th century administrators falls short, where not being fantasist, with certain echoes for later doctrines, especially in the 20th century with the efforts to ennoble and rewrite that which is found in the Roman sources as regards the issues around appropriating public goods[9]. Indeed, out of the desire to construct that which did not extend beyond a radical 19th century chimera that sought to legitimate, according to some ancestral past, certain suppositions or biased readings clearly motivated by the objective of strengthening the autonomy of administrative law. Still furthermore, in order to achieve this desideratum, some authors, including Otto Mayer[10], even dedicated themselves to pillaging and attempting to transform the privatistic institutes[11].

Should this happen in the universe of material objects, especially for public goods, this also applies, as would only be expected, to *dominium* itself. Hence, some authors attribute private property to the latter as the very nature of public ownership[12]. A position that we disagree with. In effect, this lacks the composition necessary to extracting such inferences. In practice, as Max Kaser wisely demonstrates, powers over goods, throughout all of Roman law, display a clear and rudimentary incipience[13]. Hence, they cannot serve to underpin any right to property or any other real right of benefit[14]. Indeed, while the Romanist regulations emphasise the *res*, it is no less true that the equivalence of this term with *jus* (legal right) does not seek to attribute the latter with a differentiated meaning[15]. What is more, this also happens in the case of *dominium*, connotated with the same fate to *res.* Hence, within this same scope, as regards *dominium*, there is no appropriate configuration that provides for any correspondence between the object and a determined subject[16]. Logically, this then also maintains the deduction that idea of *iura in rem* was not then contemporary and only arises at a far later time[17].

---

[4] Fernández de Bujan seeks to dispel the ideas, theoretically proposed by the emerging administrators in the 19th century. Cf. *Derecho Público Romano*, 7th ed., Madrid, 1997, pp. 215 and fol..

[5] WÄPPAUS, Heinrich, *Zur Lehre von dem Rechtsverkehr entzogenen Sachen nach römischen und heutigem Recht*, Göttingen, 1867, pp. 39-40.

[6] KAUFMANN, Franz, *Die Stellung des Privatrechtssubjekts zur res extra commercium des corpus juris civilis: Ein Beitrag zur Lehre der Extracommercialität*., Bonn, 1887, p. 40.

[7] ZOZ, Maria Gabriella, R*iflessioni in tema di Res Publicae*, Turin, 1999, p. 70.

[8] KAUFMANN, Franz, *Die Stellung*…op. cit., p. 40.

[9] Fernández de Buján highlights the need to avoid the errors made by the 19th century administrators in the sense of seeking to redefine the problematic issues around public goods to the detriment of the diffused and imprecise *res publicae* in Roman law. Cf. *Derecho Público Romano*, op. cit, pp. 215 and fol..

[10] MAYER, Otto, *Le Droit Administratif Alemand*, Vol. III, Paris, 1905, pp. 11 and fol..

[11] Terms applied by Franz Merli in his criticism of the monist model of Otto Mayer and his followers. Cf. *Öffentliche*…op. cit., pp. 33-4.

[12] MONIZ, Ana Raquel, *O Domínio Público*, Coimbra, 2005, pp. 29-30.

[13] KASER, Max, *Römisches Eigentum und Besitz im älteren römischen Recht*, Weimar, 1943, pp. 6 and fol..

[14] KASER, Max, *Römisches*…op. cit., pp. 7-8.

[15] After indicating diverse passages in the Institutes where Gaio deploys the term *jus*, Michel Villey rejects the idea that this term may lead to a right before comparing this to *res*, in a first moment, and, subsequently, in seeking to demonstrate a broad synonym between *jus* and material goods. Cf. "Du Sens de l' Expression Jus in Re en Droit Romain Classique, au Droit Moderne" in *Mélanges Ferdinand de Vischer*, Vol. II, Brussels, 1949, pp. 418 and fol.. Subsequently, in another study, Michel Villey underpins the expression *jus in aliqua re*, included in Digest, does not mean power over a good nor does the term *jus* take on any subjective facet. To the greatest extent, this represents a fraction, a division of things, never a benefit or a power over goods. "La Genèse du Droit Subjectif Chez Guillaume d' Occam" in *Archives de Philosophie du Droit*, no. 9, 1964, pp. 106-7.

[16] Paolo Grossi dismisses the idea that classical *dominium* means a right over an object as the term stands out prominently in the statute of *pater famílias*. Cf. *Le Situazioni Reali nell' Esperienza Giuridica Medievale*, Pádua, 1968, pp. 3 and fol.. Max Kaser highlights the perceptions of liberty externalised by the pater dominium and devaluing any interpretation of a subjective nature. Cf. *Römisches Recht als Gemeinschafttsordnung*, Tübingen, 1939, pp. 14 and fol.. Furthermore, Michel Villey strongly emphasises the idea that the term *dominium* does not equate to the right to property, the right to credit or any other subjective right. Cf. La Genèse…" in op. cit., p. 106.

[17] Both the terms *ius in re* and *iura in re aliena* are not Roman expressions but rather derive from the dogmatic elaborations of medieval interpreters of Roman texts. BUJÁN, António Fernández de, *Derecho Privado Romano*, 3ª ed., Madrid, 2010, p. 379. In a similar sense, there is ALBANESE, Bernardo, "Appunti su Alcuni Aspetti della Storia del Diritto

In summary, the careful and attentive reading of Romanist sources should not allow for any contamination by aprioristic ideas, without any foundations in the sources, edited at a far later date, within a framework of a blind and obsessive obedience to a theory lacking any correspondence to reality. Hence, there is the need not only to avoid rewriting history but also to reject interpretations of the past according to whatever ideas or ideologies are in vogue in a particular historical period. All because posteriority sought to legitimate its existence by drawing on the past even when any careful analysis of the sources undermined or even lacked any of the diverse theories presented with proclamatory and sometimes fairly militant bias.

3. Domanial Plurality

Following this indeterminate Roman stance, we then witness, above all throughout the Middle Ages, diverse meanings and plural attributions to the domanial category. We correspondingly face not one category, unified to a greater or lesser extent, but rather various types or species of domanial goods. In summary, the kind of domanial plurality that naturally prevents us from alluding to a single domain but rather insisting on various domains. In turn, this simultaneously and directly competes with the different ways of utilising and capitalising on domanial goods.

In effect, especially from the 12th century onwards, we may note a series of densifications of the concept of *ius* and, therefore, the diverse modalities and plurality of domanial categories. Thus, following the genesis of *ius*[18], the glossators highlighted the corresponding object, hence, the material objective and also the *actio* as a procedure[19]. Furthermore, Acúrsio solidified the notion of *ius in re* through contrasting this with non rights in rem but while similarly identifying other rights over objects, specifically *ius ad rem*[20]. Subsequently, Luís de Molina set out to demonstrate that *ius in re* constitutes the right focused on an object, where the *ius* of the object was bound over to the extent that *ius ad rem* provides the right as regards a particular object whose *ius* is not bound over[21]. Consequently, as *ius ad rem* does not always precede *ius in re*, should somebody lose possession but continue to exercise the right of ownership to which possession corresponds, then there exists *ius ad rem* as regards the power to recover possession[22].

Hence, while *ius in re* represented the direct power over the object, *jus ad rem* rather denoted a hybrid meaning: at best, a *tertium genus* between a right in rem and the credit laws[23]. Or even a juridical expectation, a right in rem under formation as, prior to the delivery of an object, the investiture, there was another moment, an investiture of a symbolic nature designed to attribute *jus ad rem*[24]. Therefore, this *ius ad rem* would be in some way a different, as more intense, credit right and, simultaneously, leveraging the objective of later bestowing an object and thereby enabling a subject to become, at a later phase, the holder of a *ius in re*.

This diversity as regards *ius*, designed to take advantage of *res*, promoted or, at the least, adapted to a plurality of meanings of the terms *usus*, *dominium* and *proprietas*. Therefore, *usus* contained a broad meaning in order to correspond to any action that a particular individual may engage in as regards an external object[25]. To this extent, *dominium* spanned the usage or the faculty to use the object whenever this is not subject to prohibition under natural law[26]. This contrasted sharply with the meaning attributed to *proprietas* as the exercising of ownership. Indeed, Acúrsio highlighted that *jus utendi* enabled the utilisation of goods placed at the availability of individual without any corresponding exercising of ownership[27]. In these terms, *dominium* differs from *proprietas* as demonstrated by the study of usufruct in applying the term *dominium* to characterise a lesser right in rem[28].

Soggettivo" in *Scritti in Onore di Arturo Carlo Jemolo*, Vol. IV, Milão, 1963, pp. 1 and fol.; SCHULZ, Fritz, *Classical Roman Law*, Oxford, 1951, p. 321.

[18] Michel Villey highlights the contribution made by Ockam towards the genesis and deepening of subjective law. Cf. "La Génese…" in op. cit., pp. 111 and fol.. However, Knut Nörr, while commenting in favour of Villey, defends that the origins of *ius* predate Ockam, however, without identifying whoever was responsible for this fundamental qualitative leap. Cf. "Zur Frage des subjektiven Rechts in der mittelalterlichen Rechtswissenschaft" in *Festschrift für Hermann Lange zum 70. Geburstag am 24. Januar 1992*, Estugarda, 1992, pp. 199 and fol..

[19] Within this perspective, Ernst Landsberg emphasises how the glossators looked down on *actio* in keeping with how this did not always correspond to a right as a crucial point of support. Cf. *Die Glosse des Accursius und ihre Lehre vom Eighentum,* Leipzig, 1883, pp. 82 and fol..

[20] MEIJERS, Éduard "Le Soi-Disant "Jus Ad Rem" in *Études d' Histoire du Droit*, Vol. IV, Leiden, 1966, pp. 176-7.

[21] MOLINA, Luís de, *De Justitia et jure opera omnia*, Venice, 1614, Portuguese trad., treatise II, dispute 2.

[22] MOLINA, Luís de, *De Justitia*…op. cit., treatise II, dispute 2.

[23] RIGAUD, Louis, *Le Droit Réel*, Toulouse, 1912, p. 65.

[24] COING, Helmut, *Europäisches Privatrecht*, Vol. I, Munich, 1985, pp. 228-9.

[25] OCKAM, Guilherme d', *Opus nonaginta dierum et dialogi*, 2nd ed., Manchester, 1963, Cap. II.

[26] OCKAM, Guilherme d', *Opus*…op. cit., Cap. II.

[27] ACÚRSIO, Francisco, *Corpus Iustinianei Digestum vetus*, Lyon, 1604, D, 59, 16, 25.

[28] ACÚRSIO, Francisco, *Corpus*…op. cit., D. 34, 5, 3.

Hence, when seeking to reference property, this perceives such as requiring more than the application of the singular *dominium* and preferring instead the usage of *dominium directum* or *dominium plenum* or, as a counterpoint, *dominium utile*[29]. Adopting a similar position, Grossi, in studying this historical period reports how *dominium* spans an enormous capacity for incorporation given this contemplates the feeling of freedom to act and naturally the taking advantage of material objects even when not always corresponding to an ownership right[30]. Thus, in efforts to better differentiate between *dominium directum* and *dominium utile*, Grossi recalls the importance of tenancies, superficiaries or long term leasing as the antinomy of owning the land, *dominus fundi*[31].

Nevertheless, domanial plurality reaches far further. In fact, this does not result from adding *dominium directum* or *dominium plenum* as a counterbalance to *dominium utile*. This requires consideration of at least *dominium eminens* and the sovereign domain. In effect, feudal law extended recognition to a larger or more eminent domain, *dominus eminens*, of the monarch over the kingdom's territory. In fair fact, given the range of possessions, stemming from the diverse domains, there was acceptance of a larger domain, *dominus eminens*, that embraced all the others and simultaneously recognised and confirmed the other domains through the issuing of a concession.

This problematic issue emerged in the preparatory works for the Diet of Roncaglia in terms of the meaning and scope of the term *dominus mundi*. Accordingly, there was the renowned controversy among the thinkers in the Bologna School. Hence, while Martinus proposed a coincidence between *dominus* and property, Bulgarus rejected this understanding and establishing a correspondence with *dominium secundum proprietate* and *dominium secundum imperium* on the understanding that the Emperor would only assume ownership over the imperial domain[32]. Bulgarus, in addition to prevailing in Roncaglia, then saw the majority of jurists adopt his position on the grounds that there was the maintenance of domanial plurality while safeguarding the idea that the emperor could not be the owner of everything[33].

This same orientation is clear in at least the writings of Odofredo, Bártolo and Zasius. Hence, Odofredo, after studying *dominus eminens*, reaffirms that the emperor holds *dominus* over particular goods, while acting as protector, taking on *jurisdictio*, but not ownership over others[34]. In a similar vein, Bártolo alludes to the higher jurisdiction of the emperor without this ever overlapping with the ownership over a particular piece of territory[35]. This was then seconded by Zasius, who maintained that the inherent level to *dominus eminens* is autonomous and distinct from the ownership of goods[36].

At a later date, in addition to the term *dominius eminens*, there appeared a broader power of jurisdiction typified as *superanus*[37]. Thus, we here encounter the presence of a territorial sovereign or a domanial sovereignty that may correspond to unification with ownership of goods or, at a later stage, a separation of the two, clearly mutually different, ownership regimes. Hence, while in the time of Charlemagne, the property of the King was not distinguished from the property of the Crown, thus establishing a single domain, a single ownership structure[38], subsequently endowed with the sovereignty domain disconnected from the ownership of goods. For example, this came to the fore during the reign of Philip V, the Tall, in 1318, in the Pontoise *Ordonnance*. In fact, this stipulates the demand to protect the property and estate of the Crown in contrast to a generic alienability of other goods[39]. There later comes the reputed densification of this position in the writings of Bodin, who maintained that sovereign power should not be confused with possession[40], and of Loyseau, who concluded that sovereignty had starkly autonomised the scope of domain[41].

[29] Furthermore, the dichotomy between *dominium directum* and *dominium utile*, present in the texts by Acúrcio, already arose in Roman law as demonstrated by Ernst Landsberg, *Die Glosse*… op. cit., p. 96.

[30] Cf. Paolo Grossi, "Usus Facti…" in op. cit, p. 310.

[31] GROSSI, Paolo, *Le Situazioni*…op. cit., pp. 107 and fol..

[32] Cf. *Monumenta Germania Historica*, Vol. 18, Hanover, 1863, p. 607.

[33] This is duly highlighted by Ernst Landberg in recognising how the bulk of jurists took up the opinion of Bulgarus and correspondingly rejecting that of Martinus. Cf. *Die Glosse*…op. cit., p. 93.

[34] ODOFREDO, Denari, *Lectura super Digesti veteri*, Lyon, 1550, com 5.

[35] SASSOFERRATO, Bártolo, In Primam, op. cit., VI, I, 1.

[36] ZASIUS, Ulrichs, *Operum Omnium,* Vol. I, Frankfurt, 1590*, p. 6.*

[37] On the appearance and evolution of the term *superanus*, see Marcel David, *La Souveraineté du Peuple,* Paris, 1966, pp. 20-1.

[38] J. HUET-GUYARD highlights the appropriation by the French kings, especially Charlemagne, of that understood as *res publicae*. Cf. *La Distinction du Domaine Public et du Domaine Privé*, Paris, 1939, p. 17.

[39] PLANCHE, Lefèvre de la, *Traité du Domaine*, Vol. III; Paris, 1765, pp. 363-4.

[40] BODIN, Jean, *Les Six Livres de la Republique*, Paris, 1576, Book I, VIII.

[41] LOYSEAU, Charles, *Traité des Seigneuries*…pp. 6 and fol.

5. Public Property

While domanial plurality was a product of the Middle and Modern Ages, we also need to signpost a subsequent effort to unify the domain. This took place in the mid-19th century within the framework of densifying an idea around a program aiming to boost the autonomy of administrative law and, correspondingly, the self-sufficiency of public law. Consequently, this perceived administrative law as a self-sufficient branch of law capable of regulating all pertinent aspects of the public domain. Therefore, in accordance with these ideas, a monist model was put forward and with the objective of rejecting any and all contributions from private law.

Furthermore, as regards the ownership of public goods or domanial goods, we may note how the densified public property theory firstly took into account the issues around the ownership of rivers and watercourses. To this end, Gesterding defended that rivers were the property of the state while other smaller watercourses were the private property of the owners of the lands crossed by such streams[42]. This position was seconded by Funke who proposed that rivers were tendentially public property while streams and springs belong to the property owners of the respective lands[43].

The justification for public property, separate to the private property of the state, was also deepened by Schwab when studying the conflicts arising from the usage of rafts and motor boats on the navigable rivers of central Europe[44]. Schwab consolidated the idea of public property as essential and with the purpose of guaranteeing the usage of the rivers and ports by the set of individuals belonging to a particular community[45]. As regards another factual event, as regards the litigation ongoing around ownership of the walls of Basle, Eisele proposed the exclusion of private law on the grounds that public objects, the domanial goods, were specifically the subject of attention by administrative law[46]. Hence, this author not only dismissed the hypothesis of private ownership extending to the walls but also reaffirmed the unity of public ownership[47]. Indeed, as regards the division of the Basle canton, especially as regards its walls, Hirsekorn confirmed that, having been withdrawn from legal commerce, they became the property of the state or any other public entity and thus establishing non-commercial property[48].

Despite these significant contributions, it was Otto Mayer who undoubtedly made the greatest contribution to consolidating the theory of public property. In effect, after seeking to demonstrate the applicability of civil law within the scope of public goods, he triggered great uncertainty and ambiguity due to the renowned difficulties in conciliating distinct juridical rules, building a model capable of implementing the public interest in the management of public goods and thereby rejecting the privatistic canons to be able to raise a new paradigm for ownership and capitalising on public goods[49]. Subsequently, this scholar produced a list of public goods, domanial assets in accordance with their different modes of utilisation (common, privative and special) and in any case under the auspices of a single ownership structure, public property[50].

Nevertheless, the ideas of Mayer, in particular, and the monist model of public property, did not gain general acceptance as the studies by Maunz[51] and Merli[52] both concluded. Indeed, even while there have been some repercussions for the doctrine, these have been limited and have not extended in general terms to positive law. Hence, even while Woydt rejected the idea that German law never consecrated the theory of public property[53], it is worth noting that the author only references certain specific legal stipulations circumscribed to Hamburg[54]. Indeed, as Fleiner counselled, this theory attempted to hand down a homogeneous administrative law and, consequently, subtract public goods from the sphere of private law[55].

---

[42] GESTERDING, Franz, "Beiträge zum Wasserrecht. Enthaltend Resultate fortgesetzer Forschungen des Verfassers in der Lehre vom Eigentum" in *Archiv für die civilistische Praxis*, 3, 1820, pp. 65 and fol.

[43] FUNKE, Gottlob, "Beiträge zum Wasser-Recht" in Archiv für die civilistiche Praxis", 12, 1829, pp. 284 and fol..

[44] SCHWAB, Carl, "Die Conflicte der Wasserfahrt auf den Flüssen mit der Benützung der leztern zum Machinenbetriebe, erörtert nach den Grundsätzen des gemeinen in Deutschland gültigen Rechts. Ein Betrag zur Lehre vom Wasserrechte" in *Archiv für die civilistische Praxis*, 30, 1847, pp. 43 and fol..

[45] SCHWAB, Carl, "Die Conflicte…op. cit., p. 45.

[46] EISELE, Fridolin, *Über das Rechtverhaltniss der res Publicae in Publico usu nach römischen Recht,* Basel, 1873, p. 22.

[47] Cf. EISELE, Fridolin, *Über das Rechtverhaltniss*…op. cit., pp. 22-3.

[48] HIRSEKORN, Simon, *Über die Öffentlichen*…op. cit., p. 33

[49] MAYER, Otto, *Le Droit Administratif Allemand*, Vol. III, Paris, 1906, pp. 111 and fol..

[50] MAYER, Otto, *Le Droit Administratif*…op. cit., pp. 122 and fol..

[51] MAUNZ, Theodor, *Hauptprobleme des öffentlichen Sachenrechts*, Munich, 1933, p. 106.

[52] MERLI, Franz, *Öffentliche Nutzungsrechte und Gemeingebrauch*, Vienna, 1995, p. 31.

[53] WOYDT, Justus, *Das öffentliche Eigentum*, Munich, 1970, p. 138.

[54] WOYDT, Justus, *Das öffentliche*…op. cit., pp. 267-8.

[55] FLEINER, Fritz, *Institutionen des deutschen Verwaltungsrecht*, Tübingen, 1913, p. 287.

Thus, as Fleiner pointed out, this does not align with the Germanic reality, having obtained only occasional and ephemeral recognition in contrast to the widespread acceptance of the dualist model[56]. This opinion was reaffirmed by Forsthoff who described how the ideas of Mayer do not achieve correspondence with Germanic positive law and may furthermore cause serious restrictions as regards the competences of civil courts to judge and rule on the factual realities deriving from usage and benefit from various different public goods[57].

In turn, Merli, adopting a broader perspective even while remaining focused on German law, demonstrated how the theory of public property depended on an intolerable simplification of the juridical relationships between public goods and rested on a supposed new administrative law that would emerge out of an authentic pillaging and transformation of privatistic institutes[58]. In addition, this simplification stemmed from a deficient vision of private law, given the assumption of the material domain, unlimited and insusceptible to restrictions, the lack of consideration of ownership without usufruct and lesser rights in rem as well as refusing to incorporate, in all its completeness, the domanial regime or the benefitting from public goods[59]. Hence, these reflect the motives explaining the lack of enthusiasm on behalf of the doctrine dedicated to the study of the domanial regime[60].

6. Usage of Public Goods or Domanial Goods

The study of the public domain, even when restricted to a recyclable logic or only to ownership, cannot overlook the different means of capitalising or otherwise benefitting from public and domanial goods. In terms of the conclusions that may correspondingly be drawn, we are left compromised in keeping with the devaluation of any prism susceptible to validating or, at the least, consolidating any opinions formulated around this important theme. Hence, without any intention of being exhaustive, we shall primarily appreciate the tripartite classification. This distinguishes between common usage, special usage or privative utilisation and exceptional usage or domanial exploitation.

Goods made available according to common usage would therefore be available and accessible to a limited public who, in turn, may benefit from them without any prior authorisation or other restriction. Correspondingly, the individual is placed in a regime of liberty that enables the utilisation of these domanial goods in a strict position of equality without the need for any permission or individual licence for benefitting from a domanial good[61]. At the least, this requires a real interest or even the collective usage of domanial goods[62]. Therefore, such goods hold a vocation for benefit by a collective, not specifically the sum of individual and singular utilisations[63]. In other cases, the individual may hold a public subjective right or even a real private right to the common usage of public goods. Accordingly, the individual would be the holder of a subjective right to common usage, for example of highways, able to exercise intentions in relation to the inspection of such thoroughfares or in opposition to the traffic management entity[64].

Special usage or privative utilisation is the opportunity endowed on a particular subject, through the intermediation of a particular act designed to attribute advantage in the usage of a public good. There would be advantages that the owner might benefit from, with a particular degree of regularity, according to the respective agreement reached with the administrative authority enabling the usage of a set of public goods in the public domain to the exclusion of other individuals from the same community[65]. Hence, while under common usage, the doctrine divides over the scope to identify a subjective right in the benefit to a domanial good, this does not apply to privative utilisations. In the latter case, there is consensus around the identification of a subjective right in favour of private individuals. Nevertheless, controversy soon returns when addressing the question of whether this subjective right consists of a public subjective right or a private subjective right. Correspondingly, Jellinek observes that the juridical capacity endowed by the state on a particular individual constitutes the existence of a genuine subjective public right[66].

---

[56] FLEINER, Fritz, *Institutionen*…op. cit., pp. 288-9.

[57] FORSTHOFF, Ernst, *Lehrbuch des Verwaltungsrechts*, 9th ed., Munich, 1966, pp. 548 and fol..

[58] MERLI, Franz, *Öffentliche*…op. cit., pp. 30 and fol..

[59] MERLI, Franz, *Öffentliche*…op. cit., pp. 37-8.

[60] MERLI, Franz, *Öffentliche*…op. cit., pp. 38 and fol..

[61] On this matter, Fritz Fleiner rules out, point blank, subjective law, whether public or private, in common usage. Cf. *Institutionen*…op. cit., p. 375.

[62] SALEMI, Giovanni, *Natura Giuridica deii' Uso Comune dei Beni Demaniali*, Milan, 1923, pp. 147 and fol..

[63] CERULLI-IRELLI, Vincenzo, *Proprietà Pubblica e Diritti Collettivi*, Padua, 1983, pp. 166-7.

[64] PAPIER, Hans-Jürgen, *Recht der öffentlichen Sachen*, Munich, 1987, p. 96.

[65] MAYER, Otto, *Le Droit*… Vol. III, op. cit., pp. 234-5.

[66] JELLINEK, Georg, *System der subjektiven öffentlichen Rechte*, Freiburg, 1892, p. 104.

Adopting a different tack, highlighting the ownership of a privative usage concession, Guicciardi defends the existence of a private subjective right over domanial goods, which equates to the scope of the administrative contract[67].

Under exceptional usage of domanial exploitation, we may note the detachment of the goods from a destination, which incorporates an intrinsic preservation whether through the intermediation of common usage or privative usage. In effect, there is in domanial exploitation, as Afonso Queiró details, an exclusive usage, qualitatively different and attributed by concession[68]. This exclusive usage, whether privative or particular, structured according to a particular portion of the public, of domanial goods, is attributed *uti singuli*, to a subject on an individual basis[69]. Queiró inclusively maintains that exceptional usage concessions attribute subjective rights in rem to the concessionaire[70]. In a similar perspective, Villar Palasí, in studying domanial mining concessions for geological resources, defends that the characteristic alluding to inalienability requires review given that the attributing of the domanial concession necessarily implies the ceding or transmission of domanial goods[71]. The same author also declares that the granting of a domanial concession results in an exclusive right, *erga omnes*, of a real nature[72]. Subsequently, after qualifying mining as *pars fundi*, in place of any result or product, the author states that individuals hold the right to take advantage of the substances incorporated into that subject to concession as well as the scope to transfer the rights attributed, by means of concession both *inter vivos* and *mortis causa*[73].

5. Domanial Benefit Rights

Consequently, not only do the origins of the domanial lack any correspondence with the right to property, such as domanial plurality, or even enable any interrelationship with the two terms as applied in Middle and Modern Age discourses. Only later, especially in the 19th century, do we encounter the theory of public property that sought to in some way ensure a correspondence between property and public or domanial goods. However, attentive to the criticism, especially the denouncing of the attempted pillaging of privative institutes, the shortcomings of the monist model, as well as the different means of utilisation of domanial goods, everything would point to how the aforementioned correspondence involved unavoidable and insurmountable obstacles. This becomes especially the case as the right to benefit from a material good does not preclude domanial goods. Furthermore, given the origins of public subjective law do not display any essentially differentiating characteristics or means of utilisation incompatible with such utilisation.

In effect, due to the exclusion of incompatibility, this portrays an exclusive right of benefit that does not assume any civil nature but, on the contrary, that of a public right. Hence, this would establish a temporary and reversible administrative right in rem in contrast to the trend towards perpetuity and irrevocability of private rights in rem. Thus, in accordance with Hauriou, concession would be a means of constituting administrative rights in rem, temporary and reversible, over the public domain[74]. Alternatively, according to Rigaud, the juridical nature of the concessionary right excludes the right to private property as this is restricted by a particular allocation of the domain[75]. Even while rejecting the inalienability of domanial goods and allowing the scope for those goods also being susceptible to various other rights, thereby also bringing about an impressive evolution in the domanial regime[76].

However, faced with a subsequent change in paradigm, especially due to the rescaling of the state, the significant movement towards privatisation and the consequent reconfiguration of administrative law, clearly revealed not only an undeniable crisis in domanial regime but also, and above all, the need to rethink multipolar relationships, specifically subjective public rights[77]. Logically, not only does this approximate the subjective public law to subjective private law but also results in the *terminus* of the fiction underlying the theory of administrative rights in rem[78].

---

[67] GUICCIARDI, Enrico, *Il Demanio*, Pádua, 1934, pp. 350-1.
[68] QUEIRÓ, Afonso, *Lições de Direito Administrativo*, Vol. II, Coimbra, 1959, p. 25.
[69] QUEIRÓ, Afonso, *Lições*…Vol. II, op. cit., pp. 25-6.
[70] QUEIRÓ, Afonso, *Lições*…Vol. II, op. cit., pp. 32 and fol.
[71] PALASÍ, José Villar, "Naturaleza y Regulación de la Concessi´´on Minera" in *Revista de Administración Pública*, no. 1, Vol. 1, 1950, pp. 88-9.
[72]. PALASÍ, José Villar "Naturaleza…" in op. cit., p. 93.
[73] PALASÍ, José Villarí, "Naturaleza…" in op. cit., pp. 101 and fol..
[74] HAURIOU, Maurice,, *Précis de Droit Administratif*, 4th ed., Paris, 1901, p. 723.
[75] RIGAUD, Louis, *La Théorie des Droits Réels Administratifs,* Paris, 1914, p. 105.
[76] RIGAUD, Louis S, *Théorie*…op. cit., pp. 188 and fol..
[77] See our monograph *Direitos Reais Administrativos: Ficção ou Realidade?*, Lisbon, 2019, pp. 381 and fol..
[78] See *Direitos Reais Administrativos….*op. cit., pp. 479 and fol..

Consequently, and thus constituting a right in rem, a subjective right over a material good, the rights attributed to private individuals, in keeping with the signing of a concession operating contract for the domanial goods, all end up assuming an identical juridical nature.

6. Domanial Ownership

Having clarified the problematic issues around private, individual rights over domanial good, what above all matters now is to grasp the right of the state, or other administrative entities, over the public domain. We also need to inquire whether these entities are the owners of those good. We should correspondingly note, in accordance with that seen above, specifically the failure of the theory of public property, that there may be the grounds to contradict such an affirmation. In any case, to further deepen this facet, we should reference the theories that prioritise such allocation. They seek most appropriately to assess the existence of any bond capable of serving as a unifying factor and that simultaneously underpins the coherence of the regime for taking advantage of domanial goods. Within this framework, there are some authors who characterise domanial goods as inalienable or not subject to appropriation while others propose they be submitted to allocation without any definitive consequences as regards the ownership or public usage of domanial goods.

Hence, allocation does not either contaminate ownership or overlap with the nature of domain and rather enables the compatibility of diverse usages of the same thing and carried out by different juridical subjects. Hence, Waline, while recognising that the meaning of the term *allocation* remains extremely vague, describes the due relevance and the need to adopt this as the cornerstone for deepening this topic[79]. Subsequently, this author maintains that allocation cannot merely be restrictive and static, within the scope of hindering the alienability or prescriptiveness of good with the objective of applying such goods in the interest of the community[80]. Furthermore, within a critical perspective as regards the characteristic features of domanial goods, Jansse highlights, and especially emphatically, the safeguarding of the monetary interests of the government[81].

Following the recognition of autonomy, the duality between allocation and ownership, there was the restructuring of this approach. This especially arose out of the idea that allocation does not condition ownership but rather becomes mutually compatible. Within this framework, Forsthoff not only distinguishes between ownership and allocation but also does not consider them incompatible or even exclusive to the state or government administration, thereby accepting the autonomy of the two bonds susceptible to encumbering the public good[82]. Gaudemet, after undertaking an extensive and detailed study about the evolution of the domanial regime, also concludes that inalienability and non-prescriptiveness are no longer structural characteristics[83]. Later, in another study, this author points to the importance of allocation as a distinctive feature of the domain regime, whether focusing on any public usage or any public service[84]. As regards that allocated to public usage, this extends to, and among others, the public maritime domain, coastal zones, lakes and lagoons, dredging, airspace and the hertzian frequency, roads and other means of communication[85] .

Thus, without unnecessarily overextending this subject, in keeping with the editorial limitations of this article, we need to reference positive law. Naturally standing out in this framework is the Juridical Regime for Public Property Assets (Portuguese acronym RJPIP hereafter) enacted by Decree Law no. 280/2007 of 7 August. Consequently, as we stated on another opportunity, despite this law not introducing significant modernity or reforms in keeping with those applied in other legal frameworks, e.g. the French and Italian cases[86], it still remains extremely relevant that article 15 consecrates the term *ownership* and not property as regards real estate assets falling within the public domain. Furthermore, no. 1 of article 16 provides for allocation to public utilities whenever the underlying public interest does not directly and immediately stem from its nature. Inversely and in contrast, article 31 allows for the acquisition of property and other rights in rem on real estate held within the private domain of the state or other public entities. Therefore, it is clear that even the RJPIP, a somewhat unbalanced, piecemeal and conservative regime, does not adopt the term public property in the case of domanial goods as a certain doctrinal position sought to make believe[87]. Additionally, and as mentioned, the RJPIP is piecemeal and therefore understandably incomplete.

---

[79] WALINE, Marcel, *Droit Administratif*, 8th ed., Paris, 1959, p. 855.

[80] WALINE, Marcel, *Les Mutations Dominiales*, Paris, 1925, pp. 31 and fol..

[81] JANSSE,, Lucien, *Les Traits Pricipaux du Régime des Biens du Domaine Public*, Paris, 1838, pp. 95 and fol..

[82] FORSTHOFF, Ernst, *Lehrbuch*…op. cit., pp. 558-9.

[83] GAUDEMET, Yves, "Du Domaine de la Couronne au Domaine Public" in *Mélanges en l' Honneur de Jean François Lachaume*, Paris, 2007, pp. 528 and fol..

[84] GAUDEMET, Yves, *Le Droit Administratif des Biens*, Vol. II, 15th ed., pp. 91 and fol..

[85] GAUDEMET, Yves, *Le Droit Administratif*…op. cit., pp. 96 and fol..

[86] See our *Direitos Reais Administrativos*…. op. cit., p. 443.

[87] MONIZ, Ana Raquel, *O Domínio*…p. 319.

This does not perform the function of a framework law or true domanial code. In effect, despite what the RJPIP stipulates as regards benefits to private interests, especially common usage, the privative utilisation and exploitation of domanial goods, it is no less true that we encounter various other legal means designed to regulate, in a particular fashion, the benefitting from domanial goods.

Consequently, as we have considered in conjunction with prior studies, public property falls short of the mark. In fact, contemporary reality has imposed profound structural alterations on the domanial regime, especially at the level of ownership[88]. Furthermore, even while RJPIP displays its own shortcomings, with various deficiencies, the law rejects very clearly the idea of public property. And, logically, any comparison between property and the public domain. On this issue, we would recall that no. 1 of article 84 of the Constitution of the Republic proceeds with a non-exhaustive list of domanial goods, no. 2 determines how ordinary law defines the regime, limits and terms of utilisation. Thus, the universe of domanial goods does not end with the list in the constitution nor in the RJPIP itself. In truth, one of the paradigmatic examples stems from the regime for prospecting, searching and exploring for liquid and gaseous hydrocarbons that still remains regulated by Decree Law no. 109/94 of 26 April[89]. Correspondingly, even while these resources fall under the auspices of the public domain, it is no less true that the exercising of activities such as prospecting, searching, developing and producing oil may be undertaken through concession in accordance with article 5 of the aforementioned law. As is clear, this may involve attributing domanial powers to the concessionaire enabling the latter to legitimately appropriate the respective resources. In our opinion, this fact serves to dispel any wish to insist, in contemporary times, that there is any scope for public property: whether at the doctrinal level or under the auspices of the Portuguese legal regime for capitalising on domanial goods.

7. Conclusions

In terms of conclusions, taking into consideration the title of this study that there is no relationship between property and the public domain but, on the contrary, a longstanding antagonism and persisting almost unbrokenly through to contemporary times. In fact, following the antinomy between *actiones in personam* and *actiones in rem*, as well as the profile attributed by the classifications of material objects, we see in Roman law how the term *dominium* remained incipient and undetermined. Furthermore, as seen above, there were later diverse and plural assertions made for the domanial category, specifically the following: *dominium directum*, *dominium plenum*, *dominium utile*, *dominium secundum proprietate*, *dominium secundum imperium*, and *dominium eminens*.

The theory of public property, on the public domain issue, emerged out of the objective of attempting to expand administrative law based on a monist type model. If this theory underwent deepening as regards rivers and the litigation arising over ownership of the walls of Basle, the ideas of Otto Mayer clearly sought to consolidate this theory. Above all, when proceeding with the drafting of a list of public goods, domanial goods, in accordance with the means of common, privative and special utilisation, we return to public property. However, the ideas of Mayer, in particular, and the monist model in general, did not gain any major acceptance in Germany and Austria given that they provided for an authentic pillaging and transformation of privative institutes.

Ownership of the public domain cannot simply overlook the different means of appropriating and using public goods, of domanial goods. Furthermore, the rights to benefit, stemming from these means of usufruct, are not real administrative rights, temporary and reversible, but rights to benefit from material goods. We must add that ownership should not be confused either with property or with allocation. Furthermore, as regards the public domain, the RJPIP enacts the term ownership, reserving the attribution of property to the private domain of the state. It requires adding that the universe of domanial goods is in no way exhausted by this already outdated and poorly balance legislation.

[88] See our *Achamento de Bens Culturais Subaquáticos*, Lisbon, 2008, pp. 554-5.

[89] Opinion no. 12/2016 of the PGR Consultation Board highlights how the legislator had no intention of revoking Decree Law no. 109/94, under the terms of no. 4 of article 1 of Law no. 54/2015 of 22 June and no. 4 of article 35 of Decree Law no. 13/2016 of 9 March.