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ACQUISITION OF STATE-OWNED ASSETS IN ADMINISTRATIVE HEADQUARTERS

ADQUISICIÓN DE LOS BIENES DE DOMINIO PRIVADO DEL ESTADO EN SEDE ADMINISTRATIVA

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ABSTRACT: The law in representation of its own nature, changing and evolving, constantly presents the development of new phenomena that end up giving rise to the appearance of new studies on the binding of substantive administrative law and its procedure, in the case of the Peruvian system, the goods State should be classified into two distinct types, the first are the public domain property of the State and secondly we have the property of the state's private domain, the latter being regulated by private law, as it was the property of individuals . However, since in the procedure for acquiring this type of property there are a number of problems in relation to the accreditation of possession in the case of real estate that is in the private domain of the State before 1995, and in addition because it is the same State, which apparently is carrying out various non-transparent mechanisms to accredit projects within said assets that are intended to be acquired either through direct sale or by possession. In addition, the verification of the inspector, who is part of the same administration that intends to adjudicate the property, keeps a force of accreditation of the possessory facts or realization of certain activities that can be performed by those who currently intend to acquire the property of private domain of the State, there is no adequate means of proof that distorts the assertions given by the inspectors who happen to be judge and part in these situations.

PALAVRAS-CHAVES: Administration, direct sale, private property of the State.

RESUMEN: El derecho en representación de su propia naturaleza, cambiante y evolutiva, presenta constantemente el desarrollo de nuevos fenómenos que terminan dando lugar a la aparición de nuevos estudios sobre la vinculación del derecho administrativo sustantivo y su procedimiento, en el caso del sistema peruano, los bienes estatales deben ser clasificados en dos tipos distintos, los primeros son los bienes de dominio público del Estado y en segundo lugar tenemos los bienes de dominio privado del Estado, siendo estos últimos regulados por el derecho privado, tal y como se tratara de bienes de particulares. Ahora bien, siendo que en el procedimiento de adquisición de este tipo de bienes existe una serie de problemas en relación a la acreditación de la posesión en el caso de los bienes inmuebles que se encuentran en dominio privado del Estado antes del año 1995, y además porque es el mismo Estado, que al parecer está realizando diversos mecanismos poco transparentes para acreditar proyectos dentro de dichos bienes que se pretenden adquirir ya sea mediante venta directa o por posesión. Además que, la constatación del inspector, quien es parte de la misma administración que pretende adjudicar el bien, guarda una fuerza de acreditación de los hechos posesorios o de realización de ciertas actividades que puedan realizar quienes en la actualidad pretenden adquirir los bienes de dominio privado del Estado, no existiendo medio de prueba idóneo que desvirtúe las aseveraciones dadas por los inspectores que resultan ser juez y parte en estas situaciones.

PALABRAS CLAVE: Administración, venta directa, bienes de dominio privado del Estado

I. INTRODUCTION

The property right has always been of great interest in regulatory matters by all the legal systems of history, in order to guarantee its legal protection. As we know the original antecedent of the current legal systems is Roman Law, and from Rome, there was a classification of the assets that were based on whether or not they were possible to be transferred within the commercial tract of the time, so we found that all those goods that could not be transferred through these commercial acts were then within the scope of public law, that is, as mentioned by HAYA DE LA TORRE (2003), citing RUIZ-ELDREGDE who in turn refers that after the nineteenth century it is creating new concepts, namely, in the public domain and in the private domain, that is, goods of such classes that are of the State, being the first in the public domain inalienable and imprescriptible; and the others remain in the field of private law. (p. 218).

In Peru we can find that the beginning of the regulation of the private assets of the State are beginning to be established, within Civil Law, in the Code of 1852, which is what generated that later in the constitutions of 1856, 1867 and the from 1919 the so-called National Property Assets have been established; which later in the Constitution of 1933 generated the precept that began to govern public goods, which states that the use of public things is a right of all citizens equally; Subsequently, the 1979 Constitution established a new provision, which refers to public domain assets, noting that they cannot be the subject of private rights. Finally, the 1993 Constitution establishes a fairly rigid legal protection regime in relation to the issue of Public Assets, also providing them with the characteristics of being inalienable and imprescriptible.

Thus, there are discrepancies between the legal nature of public goods, as indicated by LÓPEZ RAMÓN (2015), who argues that the existing bases in the conceptual field of public goods and also in relation to the public domain are typical of Civil Law, that have been linked to administrative legislation and for its part this linking of its contents occurs through political decisions, which distort the legitimacy of the celebration of these acts as part of Public Law; Likewise, for the authors of LA RIVA & CASSAGNE (2015), there is a marked controversy regarding the nature of public domain assets, referring to this concept in two aspects, where the former recognizes in the public domain as a right of pure and simple property and that as such has its limitations, and a second meaning that points to the public domain as a public property right and therefore must contain special characteristics that protect it; also for MARIENHOFF (1960), who in turn quotes BIELSA, public use goods, cannot be subject to ownership or

possession, since we talk about res quae nullius that possunt, or in other words, things that do not They can be from no one and this includes the same State.

II. THE ASSETS OF THE STATE FOR THE DOCTRINE:

The doctrine has raised various definitions on the issue of private property of the State, among them we can highlight jurists such as PATRON FAURA and PATRON BEDOYA (2004), who point out that it refers to movable and immovable property belonging to the State, such as Legal person under public law, noting only two classes of state property, public domain and public use goods, however for practical purposes we can say that the difference between them is simply theoretical.

GARCÍA DE ENTERRÍA (2006), indicates that public goods are a complex legal-political institute, which is currently undergoing ambitious and huge attacks by economic sectors, which are materialized in achieving cuts in the rights of the state, the same ones that have gradually pushed back the State and that are aimed at leaving the Public Administration only with the goods necessary for its operation. Which in a way is protected by legal figures such as the Usucapion.

We must always remember that the assets of the State, are basically made up of real estate, however due to technological advances we can appreciate that more and more movable things are being acquired by the State for the better functioning of its areas, the same thing happens in the case of intangibles such as intellectual rights, hence the simple and generic denomination of goods is the most appropriate today.

CABEZUT (2010) refers that the state assets according to the doctrine are constituted by a set of real estate, movable, tangible and intangible assets, rights and income, both in the public and private domain, which belong in full ownership to the nation to satisfy their collective needs, which are regulated, administered and controlled by the powers of the same State, including property and rights held by individuals, under a legal regime of public and private law; thus it offers us a much more complete definition, which covers all possibilities.

III. CLASSIFICATION OF STATE ASSETS:

It is at this point that we begin to make sense of research on the subject, when we find a discrepancy between the classification of state assets, when authors such as RUIZ-

ELDREGDE (1992), do not participate in the distinction of two domains that are present within the classification of state assets, as it considers it as an obsolete criterion, preferring to maintain the domain unit according to the unique legal entity of the State and especially the fact that the owner of the domain, whether we understand it directly or indirectly is the people; Sharing the same CERVANTES thesis (2006), he points out that at his discretion the current reality does not need to distinguish two classes of goods, taking into account that the goods of all kinds are for public use or for the operation of Public Administration entities , specifying that no good, however modest, will be dedicated to private use and if so it would not be correct; Finally, it indicates that its position agrees with the current doctrine, but considers it more in line with the progress not only of administrative law, but of the organization of public administration in general.

The dualistic classification of state assets, was born in the first half of the nineteenth century, and has had as an exhibitor PROUDHON cited by RAMÍREZ (2004), position assumed by ALCARRAZ (2015); Thus, in the Peruvian legal system, there are two classifications of state assets, public domain assets and private domain assets. Both the National Superintendence of State Assets and the Constitutional Court, in their work of interpretation and integration of the constitutional provisions, already in the STC No. 006-1996-AI / TC, held that "the assets of the State are divided into private domain assets and public domain assets… " Which has been stated in the STC accumulated Nos 015-2001-AI / TC, 016-2001-AI / TC and 004-2002-AI / TC. Reason why we adopt this position in the classification of goods, moving away from the traditional theoretical separation of the property of domain and those of public use.

IV. STATE ASSETS:

CASTAÑEDA (1973), points out that, public domain assets are destined to perform a utility service so that the public administration complies with granting a well-being to its administrators, this affectation being possible to influence even the very nature of the assets, giving as an example the fact that the state can modify part of the natural resources to provide greater security to the population; CAMELO (2009), indicates that local public good is understood as those goods that are supplied to a geographically and administratively defined community; such definition does not impose restrictions on the provider of the good, but on the enjoyment of said goods being made by the members of a community, in other words, we could

affirm that there is no need for the supplier of said good to be the State. For his part, GARCÍA DE ENTERRÍA (2002), refers that public goods do not belong to the state, but rather to its population, who make use of said goods due to a legal link that unites them to the state of which they are members. The state being the owner of said assets due to the delegation of rights that the population has granted.

VÁSQUEZ (2003), on the other hand, indicates that public domain assets are those that are part of the imminent domain of the State, these being of two different types, some that are for public use and others that are referred to as public service goods, however It does not pose a substantial difference between these types.

It is left seated in the Judgment of the Constitutional Court, relapsed in File No. 0048–2004 – PI / TC, in which the foundation 98 indicates that: "Renewable and non-renewable natural resources, as they are assets that make up the public domain whose The owner is the Nation they are not the object of a real property right in the civilist sense of it - they configure what is called a "special property". This is characterized by being subject to a specific regulation of Public Law, which enshrines its unavailability, given its inalienable and imprescriptible nature, pursuant to article 73 of the Political Constitution of Peru, being, consequently, excluded from the property regime civil".

Another classification can be found in the thesis of CONTRERAS (2016), who citing CASTAÑEDA, says that we can find in the doctrine that the State has archaeological assets which can be movable or immovable property, such as archaeological remains, artistic objects that have historical value and have been declared cultural heritage and on the other hand the assets of the Amazon that are natural resources; for its part RAMÍREZ (2004), indicates that state assets are classified as land domain (roads and roads), maritime goods (sea, islands, beaches), water goods (rivers, waters), air assets (airspace), mining goods (mines) and railway goods (railways); and finally, authors such as MARIENHOFF, cited by RUIZ-ELDREDGE (1992), state that public domain assets are classified as land goods (streets and roads), cemeteries and graves, buildings, national defense assets, air public domain , public water domain and other institutions linked to these.

Within the prominent characteristics of state assets, according to our legal system we can find inalienability, which is a quality of a good, which cannot be transferred or transferred, or as indicated by STOP (1991), who states that The rule of inalienability of public domain assets (which is independent of the value of the assets) is based on the extraordinary nature of the *public demand*, which cannot be available while it is affected to an end of public utility. In

that sense, the unattachability, gives the state assets an exclusion from any execution, because it gives them the quality of inalienable. This can be supported by the Constitutional Court ruling that accumulates files No. 015-2001-AI / TC, No. 016-2001-AI / TC and No. 004-2002-AI / TC, issued on January 29, 2004, which in its rationale 25 establishes that it is necessary to insist that the absence of a special law that determines which assets of the State are attachable, does not imply that the executing judge and the corresponding administrative body cannot dictate or execute seizures on assets of the State. On the contrary, the absence of a special law that establishes which assets are seized, imposes a special duty on both public bodies to protect the right to enforcement of judicial decisions. In fact, the origin of the embargo on state property, whether this furniture or real estate, should have no more limit than the fact of being treated, or have the condition, of public domain property, so it corresponds to the judge, under responsibility, determine, in each specific case, which goods meet or not the conditions of a private domain good and, therefore, are attachable.

V. STATE PRIVATE DOMAIN ASSETS:

Doctrinaries such as JIMENEZ (2013), indicate that the state's private domain assets are regulated by special laws or regulations, while public domain assets are constitutionally supported, however this depends solely on the legal system that has regulated it thus and that if at any time the Legislative Power considers it necessary to regulate it, this difference would disappear; thus, GURFINKEL (2006), states that the State has a real right of ownership over private property that belongs to it, which are subject to the administrative regulations that regulate its use, enjoyment and disposition, being that unlike those in the public domain, those are alienable, attachable and prescribable, ZECENARRO (2012), on the other hand, defines the state's private domain assets, such as those on which the norm under analysis is defined, are defined by the Peruvian Constitutional Court, as that collection of goods made up of those that, being owned by the public entity are not intended for public use or affected by any public service. We can see this in the Judgment of the Peruvian Constitutional Court issued on October 22, 2012, which indicates that since the judgment N°. TC No. 006-1996-AI / TC, the State assets are divided into private property and public domain assets; over the former, the State exercises its property as any person under private law; On the latter he exercises administration of a public and tweet nature. In the base 29 of the sentence Nº 00003-2007-PC / TC, it is established that in addition, it should be noted that the aforementioned rule has defined the

assets of the private domain of the State as those that, being owned by the public entity are not intended for public use or affected to any public service.

Then, the property of private domain of the State can be defined as the set of property owned by the State that have been acquired under any title and that are also not intended for use or to provide any public service, where the state exercises its property right as any person of private law, before this we can conclude that in private property, the State is subject to the same rules as any private person.

On the other hand we have that among the most outstanding characteristics of the public domain assets of the State we have the alienation, provided that the requirements demanded by the rule are met, as TORRES mentions. A (2014), who in turn regarding the alienation establishes an exception, which requires the observance of certain formalities established by law, as in the case of public auction and direct adjudication. For his part VÁSQUEZ R. (2003), indicates that in fact the state assets are inalienable, although there is a possibility of selling them as long as the legal requirements for this are fulfilled, as in the cases of public auction, so in fact if its transfer is possible, as well as they can be seized.

Among the private domain assets of the State we have:

a) The abandoned goods, for this there must be two requirements in order to determine that they comply with what is established to be declared in abandonment, the first is the material loss of the good and the second is the *animus derelinquendi*. In the case of our country, if a good does not have a right holder, it is presumed that it belongs to the State. The abandoned lands *Res Derelictae* according to legal provision, pass into the domain of the State for adjudication for sale; ORTIZ (2009), refers to the city as a collective space that belongs to all its inhabitants, who have the right to find the conditions for their political, social and ecological realization, assuming duties of solidarity. We can synthesize that in the city we can find as configurative elements: the permanent occupation of the territory and the land by a plurality of people, for urban purposes, where social, political, cultural, cultural, economic relations with an identity (s) develop in common; According to JIMÉNEZ (2008), the sale of land in favor of third parties is carried out for statutory purposes, that is, for the fulfillment of certain public purposes and national policies, the laws confer on certain public entities that sell the so-called land state companies in favor of third parties, with the aim that once transferred the good, it generates a social and economic benefit to the State. This is the case of land transfers carried out by the Agency for the Formalization of Property - COFOPRI on a costly basis to those possessors who have a second lot or some commercial premises, since the informal housing lot

is transfers free of charge by legal mandate. Thus, COFOPRI transfers the land on behalf of the State, without them being assets of its own.

b) Vacant assets: They are the assets of those who die without leaving heirs, being that in practice it is the Beneficence that is attached to the processes of intestate succession thereof, or as we can find in our legal system in article 830 of the Peruvian Civil Code, which indicates that the assets that due to lack of testamentary or legal successors are awarded to the charitable society by the judge or notary who knows the process of intestate succession.

c) Assets from donations: In the sense that it is the right of the State to receive any donation that an individual decides to bequeathed, since the State swells its assets with all those goods donated by individuals.

d) The eriazas lands.

e) Assets acquired by usucapion: as set forth in the Civil and Civil Procedure Court 2016, which indicates that the State owns property in the title of owner (without being it) for tens of years. It is the rule of civil law that every good that can be possessed is possible for usucapion. Only public domain assets are not.

VI. PROCEDURE FOR THE ACQUISITION OF PRIVATELY OWNED ASSETS OF THE STATE THROUGH ADMINISTRATIVE MEANS:

The Peruvian Constitutional Court, for its part, has established two classes of State assets, those of private domain and those of public domain, leaving established that the State has the exercise of its property right, such as that of any other individual, making a difference between said assets because of the fact that in private assets the State exercises property and in public ones it only exercises administration, which leads us to state as an affirmation that said assets are inalienable, as demonstrated in file No. 006-1996- AI / TC, which accumulates files No. 015-2001-AI / TC, 016-2001-AI / TC and 004-2002-AI / TC, where the classification of these goods is explained, where it can be seen that in the In the case of private property, the nature of the law is applied as if the State were a private individual, which is corroborated by Law 29151, called the Law of the National System of State Property.

There are also a series of administrative procedures, where the administrator requests the direct sale of land such as the Rodríguez Horna case against the Chavimochic Special Project to the administration, the following having happened in administrative headquarters, first by request dated November 2 of 2005, record 4069, the plaintiff requests the direct sale of

lands in possession, so that the Management Resolution No. 598-2008-GRLL-PRE / PECH dated November 26, 2008, in which it is declared appropriate the direct sale request submitted by the plaintiff with respect to the so-called VD.275-I and VD.290-I lots of 1.62 hectares and 0.53 hectares, respectively, setting the sale price in the amount of $ .863.32 (eight hundred and sixty and three and 32/100 US dollars) and $ .349.50 (Three hundred and forty-nine and 50/100 US dollars) respectively, granting it the term of 45 business days in order to record said payment; On December 24, 2008, the actor requests to be notified with Management Resolution No. 598-2008-GRLL-PRE / PECH, on Luis Broglie Street No. 265 urbanization Daniel Hoyle, for having been notified through Official Letter 2019-2008 -GR-PRE / PECH-06 to Mr. Alfredo Vigo Montero and Mrs. Floritza Rodríguez Horna at the address I quote in Manuel Romero 350 Urbanization Santa María fifth stage; Subsequently, on January 16, 2009, he obtains an answer through Official Letter No. 081-2009-GRLL-PRE / PECH-01 in which it is specified that there has been a material error, being notified correctly at the address indicated by the appellant; on February 25, 2009, the plaintiff files an appeal for reconsideration, since by means of Resolution N ° 108-2009-GRLL-PRE / PECH dated April 7, 2009, the appeal for reconsideration is declared inadmissible; e) Subsequently, on May 5, 2009, he lodges an appeal, issuing Resolution No. 2039-2009-GR-LL-PRE dated August 28, 2009, which declares his appeal unfounded, considering the route exhausted administrative Thus, from the study of said administrative file, it can be seen that through Management Resolution No. 598-2008-GRLL-PRE / PECH dated November 26, 2008, the request for direct sale of land held by the plaintiff was declared appropriate, being It is necessary to analyze whether said resolution has been duly notified to the claimant through Official Letter 2019-2008-GR-PRE / PECH-06.

In addition to the aforementioned we can see that as indicated in article 15 of Supreme Decree No. 011-97-AG, modified by article 1 of Supreme Decree No. 050-2002-AG, it states that those who at the date of publication of the Law they will be engaged in some agricultural activity within the area of the Special Hydraulic Projects executed with public funds, they can acquire ownership of the areas they exploit, by requesting them directly to the respective Special Project, which sets the price of them and, after verification, grants the title of corresponding property, in coordination with the Special Land Titling and Rural Cadastre Project - PETT of the Ministry of Agriculture. In the event that such lands are not acquired by their occupants within the period established by the respective Special Project, they are awarded by public auction. In this way, although according to Law 26505 dated July 18, 1995, all the lands of the State of the Region of the coast authorized through irrigation projects with public

funds will be awarded in public auction; exceptionally those who at the date of the publication of said Law will carry out some agricultural activity within the area of Special Projects, are entitled to request the respective Special Project direct sale of the properties they occupy. In this way, it can be seen that in the Peruvian system even in cases of public domain goods, the quality of inalienability of the goods is quite relative.

On the other hand, we have the case of Mr. Andrés Solano Colmenares against the Regional Government of La Libertad, who requests the exceptional direct sale of a property of 965.78 hectares, located in the La Ramada-Uripe-Punta Gorda and Punta Crema Sector of the Salaverry Valley, Salaverry District, Trujillo Province and La Libertad Department, specifying that it has been possessing said asset and carrying out productive agricultural activities of Tierras at rest since the year 1994.

Mr. Solano, to prove that he was in possession until before July 18, 1995, presents as documentation the descriptive report of the Costa Azul Spa, issued on May 10, 1994, in the name of the plaintiff; the Directorate of Territorial Conditioning and Human Settlements of the Provincial Municipality of Trujillo, certifies that the land of 543 hectares. they are not considered as urban expansion dated October 14, 1994; the diligence of ocular inspection is carried out by the Justice of the Peace in which the location of the property, its limits and specifying that a raft built of mats, sticks and adobe of two environments is found, inside it is observed artisanal fishing equipment, levers, in the second environment there is a bed, a table and a kerosene kitchen, at the time of the inspection, land surveying work was being done to make interior roads; In this area the Costa Azul Spa will be built on June 25, 1995; On January 3, 2002, the Governor of the Salaverry district certifies that the plaintiff is possessing the riverside land to the sea where the Uripe spas, the Ramada Punta Gorda and Punta Crema located in the Port of Salaverry are located, having in the area of Salaverry 965 hectares; and finally on December 12, 2006, the work called SPA PLAYA COSTA AZUL Location Salaverry is registered in INDECOPI on behalf of the plaintiff. Thus, in order to prove the continuous, peaceful and public possession, the actor must prove at least with a proof of those specified in article 14 of the Direct Sale of Land Regulations of the Special Chavimochic Project, in this way the administrator accredits possession of the Good direct selling stuff.

Notwithstanding the aforementioned, it must also prove whether it has been proceeded before July 18, 1995, to exploit the property directly sold directly in accordance with the law; Thus, it can be seen that on March 4, 2009, Office No. 204-2009-GRLL / PRE / PECH03CMQ was issued, dated May 12, 2009, Office No. 281-2009-GRLL-PRE / PECH- 03 and dated May

19, 2009, the Direct Selling Commission of the Chavimochic Special Project issues Act N°. 004-2009-GRLL-PRE / PECH-CVDT; in which it is specified that the area of the direct sale request is completely overlaid with the area of the Trujillo - Mar Project, Populated Centers of Las Delicias and Salaverry, including the Urban and Industrial Expansion Zone. Thus, taking into account that: a) In the Regulation of Direct Sale of Land of the Special Project Chavimochic in its article 18 referring to the evidence of agricultural exploitation, it states: "The agricultural exploitation of the land subject to direct sale request, must to be accredited through the inspection carried out by the technical personnel… Such properties should not be located in archaeological zones defined by the National Institute of Culture, reserve areas for the protection of forest and wildlife resources, marginal strips of rivers and channels natural, and areas reserved for projects with specific purposes of public interest. The piling up, wooden fence, construction of buildings or other similar acts do not in themselves constitute evidence of agricultural exploitation; it has not been fulfilled to distort in administrative headquarters that its land is not completely superimposed with the area of the Trujillo - Mar Project, Populated Centers of Las Delicias and Salaverry, including the Zone of Urban and industrial expansion in the stage of the administrative procedure, no thus legitimately accrediting the agricultural exploitation of the goods directly sold; in this way it is not appropriate to cover the direct sale request.

VII. CONCLUSIONS

• The Peruvian system establishes a classification in public domain and private domain property of the State, being that the private domain property of the State is regulated by private law, that is, the State has the same particularities as any person in The company, having all the rights, duties and sanctions that any member of the Peruvian territory, however, is quite inconsistent in relation to state assets in the public domain, because despite the fact that it establishes guardianship powers they are removed means of special laws under various circumstances.

• As can be seen from the procedure for the acquisition of private property of the State, via direct sale, there are a number of problems regarding the accreditation of the possession of private property of the State before 1995 and also because It is the same State entity, which is establishing defense mechanisms such as the accreditation of projects within the assets that are intended to be acquired through direct sale by possession.

• Finally, the inspection of the inspector keeps a force of accreditation of the possessory facts and of the activities that can be carried out by those who currently intend to acquire the assets of the private domain of the State, and there is no suitable means of proof that distorts the assertions given by the inspectors, because it is the State judge and party in this type of legal relations.

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