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PUBLIC PROPERTY IN AUSTRALIA AND RUSSIA: THE CONCEPT AND THE ROLE OF THE CONSTITUTION

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https://doi.org/10.17589/2309-8678-2019-7-2-5-52

The modern democratic state embodies the concept of the state as a service. For this reason, the administration of public property is one of the major issues related to the efficiency of public authority. Common law countries and post-Soviet countries have completely different legal explanations and bases for public property. This article takes a comparative approach, showing similarities and differences in the public property regimes in these two systems.

This article investigates why the two systems have different approaches to public property issues and how the differing experiences result in differing implementation. Australia and Russia have been chosen as examples of a common law system and the post-Soviet system, respectively. In addition to property regimes, this paper also discusses federalism issues.

An analysis of these countries' historical development permits a significant enhancement of the philosophical and legal understanding of property, especially public property. Protection of private property in Russia was very strong by 19th century standards. However, the Russian Empire fell behind in questions of public property compared to its protection of private property, and also compared to other systems outside of Russia.

Some aspects of dealing with the most critical natural resources expand public property regulation issues into the constitutional sphere. Public property issues need constitutional justification in both Australia and Russia. However, Russia has constitutional provisions that provide the categories of property rights existing in its domestic law, while a great deal of effort was required in Australia to create the constitutional basis for water resources administration.

Keywords: public property; Crown; natural resources; Russia; Australia; constitution; property rights; comparative law.

Recommended citation: Vladimir Nizov, *Public Property in Australia and Russia: The Concept and the Role of the Constitution*, 7(2) Russian Law Journal 5–52 (2019).

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Introduction

The modern democratic state embodies the concept of the state as a service. I see this arrangement as essentially a bilateral agreement between the population who consume this service and the public authority which provides it. This concept was born in economic science and focuses mostly on material issues, but involves such concepts from the Maslovian pyramid as safety and security. Societies self-organize themselves into the state and other actors (such as municipalities and corporations) that may meet their demands. In theory the state authority is an example of a true democratic body constructed with the substantial involvement of the citizenry. That is why the state has a monopoly on coercion and the right to make rules for the society. However, to do this the state and other public institutions need property, which is the material basis for their activities.

This comparative research shows similarities and differences in public property regimes in a common law country and a post-Soviet one. It is interesting to match completely different systems in the public property sphere, taking into account that both systems influenced world practice.[1] The English economic historian Edward A. Freeman proclaimed in 1873 the determinative significance of the comparative method for the awareness and appreciation of similarities and differences in various domains of social life. This paper investigates why the two systems have different approaches to the public property question and which system's experience is more appropriate for implementation.

In this article I do not try to articulate a universal concept of property or public property applicable within all societies and to all resources. I understand that such attempts to provide a comprehensive and unified explication have failed. I do not herein attempt to give a general definition of property or establish the full extent of the term; such issues have been researched extensively. Rather, it is my intention to fill a gap concerning the concept of public property.

Common law countries promote a classically liberal approach to public property administration, while post-Soviet countries are trying to transition from socialist to capitalist states. Historical preconditions define the modern understanding of public property and its role in social life. The Russian influence on modern world trends is not strong. However, the socialist legacy is still felt in this country and it had a huge influence on world development. According to the founding father of communist ideology, Karl Marx, the main threat to a peaceful and democratic society is private property as such. He continues this logic to a very radical conclusion: the overwhelming majority of property must be public.[2] This point of view had tremendous consequences not only for future socialistic states, but for capitalistic ones as well. The distribution of wealth became fairer because the Russian case served as an example of the implementation of Marxist ideas, and capitalist countries reformed their institutions in response to communism's popularity within society.[3]

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1 Edward A. Freeman, *Comparative Politics* 24–36 (London: Macmillan, 1873).

2 In Soviet times there was a concept of personal ("личная") property, which allows individuals to have property rights in ordinary items (such as clothes, toothbrushes, books, etc.). However, sometimes it is difficult to draw the line between private and personal property. The boundaries of personal property must be drawn so as to allow the possibility of using property as productive capital. Some special cases show that this approach conflicts with the natural attitude to property. For example, cows or sheep may be used as productive capital for milk or wool. It was for this reason that in the 1920s and 30s the communist administration coerced villagers to convert their animals into communal property. There is no more natural and traditional ownership than of an animal which may produce for your family. That is why resistance to the Bolsheviks' policy was massive in the countryside. Here I agree with Henry Ford, who termed this activity of the Bolsheviks unnatural.

3 The so-called middle class arose in the middle of the 20th century, when communist ideas were at the peak of popularity. The middle class is a product of more fair distribution of wealth among society and the opportunity to make use of upward social mobility. Its existence creates a visible justification for capitalist countries (free market countries). In some European countries we see a convergence of socialist and capitalist ideas (e.g. the Scandinavian countries).

Meanwhile, at the end of the 20th century the concept of public property, while not dying, was changing in many free-market countries. Post-Soviet countries were confronted with the neglect of the concept of public property and with the arguments of classically liberal (or even libertarian) romantics[4] who disfavor the very notion of public property. Many authors promote such a liberal point of view for the reconstruction of public property administration.[5]

A proper justification of public property would require its own separate investigation. Here a few observations are in order. As Kenneth R. Minogue writes, "the problem of property… is a problem of justification."[6] In other words, whenever we discuss property, we are unavoidably discussing the architecture of the community and of the individual's place within it.[7] Everything in the world may be identified as an object of property rights.[8] The crucial question is how should property be distributed and administered in a just society? How can we manage limited resources?[9]

This article provides a comparative analysis in four parts following this introduction. The first part explains the classic concept of public property and its historical preconditions in Australia and Russia. The second part investigates the constitutional provisions on this topic. The third part discusses specific cases of public property regulation of mineral resources. Advantages and disadvantages are identified in both of the public law systems that are compared. Part four sets forth the conclusion.

1. The Concept of Public Property

1.1. The Inception of Public Property

Property can be understood in two different ways: in the legal sense and in the sense of the material world.[10] Property as a material object is not pertinent for our

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4 Anatoly Chubais said that the main goal of privatization was not to earn money for the budget or solve social problems, but to kill communism.

5 *See, e.g.*, Richard A. Epstein, *Design for Liberty: Private Property, Public Administration, and the Rule of Law* (Cambridge: Harvard University Press, 2011). I use the word "liberal" in the meaning it has in European parlance; the term is often understood differently in the USA.

6 Kenneth R. Minogue, *The Concept of Property and its Contemporary Significance*, 22 Nomos 3 (1980). The pioneer of the justification of property rights was Kant. He began his discussion of law in the *Metaphysics of Morals* with an analysis of this question.

7 *Property and Community* 1–5 (G.S. Alexander & E.M. Peñalver (eds.), New York: Oxford University Press, 2010).

8 Even a human being may be classified as someone's property. It is easy to find examples in world history. Slavery still exists de facto in some parts of our planet. I will not discuss the concept of natural human rights, but theoretically as well as in practice persons may be property.

9 In this context one may remember Plato's statement that the first challenge for the new leaders of the state is the question of the distribution of property.

10 Bruce A. Ackerman, *Private Property and the Constitution* 26–27 (New Haven; London: Yale University Press, 1977).

legal research. In the legal sense, private property is that which belongs to a particular natural person, and non-private property does not. However, a legal understanding of public property arose with the inception of the first states.[11] The legal status of property as either private or public is always subject to being disputed between an individual and society. All theorists may agree that "in the world of Robinson Crusoe property rights play no role."[12]

It is difficult to give an accurate and universal definition for public property, because this term is differently understood from state to state.[13] There are countries with a deep acknowledgement of public property doctrine teachings, such as France, Italy and Spain, while some other countries have recognized public property as a modification of private property. A third group does not have a complex theoretical explanation of public property (mostly these are Anglo-Saxon countries). Another group could be said to consist of the post-Soviet countries, which have a lot in common with either the first or second group but still bear the Soviet legacy of public property. Due to different understandings of what public property is,[14] I do not give a universal definition of public property, but instead explain the preconditions for public property and why society has created public property.

There are a number of theories that explain which kind of property is more ancient: public or private. This question is very similar to the "chicken and egg" question. One point of view is that private property is the individualization of goods from a common property mass, which would explain why it emerged after some public property institutions. Another point of view argues that private property came into being as the first step when humans have just chosen to take something from nature, and the second step was public property, when a group of people started to use resources in their common interest. The third point of view contends that the first States in the West (the Greek *poleis*) favored the private property concept, while the first states in the East (Egypt, Mesopotamia, etc.) favored public property.

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[11] In some cases I may agree with researchers who argue that perhaps property existed in society before the formation of the state. However, that would be an analysis of cultural phenomena rather than legal ones. We may call this kind of property "common," but not public. *See, e.g.*, Ruth Benedict, *Patterns of Culture* 12–18 (Boston; New York: Houghton Mifflin, 1934).

[12] Harold Demsetz, *Toward a Theory of Property Rights*, 57(2) American Economic Review 347 (1967).

[13] A. Vinnitsky conducted brilliant comparative analysis. The only gap in his research is the absence of common law countries. *See Винницкий А.В.* Публичная собственность [Andrey V. Vinnitsky, *Public Property*] 1–732 (Moscow: Statut, 2013).

[14] For the basic understanding I note three main approaches to clarify what constitutes public property. The first is an agency approach: we have to know who the owner of the property is and whether it is a public law entity (state, nation, municipality, etc.), thus making the property public. Another approach is functional. Here we ask the purpose of the property. If the property is used for a public purpose, the property is public in spite of who the owner is (for example, the owner of a lake is a natural person, but everybody may use it, making private ownership limited or even fictitious). The third approach is to combine the first and second.

We may start with the simple observation that all societies, from ancient times to the present, made room for common property. The Eastern states put more importance on this kind of property because of the demands of big infrastructure projects necessary for their citizens' survival, such as the building of dams and irrigation systems which benefited the entire society. Even in the first Western countries the concept of common (public) property was well defined. Plato's "Republic" gives us an example of the "city of sows" where no one possesses any private property. He saw that approach as a perfect remedy for the negative side of human nature, such as greed and excessiveness. However, Plato reexamined his point of view in "The Laws," when he recognized private property as a natural right, but gave wide scope to public property (lands, government buildings, marketplaces, etc.).

Aristotle scrutinized this theory in his "Politics" and defended the supremacy of private property.[15] Public property must be a special type of property recognized by the legislator as being for common use. For instance, Aristotle agreed that common property might be useful in farming communities.

I think that these examples create the foundation for a dialogue which still exists: What is the best way to reach the goal that Plato calls "to live well"? Plato proposed making everything public and improving public administration and distribution. Aristotle proposed making private property more institutionalized and creating some obligations for public purposes: "private in possession, public in use." However, Aristotle stated that private property is one of the few basic values and that it must develop in harmony with the others.

I argue that this ancient dialogue was very applicable in the 20th century, where conflicts between two ideologies – socialism and capitalism – were obvious. In some cases, its applicability is clear even now. The ancient dialogue is essentially a simplified understanding of contemporary legal thinking, but it makes it easier to see the whole picture of property development. Many modern constitutions attempt to implement Aristotle's point of view within their texts. For example, Article 14.2 of the German Basic Law states that the use of property "should also serve the public interest." Article 43.2.1 of the Constitution of Ireland regulates property rights through the principles of social justice. Plato's position was implemented in socialistic states such as the USSR.

Modern theories of communities present a person as a social player and extend the tendency of Aristotle's thinking, which emphasizes the social function of property.[16] Moreover, the Greek philosopher noted the linkage between the just distribution of property and the rule of law.

Many modern researchers support Aristotle's vision of private property. David Lametti gives another definition for private property:

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[15] "The present system, if humanised and liberalised, would be far better. There might be private possession and common use among friends, such as exists already to a certain extent among the Lacedaemonians, who borrow one another's slaves and horses and dogs, and take in the fields the provisions which they want." Aristotle. *The Politics of Aristotle* 31 (B. Jowett (trans.), Oxford: Clarendon Press, 1885).

[16] *Property and Community*, *supra* note 7.

> Private property is a social institution that comprises a variety of contextual relationships among individuals through objects of social wealth and is meant to serve a variety of individuals or collective purpose.[17]

Joseph Sax completes this definition with an additional meaning:

> Property is the end result of a process of competition among inconsistent economic values… Property is a multitude of existing interests which are constantly interrelating with each other, sometimes in ways that are mutually exclusive… Property is the value which each owner has left after the inconsistencies between the two competing owners have been resolved.[18]

There is no convergence with public property in this definition. A collective purpose may be changed to a corporate purpose. Likewise, private property may serve a public purpose, especially if the owner of the property so wishes. However, even in Hegel's works we may find an individualistic approach to private property, and it can be impossible sometimes to resolve conflicts between individuals without the involvement of a public actor and its property.

The inception of public property shows us the aims of public property. Here I state two major ones:

– The accumulation of resources for those projects that will be useful for a public purpose. The first states built dams for the public consumption of river resources for agriculture. Such a project would be impossible for one or a few individuals to carry out. Another example is the armed forces, which consume a huge amount of resources;[19]

– The resolution of conflicts. The same property might be desired by several individuals, all of whom consider this property vital for their own interests. A very good example here is drinkable water or other limited resources (such as land or forests). One person may possess all the water for his own purposes, leaving other people thirsty. This situation creates preconditions for civil conflicts to arise. Avoiding such conflicts in the sharing of such a resource is one goal of the concept of public property.[20]

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17 David Lametti, *The Concept of Property: Relations Through Objects of Social Wealth*, 53 University of Toronto Law Journal 325, 326 (2003).

18 Joseph L. Sax, *Takings and the Police Power*, 74 Yale Law Journal 36 (1964).

19 Some may argue that in ancient and medieval societies armed forces were de facto private armies and that the phenomenon of "public" armies in Europe arose only in the 18th to 19th centuries. I concur, and reaffirm that a highly developed concept of public property emerged only after the French Revolution. However, "public" armed forces existed to some extent in the Greek poleis and the Roman Empire, where there was an understanding of public property.

20 Modern legal science knows other options for fair distribution. Most of them are related to the limitation of private property rights. But even with the use of legal instruments that limit private property rights, it may be difficult in practice to make them work as intended, especially with property which is unquantifiable (rivers, forests, etc.).

The development of society and state makes this function both more conceptual and more complicated. For example, the state needs public property for the realization of social functions, such as medical care or education. Meanwhile, the state attempts to diminish the possibility of conflict between rich and poor people within a country. Additionally, I suggest a third aim –

– The creation of an environment for sustainable development.[21]

This last aim may be applicable in the case of the modern state, but the concept of sustainable development is too recent to apply to the ancient states. These three scenarios are to be found in all societies and countries. However, in some states the concept of public property is very strong, while in others it exists without doctrinal explanation. With respect to the concept of public property, it is wrong to say that states with strong public property deal better with these aims, and that states without highly developed public property are unable to do so.

Thus, it is even more necessary to investigate the role of public property in the modern state and its importance in the national framework. I do this through a discussion of the different historical backgrounds of two modern federal states: the Russian Federation and the Commonwealth of Australia.

1.2. Russian Historical Preconditions for Public Property

The Russian Federation is a classic example of a post-Soviet country where the process of property transformation is still under way. In the beginning of the 1990s Russian legislation was focused on the protection of private property. It had the primary goal of forming a new democratic state which lacked traditions of free market regulation. The tradition of public property is still very strong in this country. This tradition is a legacy not only from the USSR, but also from the Russian Empire.[22] Over the last few years the relevance of public property in Russia has increased[23] because of the enlargement of state participation in the economy.[24]

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[21] It became even more important after official recognition of this goal in the U.N. 2030 Agenda (May 2, 2019), available at https://www.un.org/sustainabledevelopment/development-agenda/.

[22] The legal development of public property in the Russian Empire is well explained in Ekaterina Pravilova, *A Public Empire: Property and the Quest for the Common Good in Imperial Russia* (Princeton: Princeton University Press, 2014).

[23] At the end of 2015 the contribution of the state and state companies to GDP was approximately 70%. In 2005 this percentage was less than 40%. Доклад ФАС России о состоянии конкуренции в Российской Федерации за 2015 год [Federal Antimonopoly Service of the Russian Federation Competitiveness Report 2015] (May 2, 2019), available at https://fas.gov.ru/documents/589902.

[24] Vladimir Mazaev marks out three stages in the development of the Russian constitutional model in the economic sphere: creation of the market's regulation (1993–1999); the rethinking of the favoring of private property interests (2000–2006); and the domination of public property (from 2006). *Мазаев В.Д.* Деформация российской конституционной экономической модели: оценка и варианты реагирования // Сравнительное конституционное обозрение. 2017. № 6(121). С. 115–130 [Vladimir D. Mazaev, *Deformation of the Russian Constitutional Economic Model: Assessment and Response Options*, 6(121) Comparative Constitutional Review 115 (2017)].

Public property in Russia was heavily influenced by European countries and Roman law. Some Russian researchers purport to find essential differences in Russian property thinking and understanding, but they are faced with the reality that Russian legislation is a recipient of legal institutions from German and French civil and administrative law. It is interesting that this trend of finding a national identity and distinctive legal character has become popular in many transitional economies.[25]

It is difficult to find another country which has such a diversity in the development of its public property doctrine as Russia. Russia changed from a country that almost denied the existence of public property in early imperial times, to one where public (state) property occupied the dominant position in Soviet times. Additionally, the Russian Empire tried to adopt the doctrines of different European states all at once (England, France and Germany). This multitude of experiments shows us the disadvantages of the mindless transplantation of foreign institutions and the vital importance of a national understanding of property rights and other basic legal issues.

1.2.1. Public Property in the Russian Empire

Public property theories and doctrines did not develop during the medieval epoch of Russian history. That time is also one of the less investigated in terms of property. Property rights were under the monarch's authority, and the line between what was state and what was private often changed.[26]

The modern understanding of property as such, and even the Russian legal term property ("собственность") started with the reign of Catherine the Great, who assured the liberation of nobles from compulsory service and established the inviolability of private property as their special monopoly and privilege.[27]

In her brief memorandum "On Property" ("О собственности"), she used the expression "property" as the synonym of private property. It is not a secret that Catherine the Great was influenced by European philosophers, including Voltaire. Unfortunately, Russian philosophical thinkers did not have a big influence on the formation of the property regime in the state. In my view the two main philosophers who provided the background for the understanding of property rights in Russia are Voltaire and Hegel. These two

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[25] For example, in China, where the property system was far less influenced by European legal traditions, there is a research trend to emphasize the dichotomy of the Western and Eastern approaches to understanding property as the choice between individual and collective. China obviously is an Eastern (collective property) country and only uses the western model for different reasons. Peter C. Perdue, *Constructing Chinese Property Rights: East and West* in *Constituting Modernity: Private Property in the East and West* 35 (H. İslamoğlu (ed.), London; New York: I.B. Tauris, 2004).

[26] For example, state rights to forests in the time of Peter I, Elizabeth I and Catherine II are completely different. *See also Козлов Д.В.* Правовое регулирование земельных участков и иных природных ресурсов в Российской Империи // Вопросы российского и международного права. 2017. № 2-В. С. 262–264 [Denis V. Kozlov, *Legal Regulation of Land and Other Natural Resources in the Russian Empire*, 7(2-B) Matters of Russian and International Law 261, 262–264 (2017)].

[27] Pravilova 2014.

persons represent the French and German influence in the Russian legal order. Thus, even now Russian civil law is a mixed French-German model.

Voltaire explains the vital importance of private property and the fairness of material inequality. He was sure that the rulers must be the owners of property. In his work we may see the direct influence of Locke's ideas. Even his famous idea that labor is the property of people who do not have property originally has its inception in Locke's idea that property is nature plus labor. It is difficult to find public property concepts in Voltaire's works. We can find them in Hegel's "Philosophy of Right" where he names the first chapter "Property" and paragraph 46 explains what common property is. According to his opinion, private property is a more pragmatic institute than public property. However, the only exception is state property, but not other forms of public property (churches, etc.).[28] Hegel demonstrates quite a statist approach toward property rights. He writes that if the state demands the life of an individual, the individual has to give it and obey his moral law.

However, Catherine's implementation of the liberal ideas was rather feudal and autocratic: only a tiny circle of people obtained actual ownership of real property.[29] In 1782, Catherine extended the property rights of nobles not only to the surface of their lands and their products but also to any natural objects or features found on or beneath the surface, such as rivers, lakes, minerals, and forests.[30] Public property was not a focus of Catherine's regulation. Even in Europe concrete public property regulation arose in the 19th century, but not earlier.[31] As in any feudal monarchy, the state's share was defined negatively: everything that did not belong to private owners and institutions was the state's property.

Russia was not unique in this regard, however: the ambivalent nature of property as both an essentially personal attribute and at the same time an institution of the social order had long fueled debates among economists, philosophers, and political

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[28] Hegel uses the terms state property and national property interchangeably. This approach is very appropriate for Russian legal thinking.

[29] Catherine even created an organization which established a competition for the best proposal for a peasant property reform. The winner was Beardé de L'Abbaye, who explained that peasants must obtain freedom and a small amount of land for their activity, but Catherine never implemented those ideas.

[30] It is important not to underestimate the dominance of the state in imperial economic life. At the end of the 19th century the state was the owner of one third of all lands and two thirds of all forests in the country. *See also Ерошкин Н.П.* История государственных учреждений дореволюционной России [Nikolay P. Eroshkin, *History of the Russian State Institutions Before the Revolution*] 200–252 (2nd ed., Moscow: Vysshaya shkola, 1968).

[31] In continental Europe, the process of building a public domain separate from both private and state possession was pushed forward by the French Revolution, which proclaimed the sovereignty of the nation, supported by its power to dispose of public things. The Roman *res publica* was cited as the origin for this legal model, thus giving it a more legitimate and universal appearance. By the end of the century, almost all European law codes acknowledged the existence of a public domain that kept growing and included many objects formerly considered private.

theorists in Europe and elsewhere.[32] Ekaterina Pravilova, however, considered that Russia was lacking in the conditions for the development of the public domain: "inherently public things" were enclosed by private landowners, while the revolutionary changes in civil law that spread across continental Europe did not have much of an impact on Russian autocratic practices.

Some researchers have claimed that Russia in the second half of the 18th century had the most freedom in private property of any European country.[33] The privatization of mineral resources was quite a liberal step for the 18th century.[34] On the one hand, we have to understand that privatization was implemented in a feudal society and we may find some matching phenomena in France before the Revolution. On the other hand, at that time there were arguments that common property was even a danger for society. Thus, Gershman asserts that common ownership of forests was an important factor in the destruction of forests in Russia.[35] Later these broad conceptions of private property were to become an obstacle to the development of the public property doctrine.[36]

However, Russia did not implement the French doctrine of "domaine public," where people play a central role. The people were not great players in the political and legal space.[37] The voice of the people was limited and only some theorists could propose the concept of people's property. For example, Alexander Kunitsyn saw the people ("народ") as a bearer of sovereignty and ultimately the owner of the country's resources.

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32 Pravilova 2014.

33 Pravilova thinks that only Britain provided more wide-ranging property rights. *Id.* However, theoretically in some cases the Russian Empire provided even more. For example, some subsoil mineral resources were not Crown property as was (and still is) the case in Britain, but the property of the landowner. This is a consequence of the mix between the French idea of absolute property rights and the English absence of state in property issues. Another example of this mix is the USA, which does not have "Crown property," but has a common law understanding of property (which is broader).

34 The Russian Empire created many state monopolies ("регалии") for profitable economic activities. These included mining, and salt and tobacco production. *See also Янжул И.И.* Основные начала финансовой науки [Ivan I. Yanzhul, *Basic Principles of Financial Science*] 108–238 (Moscow: Statut, 2002).

35 *Гершман И.* Очерк истории лесовладения, лесной собственности и лесной политики в России // Лесной журнал. 1911. Вып. 3–4. С. 495 [I. Gershman, *Essay About the History of Forest Tenure, Forest Property and Forest Policy in Russia*, 3–4 Forest Journal 493, 495 (1911)].

36 *Vestnik Evropy* in its issue no. 7 (1888) observed that Russian society did not understand the inherently limited character of private property rights in the example of the importance of forests for a public purpose: "Sensible concepts about the character and limits of the right to property are so rare here, that the proclamations about the violation [of that right] can easily find fertile soil; naive people could believe that the necessary protection of forests constitutes an encroachment on private property, and crafty people could take advantage of their gullibility."

37 *See also Красняков Н.И.* Интеграция власти-территорий-населения в Имперской России // Развитие территорий. 2017. № 2(8). С. 9–13 [Nikolay I. Krasnyakov, *Integration Between Authority, Territories and Population in Imperial Russia*, 2 Territory Development 9 (2017)].

> Lands and things acquired by the people are its property; they depend upon the supreme power of the people and cannot be used or taken without its permission.[38]

Another writer, Ivan Aksakov, argued:

> State property is the property of the people, i.e. the ownership of all Russian land.[39]

Despite the fact that some of those researchers were prosecuted for their thoughts, public property in the Russian Empire was not made equal with the emperor's property. Russia usually uses the term "state property" in legal documents.[40] Additionally, the Russian theorist Konstantin N. Annenkov divided state property into two categories: private state property and public state property.[41] Only in 1797, with the creation of the Department (later Ministry) of the Emperor's Domains, the monarch's and the state's shares were finally and clearly separated with the establishment of an asset of immovable property (real estate) that provided income for the emperor's family.[42]

Russia was influenced by many different European ideas. Not only France and Germany, which were the main doctrinal donors, but also England and the Russian Empire all maintained a feudal approach to property rights; this fact made the English experience quite interesting for Russian regulation.[43]

Quite characteristically for Russia in the 18th century, it was the state which performed the functional role of a major reform agent.[44] As distinct from European countries, Russia had to implement modernization from the state level ("top down"), and any movement from below was not about political changes but consisted of coups d'état and revolts by starving subjects.

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[38] *Куницын А.П.* Право естественное [Alexander P. Kunitsyn, *Natural Law*], quoted in Русская философия собственности [*Russian Property Philosophy*] 76 (Moscow: Ganza, 1989).

[39] *Аксаков И.С.* Собрание сочинений. Т. 5 [Ivan S. Aksakov, *Collected Works. Vol. 5*] 374–383 (Moscow: Tipografiya M.G. Volchaninova, 1886).

[40] However, the original formulation of this article is very interesting: "Верховное обладание государственными имуществами принадлежит единственно самодержавной власти Императорского Величества."

[41] *Анненков К.Н.* Система русского гражданского права. Т. 1 [Konstantin N. Annenkov, *System of Russian Civil Law. Vol. 1*] 350 (St. Petersburg: Tipografiya M.M. Stasyulevicha, 1899).

[42] Pravilova 2014.

[43] Nikolay Mordvinov, the well-known Anglophile, who initiated the abolition of the nobles' monopoly over the ownership of real estate, welcomed Alexander's manifesto of 1801 as "the law of true popular freedom, a cornerstone institution for the entire Russian people, the Great Charter of Russia, our Magna Carta." *See also* Pravilova 2014.

[44] *Травин Д.Я., Маргания О.Л.* Европейская модернизация. Кн. 1 [Dmitry Ya. Travin & Otar L. Marganiya, *European Modernization. Book 1*] 5–23 (Moscow; St. Petersburg: AST; Terra Fantastica, 2004).

As we have seen, in Russian society there was no dominant theory about property rights and public domain. In spite of centralism and censorship, thinkers expressed totally varying points of view about property and law in general, from the condemning of private property[45] to the extremely direct protection of this institution. Public property was considered a vital tool for resolving public problems and the establishment of justice in society. This trend was not just Russian, but a European one. Socialism was very popular at the time and questions of property were some of the most important.

It is indisputable that Russia was the recipient of Roman law traditions directly or through European countries such as France and Germany. However, Russian property rights had a feudal inclination and did not account for the public interest for a long time. Even some big rivers were considered private property, and this fact was a huge obstacle for public interests (such as trade and transport). Each step toward the logical regulation of public property was considered as an intrusion on private interests and private property. Even reform of the peasantry through the abolition of serfdom was considered to be a violation of private property rights.[46] Russian legislation more often used the term "state property" than "Crown (imperial) property." Here we see the implementation of Hegel's statist favoritism of a strong state. However, the concept of a strong state was slowed down by Catherine the Great's legacy. From various perspectives this was the right choice, because the Russian state was not strong enough for the administration of all the imperial resources in its territory. Consequently, the government changed the legislation and invited private actors into the most important industries.[47]

All these steps were logical, but the radical protection of private property in natural resources (rivers, lakes, etc.) was not progressive for a 19th century state. The people as a whole did not participate in public property issues. Even the reforms in the second part of the 19th century did not involve the majority of the population in the discussion of the new public property doctrine. The royal authority was satisfied with that state of affairs, but it made Russia less progressive than other continental countries.

All in all, Russia had another legal world than that of the European countries, one in which many regulations were customary and public property was embodied at the level of village communities. The peasants were accustomed to the use of common

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[45] *Кистяковский Б.А.* В защиту права (Интеллигенция и правосознание) // Вехи: Сборник статей о русской интеллигенции [Bogdan A. Kistyakovsky, *In Defence of the Law* in *Milestones: Collection of Articles on the Russian Intelligentsia*] 122–149 (Moscow: Pravda, 1991).

[46] *Кавелин К.Д.* Русский национальный интерес [Konstantin D. Kavelin, *Russian National Interest*] 145–147 (Moscow: Ekonomicheskaya gazeta, 2010).

[47] For example, oil production became an important need in the 19th century, and at exactly that time legislation was changed to involve private business in oil production. The same story occurred with the construction of railways.

property for cultivation and other village activities.[48] Of course, this approach had been the usual practice in many European countries in the medieval epoch, but in Russia this institution was too strong to remove until Stolypin's reform.[49] At the beginning of the 20th century, Russia tried to establish real private property rights for the overwhelming majority of its population. However, this attempt shows that it is very difficult to implement radical property reform in a community where customs play such a big role. The consolidation of the new generation of owners would have taken several decades, as Stolypin himself admitted.

The abolition of the institution of communal property in the countryside and the absence of a strong doctrinal justification for public property on the state level were among the major factors which led Russia to radical changes in its social life and legal order after the February and October Revolutions of 1917.

1.2.2. The Socialist Past

The Soviet concept of public property was not the product of Russian ideologists. With all due respect to Lenin and other Russian socialists, the origin of that idea lay in the European countries, especially in France (Rousseau, Proudhon, etc.) and Germany (Marx). The easiest way to explain this concept is to say that private property must be limited and the state has to be the main owner of all productive forces and property as such. As Lenin put it a few years later, the state had become the only capitalist in the country. People could own only basic property such as clothing.

Before the October Revolution, there were a lot of preconditions for the implementation of the dominance of public property regimes. The idea of nationalization acquired tremendous popularity in Europe during the First World War. This was an understandable effect, because society needs to concentrate property in the hands of a single entity to mobilize resources for battle.

Russia in the 19th and the beginning of the 20th century had not made clear what state property is and how it is regulated. This uncertainty gave birth to many debates in the elites and among philosophers. In theory, the government's opponents believed in strong state intervention, state control, and the introduction of state monopolies, but argued that such measures would make sense only in the presence of a "strong state." There were calls for "establishing strong state power" and "restoring the [state] mechanism of enforcement."[50]

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[48] Stephen F. Williams, *Liberal Reform in an Illiberal Regime: The Creation of Private Property in Russia, 1906–1915* 12–13 (Stanford: Hoover Institution Press, 2006).

[49] Pyotr Stolypin served as the third Prime Minister of the Russian Empire and was the main figure in the implementation of agrarian reform, which had as its goal the abolition of collective ownership in villages and the establishment of private property for each peasant. *Столыпин П.А.* Нам нужна Великая Россия... Полное собрание речей в Государственной Думе и Государственном Совете. 1906–1911 [Pyotr A. Stolypin, *We Need a Great Russia… The Complete Collection of Speeches in the State Duma and the State Council. 1906–1911*] 94–105 (Moscow: Molodaya gvardiya, 1991).

[50] Pravilova 2014.

However, imperial Russia could not realize that idea, because of the lack of resources and the fear of reaction from the main owners of property. Even in the case of mineral resources there was still very strong protection of private rights. Only after the February Revolution did the Provisional Government enforce the decision to monopolize the fuel trade and regulate access to privately held coal mines. The government policy rested on the premise that in a state of crisis, "private initiative and private property remain secured, but they must surrender to the common interest."[51] People needed a strong state that could solve their problems, but pre-Revolutionary Russia did not respond to that desire, and only after 1917 did this idea come true.

The main question for my research into the Soviet doctrine of property is, Why is the state so important? Why should state property be synonymous with public property?[52] Why did Lenin use the terms "public" ("общественная"), "common" ("общая"), and "state" ("государственная") property interchangeably?

The understanding of the state as a people's project and the expression of the people's will was and still is very strong in Russia. Alexey Peshekhonov argued,

> To say that the power over land must belong to the people is, in essence, to say that it must belong to the state.[53]

Soviet legislation adopts other forms of property in the national legislation, but nobody doubts the supremacy of state property. Another explanation for this phenomenon is a different meaning of this term in the Russian language. The lawyer Dmitry Rosenblum claims that the term "state property" as used in the Soviet Civil Code (the word "state" was used here as an adjective – "государственная") was not equivalent to "the state's property" because the Soviet state does not possess but rather manages resources for the public good.[54]

The Bolsheviks applied the theoretical stances of European and prerevolutionary Russian thinkers to the Soviet model. The constitutional regulation of property changed from constitution to constitution. In the text of the 1918 Constitution I find the abolishment of private property in land (Art. 3), and in the next Constitutions,

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[51] Проект правительственной декларации по вопросам экономической политики, 8 июня 1917 г. // Экономическое положение России накануне Великой Октябрьской социалистической революции. Т. 1 [*Draft Government Declaration on Economic Policy, 8 June 1917* in *The Economic Situation in Russia on the Eve of the Great October Socialist Revolution. Vol. 1*] 226 (Moscow: AN SSSR, 1957).

[52] Nikolay Karadzhe-Iskrov came to the conclusion that Soviet state property was equivalent to "public things" in "bourgeois" law. *See also Карадже-Искров Н.П.* К вопросу о праве государства на землю [Nikolay P. Karadzhe-Iskrov, *On the State Property in Land*] 13 (Irkustk: Tip. izd. "Vlast' Truda," 1928).

[53] *Пешехонов А.В.* Право на землю (национализация и социализация) [Alexey V. Peshekhonov, *Rights in Land (Nationalization and Socialization)*] 13, 21 (Petrograd: Izdanie zhurnala "Russkoe bogatstvo," 1917).

[54] *Розенблюм Д.С.* Общие начала землепользования и землеустройства // Еженедельник советской юстиции. 1926. № 24. С. 738 [Dmitry S. Rozenblum, *Basic Principles of Land Tenure*, 24 Soviet Justice Weekly 737, 738 (1926)].

natural resources, transport, banks and factories were proclaimed state property. A more concrete concept of the new property regime is in the 1936 Constitution, which created the new term "socialist property," meaning a combination of state and cooperative property (Art. 5). That type of property was called the "sacred and inviolable foundation of the Soviet system" (Art. 131). In the next Soviet Constitutions this concept was accepted as well.

However, Russia chose the opposite way of radicalism: the radical defense of private property was exchanged for the ultimate supremacy of state property.[55] Soviet legislation was more substantive and contained basic ideas about public property. Due to its methodology, it was a step forward compared with imperial legislation that was always transplanting different ideas from various competing European countries. But methodological regulation was not enough, because the inclination toward the near prohibition of private property created the preconditions for grievances among the population.

The rise of the new Russia after the collapse of the USSR shows that public property doctrines did not have a real effect. Ordinary Russians did not see themselves as the owners of specific factories or natural resources.

Thus, with the proclamation of the new Constitution in 1993, the Russian Federation was moving forward with Western legal development. The country that had forgotten about private property for more than 65 years began to defend private property and to forget about the concept of regulating public property until the beginning of the 21st century.

1.3. Australian Historical Preconditions for Public Property

The Commonwealth of Australia is a typical example of a common law country with an overwhelming dominance of English legal traditions, and embodies the consequence of liberal changes in economic development at the end of the 20th and beginning of the 21st centuries. It is hard to find a concrete theoretical explanation of the concept of public property in the Australian legal framework. From a comparative perspective, Lael Weis suggests that the constitutional description of property in Australia is therefore highly unusual.[56] However, the following analysis will attempt to make some comparisons.

As mentioned above, Australia inherited the British legal system. Some theorists argue that Australian law is simply the adaptation of English law to the colonies

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[55] I do not discuss the differences in the socialist doctrine of property rights. Property rights in that point of view are explained through appropriative rights. *See also Венедиктов А.В.* Государственная социалистическая собственность [Anatoly V. Venediktov, *State Socialistic Property*] 29 (Moscow: AN SSSR, 1948).

[56] Lael K. Weis, *The Protection of Property Under the Australian Constitution* in *The Oxford Handbook of the Australian Constitution* (Forthcoming) (May 2, 2019), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3120134.

and that the main principles are derived from that law.[57] I share Albert Dicey's awareness of the risks of the historical method[58] in legal research. However, without abundant historical explanation of the modern institutions it is impossible to see the whole picture and the meaning of the constitution.[59] No doubt, over the centuries Australian law has developed and acquired distinguishing elements such as a written Constitution, federal structure, etc.[60] Accordingly, we must first analyse the British philosophers who laid the basis for the modern understanding of public property in common law countries. It would be impossible to give a clear picture of public property in Australia without such an analysis.

1.3.1. Philosophical Background of the British Tradition

In Medieval England the dominant theory was Locke's; rightful property resulted from the mixing of an individual's labor with nature.[61] Locke's famous formulation of property spoke of "lives, liberties, and estates."[62] In the following phrase, he alludes to the existence of common goods before private property:

> …shew, how men might come to have a property in several parts of that which God gave to mankind in common, and that without any express compact of all the commoners.[63]

Moreover, Locke's use of the word "property" is synonymous with "private property," comports with the term "property" as normally used in ordinary everyday English, and is consistent with the neoliberal view of social development. This is understandable, because Locke gives a very specific definition for property: "life, liberty and estate." For this purpose, it is difficult to define public "life" or public "liberty." This approach exists in modern Anglo-Saxon legal science as well. On the one hand, even texts for law students try to argue at the outset that private property

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57 Adrian J. Bradbrook, *Australian Real Property Law* 4 (5th ed., Pyrmont: Thomson Reuters, 2011).

58 Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution* 14–16 (10th ed., New York: St. Martin's Press, 1961).

59 Dicey added that the meaning of the constitution could not be adequately understood by anyone who did not take into account the situation of the colonies before the separation from England and the rules of common law, as well as the general conceptions of law and justice inherited by English colonists from their English forefathers.

60 Patrick Parkinson, *Tradition and Change in Australian Law* 3 (5th ed., Pyrmont: Thomson Reuters, 2012).

61 Thomas C. Grey, *The Disintegration of Property*, 22 Nomos 69, 74 (1980).

62 John Locke, *Second Treatise of Government* IX, § 123 (C.B. Macpherson (ed.), Indianapolis: Hackett, 1980).

63 *Id.* Ch. V, sec. 25.

is better and more effective than public property.[64] On the other hand, these books do not disclose the concept of public property at all.

Returning to medieval times, private property was considered dominant and more profitable. Hobbes identified two types of ownership: natural and public. Here I suppose that natural is, if not a synonym, then at least close to the term "private." He tries to draw the line between the personal ownership of the king and his public ownership. To simplify Hobbes' theory, I may say that the king becomes a despot when he uses his property only in his personal interests, and not for public ones. This point of view is classic in the English tradition and shows us the huge importance of Crown property in the context of public law.

However, there are other theories. John Locke in his "Second Treatise of Government" opens his famous chapter on property rights with a denial that all rights stem from the Crown:

> God, as King David says, Psalm cxv. 16, has given the earth to the children of men; given it to mankind in common.

Here I find the basic understanding of the alternative concept of public property in England – that there is property which has to be common and does not depend on the Crown.

English philosophical thinking mostly supported a customary understanding of the doctrine of tenure. Only in the 18th century did Sir William Blackstone describe property as

> that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.[65]

A similar position is stated by David Hume.

However, Hume's and Blackstone's works belong to the Scottish school, where Roman law was influential at that time.[66] Meanwhile, Blackstone's point of view is very popular among modern researchers; it reaffirms the understanding of public property and public interests:

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[64] Bradbrook 2011. In my view, this is very similar to what was in the Soviet legal tradition: the dominance of public (state) property is favored and is more effective given the absence of different points of view on property questions.

[65] Sir William Blackstone, *Commentaries on the Laws of England* 2 (11th ed., London: A. Strahan & W. Woodfall, 1791).

[66] James Moore, *Hume's Theory of Justice and Property*, 24(2) Political Studies 103, 112–113 (1976).

> Besides, the public good is in nothing more essentially interested, than in the protection of every individual's private rights, as modelled by the municipal law.[67]

This statement explains the English approach to understanding property in general: it is difficult to find any notes about public property, but there are plenty about public interests. Public interest in England had a broad meaning. For example, railway companies obviously hoped to earn profits for private shareholders, yet the services they provided were sufficiently important to constitute a public benefit. Public interests are a well-known theme in contemporary investigations, but very few raise the question of public property.

English traditions of property developed under feudalism. The well-known comparativist Ugo Mattei states that property is the most feudal institution in modern common law.[68] After the Norman conquest, a new property order was established. The Crown was recognized as the owner of all land in England. The rights of all other persons are derived from the Crown.[69] Moreover, the classical common law theory was born when political power was increasingly centralized in the monarch's hands and the law became an instrument in the sovereign's repertoire.[70] Here I have to admit that Crown property rights are considered a sovereign right. This concept was standard for all medieval monarchies in Europe, but continental European countries overcame their feudal heritage with the receipt of Roman law.

In the Middle Ages, England was not influenced by Roman law with its concept of contracts and it is difficult to find written legislation which fully describes the concept of public property. Additionally, the understanding of property is much wider in English traditions than in civil law countries. What continental European countries called a contract, in common law can be understood as property rights. The best example here is a "trust,"[71] which is understood completely differently in common law and civil law countries, for the reasons already described.

As Carol Rose shows, the existence of "inherently public property," lying outside purely private property and government-controlled "public property" had been recognized in common law since the Middle Ages.[72] However, it was difficult to find works about public property. Australia directly acquired the same approach

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67 Blackstone 1791.

68 Ugo Mattei, *Basic Principles of Property Law: A Comparative Legal and Economic Introduction* 7 (Westport: Praeger, 2000).

69 Bradbrook 2011.

70 Gerald J. Postema, *Bentham and the Common Law Tradition* 3 (Oxford: Oxford University Press, 1989).

71 Henry Hansmann & Ugo Mattei, *The Functions of Trust Law: A Comparative Legal and Economic Analysis*, 73 New York University Law Review 434, 439–445 (1998).

72 Pravilova 2014.

for the understanding of public property (or the absence of this understanding). I conclude that Crown property is a unique phenomenon in modern property law. It has components of private property (the Queen or King as the only owner[73]) and public ones (the function of this property is usually for a public purpose), with an inclination to the latter.[74] Thus, it is correct to say that the Crown is an administrator of public property, and when the legal framework tells us that the Crown is the owner of property, it is just a fiction which simplifies this administration. It is hard to imagine that all wild animals in Australia belong to the Crown.[75] However, it is a formal reality of Australian law, which makes it easier to pursue legal cases. In this context it is difficult to deny Jeremy Bentham's critique, which recognized common law as "fiction from the beginning to end."[76] The same approach is seen when rivers or trees obtained the status of legal entities.[77] What can be said is that Crown property in modern common law countries is public property and that this medieval institution just helps to preserve the entire legal system from destruction.

1.3.2. Sovereignty vs Property Rights

Crown property, however, is only one example and does not explain what public property in common law countries is. Public property in Australia is distinguished by the use of sovereign powers in the property. There is a principle in common law countries that only Parliament[78] may authorize the compulsory acquisition of property or the imposition of taxes. It is understandable that public power in the state may use two instruments to influence particular property: 1) law making[79] and 2) having property rights over this object.

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[73] The first attempts to delineate the private crown property from the public crown property were carried out in the 12th century by Henry II. In 1800, the first Crown Private Estate Act was passed. This act allowed the monarch to own property as a private person. However, there is no bright line distinction between public and private even today.

[74] The question what is meant by "Crown" is an interesting one. In the *Town Investments* case Lord Diplock said that the Crown meant the government and included all of the ministers and parliamentary secretaries. *See also* Maurice Sunkin & Sebastian Payne, *The Nature of the Crown: A Legal and Political Analysis* 5–7 (Oxford: Oxford University Press, 1999).

[75] *Yanner v. Eaton* (1999) 201 C.L.R. 351.

[76] Jeremy Bentham, *The Collected Works of Jeremy Bentham: Of the Limits of the Penal Branch of Jurisprudence* 195 (Oxford: Oxford University Press, 2010).

[77] Jonathan Pearlman, *New Zealand River to Be Recognised as Living Entity After 170-Year Legal Battle*, Telegraph, 15 March 2017 (May 2, 2019), available at https://www.telegraph.co.uk/news/2017/03/15/new-zealand-river-recognised-living-entity/.

[78] It is well-known that Parliament in the UK and Australia has three parts: two chambers and the Queen (the so-called "the King in Parliament" concept).

[79] Parliament may pass laws which limit the property rights of private persons and enlarge the rights of Government. In modern times, this practice is often linked with ecological cases.

In England the supremacy of Parliament makes it unnecessary to distinguish between sovereign power and property rights.[80] The idea that state power was limited by fundamental law was accepted by the majority of researchers in England in the Middle Ages and through to the 17th century.[81] In the 19th century, the Judicial Committee of the Privy Council held that when the Imperial Parliament granted power to colonial legislators to make laws for "the peace, welfare and good government" of their colonies, it granted them power of the same nature as its own power.[82] In Australia, where legislative power is divided between the Commonwealth and the states, parliaments are legally bound by written constitutions, but not by common law, and within their respective constitutional boundaries, they are as sovereign as the Parliament of the United Kingdom.[83]

Can it be said that public property is a part of parliamentary sovereignty? The answer seems to be positive if we understand the concept of parliamentary sovereign rights. The sovereign power of Parliament may be implemented by the agents of Parliament. The agents of Parliament are simply all those it appoints, directly or indirectly: ministers, civil servants, quasi-government, the nationalized industries. Thus, the property of these entities will be public property, because it serves a public function and is derived from parliamentary authority.

1.3.3. New Australian Trends

Oliver Wendell Holmes described the trends of legal thinking in his famous lecture *The Path of the Law* in 1897. He maintained that the focus of law would move toward empirical, inductive, and statistical methodologies adopted from sociology and economics.[84]

The law and economics movement and other utilitarian approaches to explain public property administration have not been wholly successful. The problem is that these theories presume individuals to be purely self-interested persons, who want to satisfy only their personal demands. In such a case any person would, to the

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[80] According to Dicey's "Introduction to the Study of the Law of the Constitution," *supra* note 58, one of the main doctrines in the sovereignty of parliament is that "Parliament has the right to make or unmake any law whatever." It means that any law which abolishes private property is theoretically possible. In recent decades, criticism of this principle has emerged. It is quite unprogressive for modern implementation of the checks and balances principle to give unlimited power to one institution, even a parliament. However, the Australian federal system overcomes the disadvantages of the Westminster system.

[81] John W. Gough, *Fundamental Law in English Constitutional History* 20–39 (Oxford: Clarendon Press, 1955).

[82] *R v. Burah* (1878) 3 App Cas 889; *Powell v. Apollo Candle Company* (1885) 10 App Cas 282.

[83] Jeffrey Goldsworthy, *The Sovereignty of Parliament: History and Philosophy* 1 (Oxford: Clarendon Press, 1999).

[84] Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 Harvard Law Review 457 (1897).

extent possible, avoid contributing to the public domain.[85] However, in practice we see many examples of participation with self-sacrifice for the public interest. This factor is more in the realm of psychological analysis, but it must be admitted that utilitarian theory cannot be universal, especially at the level of the state, which also implements decisions for non-economic reasons.

In recent decades, Western legal doctrine has used needs-based theory. It was created under the influence of Marxist thinking and focuses on the needs of the disadvantaged. This theory imposes a certain social and environmental responsibility on property owners.

As we have seen, Australian law is based on common law traditions that were inherited from England. Common law has little space for public property, and establishes a direct linkage between public property and Crown property. Here we see a feudal legacy without any reception of Roman law. In England, the Crown was the owner of all real estate, and the changes that occurred in the 19th, 20th, and 21st centuries did not overcome the feudal basis for the understanding of public property. The story is the same in Australia.

Additionally, Australia has another understanding of state property rights, included in the sovereign rights of Australia and its states. However, some property obviously lies in the public law sphere and requires that its owner be a public entity. Such property can include public lands, wild animals, water resources and property which serves a public purpose (for example, military arms).

A number of further supplementary considerations provide support for the contention that in the second half of the 20th century and the beginning of the 21st Australia changed its regulation of public property due to many factors. However, Australia did not apply the concept of public property as did some other common law countries such as the USA and Nigeria. The USA has a more developed concept of public property, because the national legal framework broke with the fiction of Crown property, and the Queen plays no role in the American legal system. Moreover, the interpretation of common law in the USA was markedly influenced by the American Revolution, and Americans quickly developed their own case law in the years following the Declaration of Independence.[86] The same might be said about other common law countries which refuse to recognize the supreme role of the Crown. Without this fiction, lawyers need to find substitute institutions such as national property, people's property or other names for the legal construct of public property.

Australia did not have this challenge and felt comfortable with the fiction of Crown property. By comparison, New Zealand had serious discussions about

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[85] Some researchers try to formulate an amendment to the utilitarian theory such as "bounded self-interests."

[86] Parkinson 2012.

changing the concept of Crown property.[87] Similar discussions occur in the Australian legal community, but the concept does not have enough support from the lawyers and politicians. The lack of support for such a change is understandable, because the common law consists of a body of traditional ideas of a highly varied character received within a caste of experts.[88] It is well-known that customary systems of law may exist only with the encouragement of orthodoxy, but if people change, the law changes as well.[89] Such a change occurred when Australia included the property of indigenous peoples in the constitution.[90] The new concept of property was the answer to the challenge of defense of Aboriginal rights. The case of *Mabo v. Queensland* was a great step against the status quo and the idea that before British settlement Australia was just *terra nullius*. Now aborigines had their own title to the land. It is difficult to say for sure which of these two concepts – statutory law from Parliament, or natural law – underpins this idea. This title does not originate from the Crown, but is a natural right, which existed before British occupation of the land. These rights are the result of statutory law, which originates from parliament's sovereignty. However, this does not change the general picture of public property in Australia, and it is still a clone of the English system with small differences.

2. The Constitutionalism of Public Property

Constitutional law differs from state to state. There are two main doctrines for the explanation of what constitutional law is. The first one includes all rules that directly or indirectly affect the contribution or the exercise of sovereign power in the state. The other doctrine explains constitutionality through the importance of concrete issues. In other words, constitutional law is the regulation of the most necessary subjects which the law treats. I will use the second option and advocate the idea that the objects of constitutional regulations may change. However, there are some common topics for the constitutional regulation of each country, such as governance and human rights. Property rights and public property are not general provisions for all countries. My concern in this chapter is to show that public property is at least indirectly constitutionally regulated in every country. This is a consequence of the basic significance of the common property, as was described in the previous chapter.

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87 Preliminary Paper No. 20: Tenure and Estates in Land, NZLC PP20 (1992).

88 William L. Twining, *The Common Law and Legal Theory, Legal Theory and Common Law* 10 (Oxford: Blackwell Pub., 1986).

89 Postema 1989.

90 One might say that the recognition of indigenous people's property rights contradicts our statement that public property exists within the system of parliamentary sovereignty. I emphasize that the recognition of this idea was made by parliament in its statutory legislation.

"Constitutionalism" and "constitutional law" have completely different forms and definitions from country to country. Continental European represents a written and positivist approach to this phenomenon. There is less clarity with constitutional law in common law countries. Australia does have a written constitution, but the unwritten part is essential for a real understanding of what Australian constitutional law is. Russian constitutional law is primarily the law of the Constitution of the Russian Federation of 1993 and all other sources obliged to follow it.

2.1. The Constitutionalism of Public Property in Russia

The Constitution of the Russian Federation proclaims that recognition and equal protection shall be given to private, state, municipal *and other forms of ownership* (Art. 8 of the Constitution). In spite of that formulation, Russian legislation regulates only the first three forms. There is no legal clarification of other forms. The term "public property" is not a legal definition for official Russian documents, but theorists use this term to explain both state property and municipal property.[91] That is why from a conservative point of view, public property is the sum of state property and municipal property. Few researchers argue that de facto Russia does not have municipal property; it is just a lower level in the system of state property. Local self-government is very influenced by the state's authority, especially in the area of budget transfers.[92] State and municipal property are treated similarly as to their nature and administration. However, the text of the Constitution grants the local self-government independence within the limits of its authority (Art. 12) and municipal property has a special aim – to play a role in the solution of *local* problems. Thus, we may say that Russia has municipal property, but in reality, local self-government is weaker for the implementation of these constitutional principles. However, it still must be acknowledged that the Russian Federation has two main types of public property: state and municipal.

Constitutional regulation leaves space for the creation of other types of public property. During the last few decades Russian authorities have tried to make this a reality and create new, extraordinary forms of property within the Russian legal framework. This tendency gave rise to many debates among scholars specializing in constitutional law. Some researchers argue that state and municipal property should

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[91] This approach was approved by a Constitutional Court decision. *See* Постановление Конституционного Суда РФ от 20 декабря 2010 г. № 22-П // Собрание законодательства РФ. 2011. № 1. Ст. 264 [Ruling of the Constitutional Court of the Russian Federation No. 22-P of 20 December 2010, Legislation Bulletin of the Russian Federation, 2011, No. 1, Art. 264]; Постановление Конституционного Суда РФ от 30 июня 2006 г. № 8-П // Собрание законодательства РФ. 2006. № 28. Ст. 3117 [Ruling of the Constitutional Court of the Russian Federation No. 8-P of 30 June 2006, Legislation Bulletin of the Russian Federation, 2006, No. 28, Art. 3117].

[92] Municipal incomes are not sufficient for their budgets. Thus, regional and federal governments transfer huge amounts to the local level. Usually, these transfers and subventions are the main source for municipal budgets.

not be the object of constitutional regulation, but rather of civil and administrative law. Others emphasize the importance of public property issues and insist they be the subject of constitutional law.[93]

Public property issues are strictly regulated at both the constitutional and administrative level. According to Article 114 of the Russian Constitution, the Government of the Russian Federation shall manage federal property. This statement is repeated in Article 19 of the federal constitutional law "On the Government of the Russian Federation." Meanwhile the Government has the right to delegate functions to executive bodies such as ministries, services and agencies.[94]

According to the Government Act,[95] the main administrator of Federal property is the Federal Agency for State Property Management ("Росимущество").[96] Its authority is that of the owner of this property. Thus, it may implement a triad of rights: to possess, to use and to dispose of the property.[97] Meanwhile, the agency is subject to many limitations of these rights by the Ministry of Economic Development, the Government, the President and legislation in general. This specialized federal agency is not the only body which administers federal property, as some functions of property management belong to the Ministry of Justice, Ministry of Culture and the Office of the President.[98]

Additionally, Russian constitutional law gives examples of specific public property. For example, the use of natural resources by indigenous peoples is regulated by the Federal law "On the Guarantees of the Rights of Indigenous Numerically Small Peoples

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93 *Мазаев В.Д.* Публичная собственность в России: конституционные основы [Vladimir D. Mazaev, *Public Property in Russia: Constitutional Bases*] 3–10 (Moscow: Gorodets, 2004); *Талапина Э.В.* Публичное право и экономика [Elvira V. Talapina, *Public Law and Economics*] 38–73 (Moscow: Wolters Kluwer, 2011).

94 The Russian government system created three types of executive body: the ministry (provides policy in its subject area, creates rules), the service (exercises control functions); and the agency (provides state services). There are many exceptions to that structure, but according to the theory of administrative reform of 2004 this was the basic, overarching structure.

95 Постановление Правительства РФ от 5 июня 2008 г. № 432 «О Федеральном агентстве по управлению государственным имуществом» // Собрание законодательства РФ. 2008. № 23. Ст. 2721 [Ruling of the Government of the Russian Federation No. 432 of 5 June 2008. On the Federal Agency for State Property Management, Legislation Bulletin of the Russian Federation, 2008, No. 23, Art. 2721].

96 Of course, there are many other executive entities which administer federal property as necessary for their own existence and functions, but they are exceptions to the general rule.

97 The three rights concept was incorporated into Russian legal tradition in the 19th century by Shershenevich. This idea was carried over from the understanding of property and property rights in Roman law.

98 Officially the Office of the President is the federal agency in the structure of the Government. However, the President provides leadership of this body and issues decrees to the Government for the delegation of authority concerning the administration of state property to this agency. Pursuant to such delegation, the agency provides logistics, social and personal services (such as accommodation and medical services) for the officials of all supreme bodies in the country (such as the Presidential Administration, the Government, the chambers of parliament, the Constitutional Court, Central Election Commission, etc.).

of the Russian Federation" (No. 82-FZ of 1999).[99] The property rights of public law companies and state corporations are another kind of quasi-public property. Russian scholars often analyze these issues through constitutional law and constitutional principles.[100] Much research has been devoted to the constitutional basis for public property[101] and for property in general.[102]

My hypothesis in this section is that the constitutional level of public property regulation in Russia has three parts: 1) public property is the material base for national sovereignty;[103] 2) public property is the material base for the activities of public authorities;[104] and 3) public property is a vital tool for the implementation of the state's constitutional obligations.[105]

I agree with Mattei, who explained the importance of the court system in the protection of property rights.[106] Another argument favoring the constitutional-level

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[99] *Кряжков В.А.* Право коренных малочисленных народов на традиционное природопользование (на примере охоты) // Государство и право. 2016. № 11. С. 32–42 [Vladimir A. Kryazhkov, *The Right of Indigenous Peoples to Traditional Environmental Management (on the Example of Hunting)*, 11 State and Law 32 (2016)].

[100] *Бакирова Е.Ю., Китаева А.Е.* Право собственности государственной корпорации через призму конституционного разграничения форм собственности // Власть закона. 2014. № 1(17). С. 66–71 [Elena Yu. Bakirova & A.E. Kitaeva, *Right of Ownership of Public Corporations Through the Prism of Constitutional Differentiation of Forms of Ownership*, 1(17) Rule of Law 66 (2014)].

[101] *Пахомов С.А.* Конституционно-правовой режим федеральной государственной собственности в Российской Федерации: Автореф. дис. … канд. юрид. наук [Sergey A. Pakhomov, *The Constitutional Legal Regime of Federal State Ownership in the Russian Federation: Synopsis of a Thesis for a Candidate Degree in Law Sciences*] (Moscow, 2008); *Грузин С.В.* Особенности конституционно-правового режима охраны публичной собственности на природные ресурсы в Российской Федерации // Известия Российского государственного педагогического университета им. А.И. Герцена. 2007. № 29. С. 40–43 [Stanislav V. Gruzin, *Constitutional Law Regulation of Defense of Public Natural Recourses Ownership in the Russian Federation*, 29 Izvestia: Herzen University Journal of Humanities & Science 40 (2007)].

[102] *Царикаева Ж.М.* Конституционно-правовой режим права собственности в Российской Федерации: Дис. … канд. юрид. наук [Zhanna M. Tsarikaeva, *The Constitutional Legal Regime of Property Rights in the Russian Federation: Thesis for a Candidate Degree in Law Sciences*] (Penza, 2007).

[103] Определение Конституционного Суда РФ от 19 мая 2009 г. № 596-О-О // Вестник Конституционного Суда РФ. 2009. № 6 [Definition of the Constitutional Court of the Russian Federation No. 596-O-O of 19 May 2009, 6 Bulletin of the Constitutional Court of the Russian Federation (2009)], para. 3.

[104] This statement is confirmed by any legislative act which regulates public authorities on the federal, regional or local level.

[105] The Russian Federation is a social state which has declared a free education and medical care system. It is possible to promote it without public property (to arrange a system of compensation, etc.), but in fact the Russian government discharges these obligations in a classic way. Private actors are more independent and have less constitutional responsibility. Thus, to give some functions over to outsourcing is an unacceptable act. The same logic is expressed in the Israeli Supreme Court's decision forbidding private prisons. *See also* Human Rights Division, *Academic Center of Law and Business v. Minister of Finance*, HCJ 2605/05, 19 November 2009. An English translation is available at http://elyon1.court.gov.il/files_eng/05/050/026/n39/05026050.n39.pdf.

[106] Mattei 2000.

analysis of public property is that Russia has many Constitutional Court decisions that resolved issues of public property. They include cases about infrastructure projects, the delineation of natural resources between regions and the federation, nationalization and many others.

Russia's written Constitution contains several provisions that make public property an essential part of the constitutional scheme. By contrast with other constitutions, it has a direct article about state and municipal property along with a standard or norm for the protection of this property.[107] On the one hand, this standard stems from the Soviet doctrine of social protection, under which the state protects public interests from socially dangerous elements. On the other hand, constitutional protection of public property is more complicated than the protection of private property. That is why many constitutions refuse to address it in their texts. Russian Constitutional Court Judge Gadis Gadzhiev states that it is enough to declare the inviolability of private property and promote its protection under the principle of the rule of law.[108] The state as a lawmaker has no other responsibility for private property, but it does for public property, because in this case it is not enough to guarantee such protection of the property; the state must also be an effective manager of the public property toward the goal of satisfaction of public demands. These goals obviously require a correspondingly serious constitutional regulation of public property in Russian national legislation.

2.2. (Un)written Constitutionalism in Australian Public Property

The approach of written constitutionalism in the realm of property issues is not characteristic for common law countries. It is difficult to find examples of property issues in written Australian constitutional law. The main exceptions to this are the property of indigenous peoples and the acquisition of property. The protection of private property from arbitrary confiscation is canonically cited as among the few examples of an express guarantee of rights found in the Australian Constitution.[109]

Indeed, the Russian Federation and the Commonwealth of Australia have similarities in their public property systems. The level structure may be similar at first glance. However, the three levels of public property (federal, regional and municipal) are essentially different in the two systems. The reason for this lies in the emergence of the federal structure of each state: Australia was created by states

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[107] The protection of public property is not a typical feature of many Western constitutional systems. Even centralized countries such as France do not promote this protection in the text of their constitutions.

[108] *Гаджиев Г.А.* Российские исследования в области права и экономики: уточнение юридической картины мира [Gadis A. Gadzhiev, *Russian Studies in the Field of Law and Economics: Clarifying the Legal Picture of the World*] (May 2, 2019), available at http://www.ksrf.ru/ru/News/Documents/report_%D0%93%D0%B0%D0%B4%D0%B6%D0%B8%D0%B5%D0%B2_2017.pdf.

[109] Weis, *supra* note 56.

which surrendered some authority to the federal level, while Russia is a top-down federal state in which federalism was imposed by the central government.[110]

It is difficult to draw the borders of constitutional law. The situation becomes even more complicated if the country has no written constitution. Geoffrey Marshal in his *Constitutional Convention* stressed a very essential idea for common law countries:

> The Constitution is unwritten… it includes a large number of non-legal conventional rules.[111]

Fortunately, the Commonwealth of Australia is not among such countries. The written Australian Constitution regulates only basic issues and bears some "mystery" within.[112] The role of a written constitution may be overrated by those who do not understand common law traditions. That is why it is impossible to make any conclusions from the text alone, while it is vital to know case law on constitutional issues.

The regulation of property and its academic explanation in Australia is progressive. There are two dominant approaches to public property in contemporary Australian scholarship: the economics of law utilitarian theory, and liberal contractarianism. Both theories state that public property is an instrument for the satisfaction of individual preferences and that the individual stands ontologically prior to any public entity, including the state.[113] Any special constitutional act regulating public property disbalances this system. Some Commonwealth researchers do not wish to recognize any distinction between public and private law,[114] and thus do not want to distinguish public property either. However, other ideas that are more tolerant to the constitutional regulation of public property have become more popular in Australia.

Theorists investigate constitutional property law issues mostly concerning compensation for the acquisition of private property and the Queen's prerogative

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[110] This history explains the constant tendency toward centralization in Russian history. The regions (subjects) have never been independent or self-regulated. Moreover, the unnatural delegation of legal authority to the regional level created preconditions for failing governance or weakness in the federal structure. In the time of decentralization, in the 1990s, many subjects transcended the boundaries of their constitutional rights and established their own authority in vital spheres (there was even an attempt to print regional banknotes – Ural franks).

[111] Geoffrey Marshall, *Constitutional Convention: The Rules and Forms of Political Accountability* 20–37 (Oxford: Oxford University Press, 1987).

[112] The written constitution sometimes contains norms that are purely formal. For example, the Governor-General is the commander-in-chief of the naval and military forces, but his real power is de facto merely ceremonial, and real decisions of war are made by the Cabinet and Prime Minister. This interpretation of the constitutional text is very flexible in this case. It is hard to imagine the same situation in civil law countries (and even in the U.S.), where the written constitution plays an even more important role. Helen Irving, *Five Things to Know About the Australian Constitution* 7–15 (Cambridge: Cambridge University Press, 2004).

[113] *Property and Community*, *supra* note 7, at 19–21.

[114] Peter Cane et al., *Principles of Administrative Law* 4 (2nd ed., Oxford: Oxford University Press, 2013).

property rights. According to the Australian Law Reform Commission (ALRC), public interest matters include freedom of expression, freedom of the media, public health and safety, national security, open justice and the economic wellbeing of the country (ALRC 2016). The text of the Australian Constitution mentions the word "property" ten times. However, there are no provisions or principles about public property or property as such. A similar situation prevails with respect to state constitutions.[115] Property rights may be protected very effectively without a constitutional provision for property rights. An analysis of the text of the constitution shows only a few mentions about property rights and their regulation.[116] I believe such omissions are rather typical for common law countries, in which provisions concerning property rights may even be excluded from a constitution during the course of its amendment over time.[117] The understanding of what public property is hidden in common law and court decisions.

However, it is difficult to manage public property without a strict understanding of where it is and what kind of public property exists in the national framework. Despite the terminology specifying state or federal property, Australia's main kind of public property is Crown property. Some researchers argue that the legal nature and position of the Crown are matters of constitutional law.[118] I endorse this logic and concur that Crown property, in most cases, is a matter of constitutional law. It is generally agreed, for example, that natural resources are a vital issue for Australia or any nation; accordingly issues concerning them must be regulated at the constitutional level.[119]

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[115] For example, the Constitution Act of Victoria State contains the term "property" only once, in the following sentence: "The Judicial Commission may acquire, hold and dispose of personal property" (Division 3, 87AAK, 2(d)). The Constitution Act of West Australia State does not contain the word "property" at all.

[116] A very important provision was included in Article 100 – rights to use water resources without limitations from the Commonwealth. We see here examples of natural public property which has enormous value in many countries. The Commonwealth Constitution Act is not the only constitution which mentions the water question. Australian states' constitutions either focus their attention on water resources (Part VII of the Constitution Act of Victoria). The access to water resources was and still is a vital right which obtains constitutional recognition even in water-rich countries. For example, Slovenia became the first EU country which declared a constitutional right to drinkable water. In our opinion, the declaration of that kind of constitutional rights demands a material basis for its implementation. That is why it will be impossible to implement that right if all water is on private property. The same view is held by the Higher Court of Australia in the *ICM Agriculture Pty Ltd v. The Commonwealth* case ((2009) 240 C.L.R. 140), where it justifies the burden that private property owners must bear for the public good.

[117] Alexander Alvaro, *Why Property Rights Were Excluded from the Canadian Charter of Rights and Freedoms*, 24(2) Canadian Journal of Political Science 309, 318 (1991).

[118] Sunkin & Payne 1999.

[119] The significant role of constitutional law in resource ownership has been noted in the work of Michael Crommelin. *See* Michael Crommelin, *Resources Law and Public Policy*, 15 University of Western Australia Law Review 1, 6–9 (1983).

As mentioned, this type of property is mostly a fiction. Roscoe Pound declares that

> …so-called state ownership of *res communes* and *res nullius* is only a sort of guardianship for social purposes … The state as a corporation does not own a river… Our modern way of putting it is only an incident of the nineteenth-century dogma that everything must be owned.[120]

The concept of the state as a corporation is popular nowadays, and not only in common law countries. According to this idea, state property should have the same character as corporate property, i.e. with the citizenry as shareholders. Charles Reich argued that state benefits were often "fully deserved" because citizens make contributions to the state that are intended to fund their benefits.[121] However, courts have not often applied this concept.[122]

In the vast majority of cases the constitutional provision for acquisition concerns private property rather than public property. However, there are some cases about the acquisition of property between federation and state. Moreover, even private property cases eventually came to concern public property, because the new owner of the property was a public entity (the Commonwealth). Therefore it is argued that Article 51 (xxxi) regulates public property as well. By contrast, the Australian courts do not regard every acquisition of property by the Commonwealth as an acquisition under Article 51(xxxi). The High Court has stated that there is no acquisition under Article 51(xxxi) in the case of the acquisition of property that has been forfeited due to its use in the commission of a crime.[123] Tom Allen comments that the sovereign power over property can be subdivided into a number of different powers, depending on the purpose and effect of the interference with property rights.[124] The power to acquire property under Article 51(xxxi) is the power of eminent domain, and it is distinct from powers such as those of forfeiture, taxation and bankruptcy.

It is not easy to argue that Australia has a constitutional level of public property regulation. Compared with France, Russia or even the USA, the Australian constitutional regime gives little space for public property issues. This fact is explained simply: The approach to the civil rights adopted by the Australian Constitution is in the common law tradition. Most Commonwealth countries include a right to property in a constitutional bill of rights.[125] In other words,

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120 *Yanner v. Eaton*, *supra* note 75.

121 Charles A. Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 Yale Law Journal 1245, 1255 (1965).

122 *See Georgiadis v. Australian and Overseas Telecommunications Corporation* (1994) 179 C.L.R. 297.

123 *Re Director of Public Prosecutions; Ex Parte Lawler* (1994) 179 C.L.R. 270.

124 Tom Allen, *The Right to Property in Commonwealth Constitutions* 40 (Cambridge: Cambridge University Press, 2000).

125 *Id*. at 1.

> the Australian approach has been to limit the power of Governments rather than to proclaim the rights of citizens in abstract terms.[126]

In the question of property, we may see the influence of the Magna Carta as well. That is why Australian constitutional law tries to find a way and mechanism for the limitation of state power. I cannot say that this method is wrong, but the range of possibilities under a common law approach will be narrower than that which exists in continental Europe.[127] The main object for regulation here is not property as such but the rights and accountability of the government.

However, as previously mentioned, the USA has another approach because of its different understanding of public property and the absence of Crown power in its national legal system. In the USA, any judge can strike down a statute, administrative regulation, or judicial precedent as unconstitutional. It is not surprising that issues concerning public property are common in these kinds of cases. The constitutionalisation of property gives courts a specific function and a particular context in which to articulate the role of property, and the right to property, in the constitutional order.[128]

This model is completely absent in the UK and Australia. Thus, we see a variation in common law countries. In light of such differences, it is difficult to agree with theorists who suppose that public property in Australia is not a matter of constitutional importance. Cases about public property and its regulation according to the Australian Commonwealth Constitution have been discussed above. The fact is that public property requires less regulation in common law countries. It may be said that public property consists of everything except property which is recognized as private.[129] Common law establishes "the individual's freedom to pursue individual ends," and civil law establishes "the government's freedom to pursue collective ends."[130]

However, the problem of public property may arise when there are many public actors within the state. The federal state is excellent, for example, when public property needs more regulation for the prevention of conflicts between different

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126 Peter Gerangelos et al., *Winterton's Australian Federal Constitutional Law: Commentary & Materials* 17 (4th ed., Pyrmont: Thomson Reuters, 2017).

127 I argue that in federal states the regulation of public property is even more important than in unitary ones. The possible disputes between different levels of public authority make for unpredictable results. The judicial system may intervene and resolve this dispute, but even common law countries do not have a huge legacy of decisions in such cases.

128 Allen 2000.

129 This is the direct consequence of the feudal Crown property, the historical development of which I have already examined. The Crown owns everything: this provision does not need any special regulation, and all possible provisions may regulate the line between private property and Crown sovereign rights.

130 Paul G. Mahoney, *The Common Law and Economic Growth: Hayek Might Be Right*, 30(2) Journal of Legal Studies 503, 511 (2001).

states or between a state and a federation. It is difficult to deny that this kind of negotiation may be defined as constitutional and needs constitutional regulation.

In contrast, the courts require clear evidence that regulation is intended to extinguish vested rights, even where there is no transfer of property to the state.[131] The High Court stated that the Australian Constitution was intended to create a decentralized state.[132] Thus, the appropriate constitutional regulation of public property decreases the level of possible conflicts. However, even Australia does not try to create a clear constitutional scheme of public property regulation, and state property or national property are just words in some official documents, and not truly a structural doctrine. Thus, Australia needs to reexamine its approach to public property regulation and focus on more concrete written regulation in this sphere.

Some researchers hold the view that English society lacks state traditions.[133] The idea of the Crown substitutes for it, but is still a matter of constitutional law. Leaving aside the political reasons for its existence,[134] it might be said that Crown property is a complicated institution which has many disadvantages. The questions arise not only in the area of property but in others as well. Until the defeat of the superiority of Crown property, it will be difficult to build other constitutional forms of public property. Moreover, even an administrative level of regulation may contradict Crown authority. The administrative regulation of public property is implemented through the accountability of the public entities which have authority over public resources.[135] However, the importance of public property, such as natural resources, requires a special normative justification in order to be regarded as legitimate and I believe that in this case written constitutional regulation is the best option for Australia as well. First of all, constitutional rights promote democratic decision-making by the government. Secondly, the population of Australia is changing, and it would be more transparent to have a special textual norm, which will be understandable without the historical development of common law. Finally, a written constitution will erect obstacles to radically changing this area.[136] This fact is very important if society wants to preserve modern standards of constitutional rights.

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131 *Colonial Sugar Refining Co. v. Melbourne Harbour Trust Commissioners* [1927] A.C. 343 at 359 per Lord Warrington.

132 *Attorney-General of Queensland v. Attorney-General of the Commonwealth* (1915) 20 C.L.R. 148 at 163; *D'Emden v. Pedder* (1904) 1 C.L.R. 91; *Deakin v. Webb* (1904) 1 C.L.R. 585.

133 Kenneth H.F. Dyson, *The State Tradition in Western Europe: A Study of an Idea and Institution* 37–42 (Oxford: Blackwell, 1980).

134 The Head of State is a monarch whose primary loyalty is, and always will be, to Britain. Parkinson 2012.

135 Public Governance, Performance and Accountability Act 2013 (May 2, 2019), available at https://www.legislation.gov.au/Details/C2013A00123.

136 It could be counter-argued that the system will become less flexible for making changes. In some challenging moments the written constitution may become a shield for populists in the Parliament. We may imagine a situation where the written constitution guarantees free access to drinkable water,

3. The Case of Natural Resources

Natural resources are one of the common objects of public property worldwide, especially countries with promising soils. Australia and Russia are, no doubt, among these countries. The administration of those vital resources needs clear legal mechanisms for property rights. In federal states there are three main questions:

1) Who is the owner of the particular natural resources?

2) How are public interests in this sphere to be protected?

3) How are federal and regional rights delineated?

The natural resources may become the property of a public entity (such as a state or municipality) or a private person (for example, a landowner). However, the public interest may be protected not only through the property title, but with legal obligations and restrictions such as taxation, licenses or the prohibition on selling.

Meanwhile, the protection of public interests can be difficult in a federal state. When legislation on natural resources is applied, various types of conflicts can arise. First, there might be conflicts between the federal and regional authorities of state power, because the rights of the regional organs of state power on issues related to the use of natural resources might be violated, in turn reducing their capacity to defend the rights and legal interests of the population within their territory.[137] There are the interests of the entire population (federal) and that of the specific territory (or region).[138] The distribution of resources from one region to the whole country would be disadvantageous for this region. That is why instances when federal and regional authorities are in conflict with each other are familiar ones. Constitutional mechanisms are called on to resolve such conflicts according to common principles and rules.

3.1. Mineral Resources

Australian mineral resources were originally linked with the land title.[139] It is an implementation of the principle *Cuius est solum, eius est usque ad coelum et ad inferos* ("whoever's is the soil, it is theirs all the way to Heaven and all the way to Hell").[140] I have already mentioned that here we have a legal fiction – the Crown and its ownership.

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but drought dramatically decreases the amount of drinkable water in the country. The limitation of this right will be unpopular and it will be difficult for legislators to vote for amendments. However, even in this case it is possible to find mechanisms for the temporary limitation of constitutional rights such as martial law, etc.

137 *Encyclopedia of the Barents Region. Vol. 2: N-Y* 30 (M.-O. Olsson (ed.), Oslo: PAX, 2016).

138 I do not address the problems of the disputes between other actors such as municipal entities and indigenous people.

139 *Wilkinson v. Proud* (1843) 11 M. & W. 33.

140 Mattei 2000.

The general rule says: the transfer of lands leads to the transfer of resources.[141] Thus, private ownership of any natural resources was an acceptable phenomenon in Australia until the beginning of the 20th century. Exclusive public property over the most important resources was established only at the end of the same century.

How did this come about? The states that make up the federation have priority in questions of mineral resources, because the Constitution of the Australian Commonwealth gives us a list of federal powers, but not state ones. With the growth of the Australian federation even statutory law took this approach:

> The entire management and control of the waste lands belonging to the Crown in the said colony… including all royalties, mines and minerals.

Michael Crommelin argues that the role of the Crown has only historical significance.[142] Given the fact that the legislative authority may publish any new regulation,[143] we need to understand that

1) Statutory law often copies common law principles into its texts. In case of petroleum, all Australian states declared that this resource is owned by the Crown without exception;

2) Some questions are not covered by statutory legislation.

However, Australian states passed their own legislation which sets the norm that mineral resources are considered public property (Crown property).[144] There are still a lot of nuances with respect to different resources in different states.

Compared with Australia, in the Russian national framework it is more expected that the owners and the status of mineral resources will be legislatively defined. Moreover, the Russian constitution contains numerous principles which address this issue: land and other natural resources shall be utilized and protected in the Russian Federation as the basis of life and activity of the people living in corresponding territories;[145] these natural resources can be owned privately, by the state, or by

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[141] Even in this case there is one important exemption – royal metals. Gold and silver remain subject to the Crown's ownership. It is curious that other important resources such as oil and gas are not regulated in the same way. The explanation here is simple: at the time of the inception of this common law principle these resources were not important.

[142] Crommelin 1983, at 4.

[143] *Nicholas v. Western Australia* (1972) W.A.R. 168.

[144] Not only petroleum, but other resources became the object of Crown property. Tasmania Mining Act (1962), South Australia Mining Act (1971), New South Wales Coal Acquisition Act (1981), Victoria Mines Act (1983), etc.

[145] The Russian Constitution uses a very liberal approach for natural resources compared with other post-Soviet countries. For example, Article 13 of the Ukrainian Constitution provides: "The land, its subsoil, atmosphere, water and other natural resources within the territory of Ukraine, the natural resources of its continental shelf, and the exclusive (maritime) economic zone, are objects of the right of property

a municipality (Art. 9); land owners may use and dispose of natural resources freely, unless this will cause harm to the environment or violate the rights of other persons (Art. 36); everybody has the right to a healthy environment, information on its condition, and compensation for damages if ecological rules are violated (Art. 42); and everybody must protect nature and the environment (Art. 58).

Russian constitutional regulation defines the special purposes of natural resources. This framework usually defines the attributes of public property.[146] Meanwhile, land and other natural resources may be under private, state, municipal or other forms of ownership. Federal law regulates this issue more specifically:

> Subsoil in the borders of the territory of the Russian Federation, including underground space and the minerals contained in subsoil, energy and other resources is state-owned property.

State-owned includes two kinds of owners: federal and regional.[147]

The Russian Federation has legal and political dominion over its resources. However, the Federal Treaty of 31 March 1992 explains that natural resources are the property of the population of the republics[148] and there are two levels of regulation: basic federal regulation and republic-level regulation.[149] Republics used

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of the Ukrainian people. Ownership rights on behalf of the Ukrainian people are exercised by bodies of state power and bodies of local self-government within the limits determined by this Constitution."

Article 13 of the Belarus Constitution: "The mineral wealth, waters and forests are the exclusive property of the State. The land for agricultural use is the property of the State."

Article 6 of the Kazakhstan Constitution: "The land and underground resources, waters, flora and fauna, other natural resources shall be owned by the state. The land may also be privately owned on terms, conditions and within the limits established by legislation."

146 *Мазаев В.Д.* Понятие и конституционные принципы публичной собственности: Учебное пособие [Vladimir D. Mazaev, *The Definition and Constitutional Principles of Public Property: Study Guide*] 19–27 (Moscow: Institute of Law and Public Policy, 2004).

147 Of course we may find other actors in this case. For example, the future generation is another subject of constitutional law. Natural resources are an important heritage which belongs to the present and future generation. If Russian legislation addresses this face in specific legislation, Australian legislation may not mention this fact, but nonetheless implement ecological protections which pursue the same goal.

148 The Russian Federation has different types of regions (in legal parlance – subjects) within the federal structure. There are republics, territories, regions, cities of federal importance, etc. In this Article I use the term "regions" in the broad meaning as a synonym for "subjects."

149 Пункт 3 статьи III Федеративного договора – Договора о разграничении предметов ведения и полномочий между федеральными органами государственной власти Российской Федерации и органами власти суверенных республик в составе Российской Федерации от 31 марта 1992 г. // Федеративный договор: Документы. Комментарий [*Paragraph 3 of Article III of the Federal Treaty – the Treaty on the Delimitation of the Objects of Competence and Powers Between the Federal Bodies of State Power of the Russian Federation and the Authorities of Sovereign Republics Within the Russian Federation of 31 March 1992* in *Federal Agreement: Documents. Comment*] (Moscow: Respublika, 1994). For more about

this background for their regional constitutional regulation and the establishment of the republic's property over natural resources. In the 1990s and the beginning of the 2000s there were many disputes between federal and regional authorities concerning such issues. Consequently, Russian jurisprudence includes numerous important Constitutional Court decisions.

According to Article 72 of the Russian Constitution, issues of possession, use and disposal of land, subsoil, water and other natural resources are a matter of *joint jurisdiction* of the Russian Federation and the Subjects of the Russian Federation. After several Constitutional Court decisions about the delimitation of the competence and disposition of the republics' norms about their property rights over resources, the Russian Federation enlarged its power over resources. In the *Forest Code* case, the Court stated that exclusive federal property rights over forests do not contradict the Constitution and that forests do belong to the federal government, even if it is possible to transfer tracts of forest to a subject. It emphasized the vital importance of the forest resources and the multifunctional role they have. Thus, these resources are "public property of the multinational people of Russia and form a special kind of federal property, about which there is specific legislation" ["публичное достояние[150] многонационального народа России и как таковой является федеральной собственностью особого рода и имеет специальный правовой режим"].[151] The Constitutional Court of the Russian Federation confirmed this point of view in other cases delineating the respective rights of the Federation and the regions over natural resources.[152]

It is interesting that the Australian High Court supports the same trend as the Russian Constitutional Court – in the direction of broadening the scope of federal

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the Delimitation of Jurisdictional Subjects and Mutual Delegation of Powers between the State Bodies of the Russian Federation and the State Bodies of the Republics in English, *see* Dmitry Yu. Tumanov & Rinat R. Sakhapov, *Subjects of the State Within the Russian Federation: Constitutional and Legal Framework*, 11(17) International Journal of Environmental & Science Education 10265, 10270–10274 (2016).

150 The phrases "публичное достояние" and "национальное достояние" (which are close to the meaning of "public property" and "national property") are very popular in the Russian legislation and legal thinking of the 21st century. Some private companies try to use this concept for marketing purposes. However, the head of the Federal Antimonopoly Service, Igor Artemiev, argued that it is possible to use this phrase for "people, culture and even subsoil, but not Gazprom." «Газпрому» запретили называться «национальным достоянием» // РБК. 14 января 2016 г. [Gazprom Was Banned from Being Called "National Treasure," RBC, 14 January 2016] (May 2, 2019), available at https://www.rbc.ru/technology_and_media/14/01/2016/5697d5469a79475d2640f7d1.

151 Постановление Конституционного Суда РФ от 9 января 1998 г. № 1-П // Собрание законодательства РФ. 1998. № 3. Ст. 429 [Ruling of the Constitutional Court of the Russian Federation No. 1-P of 9 January 1998, Legislation Bulletin of the Russian Federation, 1998, No. 3, Art. 429].

152 Постановление Конституционного Суда РФ от 7 июня 2000 г. № 10-П // Собрание законодательства РФ. 2000. № 25. Ст. 2728 [Ruling of the Constitutional Court of the Russian Federation No. 10-P of 7 June 2000, Legislation Bulletin of the Russian Federation, 2000, No. 25, Art. 2728]; Определение Конституционного Суда РФ от 27 июня 2000 г. № 92-О // Собрание законодательства РФ. 2000. № 29. Ст. 3117 [Definition of the Constitutional Court of the Russian Federation No. 92-O of 27 June 2000, Legislation Bulletin of the Russian Federation, 2000, No. 29, Art. 3117].

jurisdiction.[153] However, the approaches to delineating such jurisdiction in Russia and Australia are different. In Australia the federal body has a limited list of powers, and it is impossible to give more power to the federation without clarifying the modern text of the constitution. In the Russian Constitution there are three lists of rights: federal, subjects', and joint. Moreover, in practice, joint competence results in the priority of federal authority.

There is no legal basis in Australia for federal intervention in the case of mineral resources. However, the Australian federation may restrict the state's power over resources with other tools, such as forbidding exports, or by taxation and rent collection.[154] The Russian federal authority may use the same instruments as well as many more. The federalism in the Russian Federation is quite limited in the scope it affords for implementation of the subject's rights. As I have already noted, the trend of the judicial system to enlarge competence in Russia and Australia has to be viewed from different perspectives in the case of the two countries. On the one hand, initially the Russian Federation had much greater authority than the Commonwealth of Australia. On the other hand, Australia did not need the concentration of its resources in federal hands. Here I have reference not only to the history of the middle of the 20th century, but to modern times as well. In the 90s Russia faced the danger of territorial disintegration and terrorism. Due to Australia's successful economic policy, there have been no comparable challenges in recent decades.

I need to emphasize that further centralization in Russia will lead to the depreciation of federalism as a constitutional value.[155] In the Australian case I assess the modern trend positively. First of all, the written Australian Constitution promotes the limitation of federal authority and it is difficult to make a disproportional enlargement of federal power without violating the Constitution. Secondly, modern challenges need federal power over some property – for example, mineral resources in the continental shelf, exclusive economic zones, etc. And finally, the Australian federal structure takes into account the interests of the states. State representation in federal bodies is prominent and is accorded respect. Here I find the defining difference between the two countries' systems. The regional actors in Australia have contractibility, which means the possibility to make an agreement with other actors. In Russia this is a big problem, because of the historical preconditions to the creation of the federation (Russia became a federation accidently, from the "top down"), and it has a general lack of experience in creating agreements between groups of citizens.

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153 *Commonwealth v. Tasmania* (1983) 158 C.L.R. 1; *Murphyores Inc. Pty Ltd v. Commonwealth* (1976) 136 C.L.R. 1.

154 During WWII, the Commonwealth controlled the New South Wales coal industry by means of its legislative power with respect to defense.

155 Admittedly, there have been some attempts to delegate some rights in the educational, healthcare, and infrastructure spheres to the regional level. However, in most cases the result of this delegation was unsuccessful. The same approach may be found in the administration of forest and water resources.

The subsection below describes attempts at the collective administration of public property using the example of water resources.

3.2. Water Resources

As I have noted, irrigation systems are the most illustrative examples of public property in the first states known to history. According to the United Nations Development Program, irrigated land currently provides about a third of total world food supply. The productive organization of irrigation development is one of the main agendas of the modern world.[156] The constitutionalism of property rights over water resources can thus be explained as a part of the framework of human rights. The Mar del Plata Conference in 1977 stated that water accessibility and scarcity threaten four fundamental aspects: food production, human health, the health of the aquatic environment and social, economic and political stability. It is obvious that such long-term challenges are related to public property. I will describe the public property rights in water resources in Russia and Australia.

It is difficult to find a more appropriate example of public property than water resources.[157] According to national legislation, water can be divided into several types such as surface water bodies, subsoil water resources, running water (rivers), etc. To simplify my comparative approach in this area I consider only surface water bodies and rivers. The reason is that other objects can be described as mineral resources in national law.[158]

Property rights over water resources historically have been a natural incident of the ownership of land. Running water in England was recognized as a public good. This is a rare example where the common law historically adopted the Roman law concept and prioritized the public interest. The riparian rights system was dominant in English law, and water resources were not Crown property, but open access communal property.[159] Australian states inherited this system and used it until the end of the 19th century.

Russian history demonstrates the opposite approach in this case. One of the best examples of the extraordinary status of water resources in the Russian Empire is the case of the Emba River. The private river was a ridiculous case in Russian history;

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156 United Nations Development program, Principal challenges associated with water resources, Chapter 2, L.R. Brown, 77–88 (2003).

157 Respondents were asked if there existed a human right to clean fresh water in urban and rural Australia. All of the 428 respondents answered this question and the majority of the participants (90%) thought that there was a human right to clean fresh water in urban and rural areas in Australia. *See also* Anna Lukasiewicz, *Commonwealth Scientific and Industrial Research Organization (Australia)* in *Natural Resources and Environmental Justice: Australian Perspectives* 68 (A. Lukasiewicz et al. (eds.), Clayton: CSIRO Publishing, 2017).

158 For example, the Russian Federal law "On Subsoil" expands the regulation for mineral resources to subsoil water as well.

159 Alison Clarke & Paul Kohler, *Property Law: Commentary and Materials* 37 (Cambridge; New York: Cambridge University Press, 2005).

it was a consequence of the feudal foundation of the state. However, even in this case the Russian civil servant Mordvinov wrote to the Emperor (who wanted to nationalize the river):

> The law of property is considered in Russia unshakeable; thus, the property of count Kutaisov must be inalienable… it may not be taken in common use, for there is no law that private people can be deprived of their property for the public good.

In 1802, the government ruled to expropriate Count Ivan Kutaisov's lands and his monopoly to fish on the Caspian seashore, and, notwithstanding the illegality of this acquisition, generously compensated the owner for the loss of property.

The development of any common property system for water was slow and faced with obstacles. The head of the Law Department at the State Council, Baron Alexander Nikolay, noted that irrigational water cannot be *res communes* because it brings profit (in the form of additional harvest) and, hence, has monetary value.[160] He asserts that water is property[161] that is equal to all other kinds of immovable property, and no one can dispose of this property without the owner's consent.

However, in modern Russia, water resources in general are public property. The general principle is that water bodies are owned by the Russian Federation. The only exception here is a pond or flooded pit located on land owned by a constituent territory of the person or entity. The Russian Water Code in Article 6 creates the following construction of public property for water resources: Surface water bodies which are objects of municipal or state (federal and subject) property have the status of publicly accessible bodies.[162] Every person has the right of access to public water bodies and can use them free of charge for personal and domestic needs. Moreover, some municipalities strengthen the public nature of water consumption and establish priority for drinking and domestic purposes.[163]

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[160] Pravilova 2014.

[161] Some individuals in Russia wanted compensation from peasants who used ice from that river. I may find a parallel with this proprietary approach in Australian history. In one of the federal conventions I find the following:

Barton (New South Wales): What is the difference between taking away some of our water and taking away some of our land?

Deakin (Victoria): Exactly.

Kingston (South Australia): But it is not your water.

See also Official Record of the Debates of the Australian Federal Convention. Vol. 2 44 (Sydney: Legal Books, 1986).

[162] Russian legislation provides a list of exceptions to which free access is not permitted. Meanwhile, many bodies of water can be on private property.

[163] Решение Совета муниципального района Благовещенский район Республики Башкортостан от 25 ноября 2009 г. № 21-160 «О Правилах использования водных объектов общего пользования, расположенных на территории муниципального района Благовещенский район Республики

However, common law application in Australia made some changes to English law. In Australia the regulation of the above-mentioned provision is within the authority of the states. Thus, in every jurisdiction the right to take and use water is a statutory right.[164] At the end of the 19th century New South Wales and Victoria enacted legislated abolishing most riparian rights.[165] This caused conflicts between states within the federation. Some agreements were made about the use of water in the Murray–Darling Basin.[166] According to the Australian federal system, the Federation lacked authority in this case. In the origin of the Australian Federation there were sensible ideas that water is the common property of Australia. The Commonwealth Constitution embodied very specific protection of states' rights over water resources. Section 100 states:

> The Commonwealth shall not, by any law or regulation of trade or commerce, abridge the right of a State or of the residents therein to the reasonable use of the waters of rivers for conservation or irrigation.[167]

The water legislation in Australia varies from state to state. In Victoria in 1905 a centralized system of water management was established, which provided a platform for private initiatives in business. Formally, it was nationalization of the water resources, the owner of which became the Crown. It is very interesting that the same arguments for federal concentration of power were not acceptable till the very end of the 20th century.

However, even a decentralized federation such as Australia may rethink its approach in the case of water.[168] In 2007 The Water Act was published and came into force. Is there any contradiction with the constitutional provision which protects states' rights over

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Башкортостан, для личных и бытовых нужд» // СПС «КонсультантПлюс» [Decision of the Council of the Municipal District Blagoveshchensky District of the Republic of Bashkortostan No. 21-160 of 25 November 2009. On the Rules for the Use of Public Water Objects Located in the Territory of the Municipal District Blagoveshchensky District of the Republic of Bashkortostan for Personal and Domestic Needs, SPS "ConsultantPlus"], para. 3; Закон Республики Ингушетия от 19 июля 2007 г. № 30-РЗ «Об использовании и обеспечении безопасности водных ресурсов Республики Ингушетия» // СПС «КонсультантПлюс» [Law of the Republic of Ingushetia No. 30-RZ of 19 July 2007. On the Use and Ensuring the Safety of Water Resources of the Republic of Ingushetia, SPS "ConsultantPlus"], Art. 3.

164 Kate Stoeckel et al., *Australian Water Law* 11 (Pyrmont: Thomson Reuters, 2012).

165 Riparian law protected downstream users from any upstream activity that could result in a significant reduction of flow.

166 For example, the River Murray Waters Agreement of 1914, which brought about the end of active legal and political disputes between the states.

167 This section constituted advantageous regulation for the water-abundant states, such as New South Wales (NSW). In fact, the representatives of NSW proposed even stricter limitations on federal power. Of course, the South Australia state was against this idea because it depended on the water flow from NSW.

168 As already mentioned, section 100 of the Commonwealth Constitution guarantees the rights of states over water resources and protects them from federal intrusion.

water resources from federal intrusion? In 1983 Justice Mason referred to section 100 in the context of the *Tasmanian Dam* case. He explained that the primary purpose of that section was to safeguard the rights of a State and its residents to use water and rivers used for interstate trade and commerce including navigation and shipping, namely the Murray River.[169]

The precondition for such a decision lay in the nature of the Murray–Darling Basin (MBD),[170] which spanned the jurisdiction of Queensland, New South Wales, Victoria, South Australia and the Australian Capital Territory.[171] The Basin, with its catchment that includes parts of four states and the Australian Capital Territory (ACT), creates a higher level of complexity. The new Act established a centralized government body with special authority over the Basin: the consensus-based Commission was replaced by the Murray–Darling Basin Authority which reports to the federal government. However, the states are still responsible for the Act's implementation. In particular, the Water Act required the Murray–Darling Basin Authority to prepare a Basin Plan that, for the first time, defines an integrated cross-border approach to manage the Basin's water resources. However, there are even more examples of national regulations through a coordinated approach, such as the Council of Australian Governments (COAG) decisions. The history of how such coordination was achieved, and what the precondition and mechanism for that decision was, is an interesting one.

In 1886 legislative arrangements established the principle that streams across the Murray–Darling Basin were state property administered by state-controlled agencies. However, even since that time conflicts over water management in the MDB have been frequent.[172] Two issues have been perennial: relations between individuals and their government, and which jurisdiction should take prime responsibility.[173] At the beginning of the 20th century states coordinated the management of the water resources in the MBD.[174] This cooperation was fruitful for the construction of dams, as witness the tenfold growth in the capacity of major dams in Australia between 1940 and 1990.[175]

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169 *Commonwealth v. Tasmania*, *supra* note 153, para. 99.

170 The Murray–Darling Basin generates approximately 40 percent of Australia's agriculture and pastoral production. *See also* Don Blackmore, *Protecting the Future* in *Uncharted Waters* 1, 7 (D. Connell (ed.), Canberra: Murray–Darling Basin Commission, 2002).

171 Stoeckel et al. 2012.

172 Joseph M. Powell, *An Historical Geography of Modern Australia* 101–134 (Cambridge: Cambridge University Press, 1988).

173 Daniel Connell, *Water Politics in the Murray-Darling Basin* 9 (Annandale: Federation Press, 2007).

174 The 1902 Interstate Royal Commission investigated future options for the Basin. The 1914 interstate agreement provided a defined volumetric flow for the end-of-catchment state, South Australia, and shared what was left between the upper states of New South Wales and Victoria. This case shows the existence of experience in the common management of water resources.

175 David I. Smith, *Water in Australia: Resources and Management* 162 (Melbourne: Oxford University Press, 1998).

In *Gartner v. Kidman* (1962), the court pronounced the following thoughts:

> These rules are very old… The conditions of settlement, of climate and of geography in which this body of customary law developed are very different from those prevailing in many parts of Australia… But it is beyond doubt that these rules are a part, and an important part, of the common law that Australia has inherited.[176]

For many decades the interests of the government and water users were very similar: economic growth. With separate property rights to water allocations securely vested with irrigators, the policy then proposed the introduction of arrangements for irrigators to buy and sell water up and down the Murray–Darling Basin. The main reason for the radical water reform which led to the 2007 Water Act was an ecological crisis[177] which pushed federal and state authorities to combine their forces to overcome this challenge.

During the 1980s at the inter-jurisdictional level, the Murray River Commission was replaced by the Murray–Darling Basin Ministerial Council, the Community Advisory Committee and the Murray–Darling Basin Commission. The new bodies were designed to take account of a broader range of political, community, productivity and environmental interests.[178] Australia's water reforms of the past two decades have been implemented in large part through national economic and competition policies that encouraged state governments to standardize water entitlements, separate water rights from land titles, split regulatory and service delivery functions, privatize irrigation schemes, and move towards greater cost recovery from water users.[179] The inspiration for such reforms is found in international sources such as the Millennium Assessment Report of the U.N.-affiliated Millenium Ecosystem Assessment. That report of course does not advise establishing federal property rights over the water or even nationalizing this sphere. However, it states:

> Integrated water resource management is a challenge of governance.[180]

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176 *Gartner v. Kidman* (1962) 108 C.L.R. 12.

177 Steve Y. Schreider et al., *Estimation of Climate Impact on Water Availability and Extreme Events for Snow-free and Snow-affected Catchments of the Murray–Darling Basin*, 2(1) Australian Journal of Water Resources 35 (1997); Jamie Pittock & Daniel Connell, *Australia Demonstrates the Planet's Future: Water and Climate in the Murray–Darling Basin*, 26(4) International Journal of Water Resources Development 561 (2010).

178 Connell 2007.

179 John Quiggin, *Environmental Economics and the Murray–Darling River System*, 45(1) Australian Journal of Agricultural and Resource Economics 67 (2001).

180 *Ecosystems and Human Well-Being: Policy Responses* 221 (Washington: Island Press, 2005).

In addition, in October 1995, the Standing Committee on Agriculture and Resource Management of the Australian Parliament developed the National Framework for the Implementation of Property Rights in Water.[181]

However, since 1983 the Australian government has increasingly exercised its constitutional powers, particularly to implement national obligations under treaties for the conservation of the environment and water resources.[182] In 1994, the Council of Australian Governments (CoAG)[183] endorsed a framework of initiatives for the water industry to run over a seven-year period. It was obvious that this was a question of national priority and that the states needed a federal body which would coordinate the initiative. The Council of Australian Governments originally envisaged that the strategic water reform framework would be implemented by 2001. Subsequently it extended the implementation timeframe to 2005.[184] On 25 June 2004 the CoAG reached the Intergovernmental Agreement on a National Water Initiative that developed and extended the original water reform strategic framework. Under the National Water Initiative, the CoAG created a new body, the National Water Commission, to oversee the implementation of the reform program.[185]

However, all these attempts were not enough to overcome the ecological crisis. Daniel Connell argues that inter-jurisdictional institutions and policies do not provide adequate protection for the environment and water as an economic resource.[186] It was to be expected that the CoAG was an unresponsive entity which could not react to the ecological crisis in a timely manner. The final step was enacting the Water Act that moved the center of power into the Commonwealth.

It is impossible to imagine the same coordination in the Russian Federation, given the federal authority over the main water resources. Small bodies of water may be the property of a region, but that would not be an obstacle to proper administration. It was the right decision in the 1990s to concentrate water resources as federal property, because these kinds of resources demonstrate a high possibility to generate conflicts.[187] However, the Australian experience of the coordination between states

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181 Promoting Efficient and Effective Water Trading Across the Murray–Darling Basin, Australian Economic Forum, Sydney, 20 August 2009, Commissioner Ed Willett (May 2, 2019), available at https://www.accc.gov.au/system/files/Promoting%20efficient%20and%20effective%20water%20trading%20across%20the%20Murray-Darling%20Basin.pdf.

182 Connell 2007.

183 It is the most recent iteration of a series of institutional processes that have been created to coordinate the two levels of government in the Australian federal system.

184 National Competition Policy Website (May 2, 2019), available at http://ncp.ncc.gov.au/pages/water.

185 Intergovernmental Agreement on a National Water Initiative (May 2, 2019), available at https://www.pc.gov.au/inquiries/completed/water-reform/national-water-initiative-agreement-2004.pdf.

186 Connell 2007.

187 *Нестерова И.Е.* «Водная карта» в глобальном мире // Вестник Санкт-Петербургского университета. Серия 6. 2011. № 3. С. 53–62 [Irina E. Nesterova, *"Water Map" in the Global World*, 3 Bulletin of St. Petersburg University. Series 6 53 (2011)].

can be very useful for implementation in Russia.[188] If the Russian Federation wants to develop federalism and improve the administration of public property, it will be forced to engage in the decentralization of the current system of administration.

Conclusion

It is clear that public property still plays a significant role in modern societies. The reasons why we need it have not changed over the centuries. Moreover, public property is an essential basis for sustainable development for each society. Ecological problems make the subject of public property even more relevant at the constitutional level. In spite of the fact that all societies need public property, different countries regulate it in different ways. I have described two examples, representing a post-Soviet legal system and a common law one.

It is certainly the case that public property systems in Australia and Russian are completely different. The question of greatest interest to us was why they are different. These countries' historical development made a tremendous contribution to the philosophical and legal understanding of property, especially public property. The Commonwealth of Australia enjoyed a big advantage, in inheriting the English system of common law and British state institutions. Over the last few centuries, Australia has developed without any collapse or radical changes in its doctrinal approach to property and power. The dominant philosophical view on this track is Locke's approach. Australia has changed slowly under the circumstances of economic life. Russian history demonstrates the opposite tendency. It experienced several periods which sharply contradicted each other (imperial, Soviet, and modern). Moreover, even before 1917 Russia combined several doctrines which were received from France (Voltaire) and Germany (Hegel). Unfortunately, Russia did not develop nor implement its own legal doctrines. The imperial elites always debated which experience was better: French, German or even British. This caused the country to develop as though it were a sort of "tightrope walker."

It bears emphasizing that Russian protection of private property was very strong, judged by 19th century standards. However, Russia fell behind other countries in questions of public property. Other European countries established public property as one of the attributes of a new democratic society (especially in republican states such as France) or at least limited private property rights over important resources

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[188] We take additional notice of the ability of the Russian Federation to promote coordination with other actors. For example, the Joint Estonian-Russian Commission on Protection and Sustainable Use of Transboundary Waters demonstrates the fruitful cooperation between two countries which are not on very good terms with each other. The same approach could be used by Russia domestically, between subjects of the Federation. *See also Ланко Д.А.* Управление трансграничными водными ресурсами: сравнительный анализ российского и американского опыта // Балтийский регион. 2013. № 1(15). С. 27–37 [Dmitry A. Lanko, *Management of Trans-Boundary Water Resources: Comparing Russian and American Experiences*, 1(15) Baltic Region 27 (2013)].

(such as forests). In Russian society any kind of limit was recognized as an intrusion by the state. This attitude slowed down the trend of public property development. At the same time, Australia used English law, which lacked a coherent system of written legislation that could regulate public property. However, common law contains numerous judicial precedents which delineate public property from private. The feudal understanding of property in the English tradition is still in force. Public property is directly linked with Crown property and the concept of the Crown.

The Russian Empire did have the Crown but it played a different role in the legal framework. The Russian Crown was not as absolute as in the UK (and later in Australia). Russia had a strong concept of state from the outset. This is one of the main distinguishing features between the British and Russian Empires at the end of the 19th century.

In the Soviet period the Russian state fully implemented the idea of public property. The radical protection of private property changed into radical protection of public property. For more than half a century Russia developed on a different, socialistic track. Therefore, by the end of the 20th century, after the collapse of the Soviet Union, it faced a new world, where the concept of private and public property had changed since the 19th century. That new world is more visible in European states such as France, Germany, Italy, etc.

In common law countries the property system has a feudal background. Lawyers must use the fiction of Crown (Queen) ownership over the land and other objects of public property. However, even the doctrine of divided property has changed. The Australian states passed statutory legislation that changed private property rights over the most important resources such as petroleum and gas. Additionally, the *Mabo* case establishes the title of indigenous people to the land.[189]

In the modern world, natural resources are the most significant objects of public property rights. It is no surprise that Russia and Australia have written legislation which establishes dominant rights to their resources. One of the most interesting issues treated during the course of this research proved to be the development of natural resource regulation. Theoretically, the Russian Constitution allowed ownership of mineral resources as private property, but a special federal law completely limited those rights and proclaimed state property in this sphere. In Australia, the principle "the owner of the land is the owner of minerals in subsoil" was well-known as well. Common law segregated the so-called royal metals (gold and silver) from that rule. However, Australia in the 20th century faced the reality that neither gold nor silver was the most important resource, but rather gas and oil. Up through the end of the 1980s Australian states passed acts that recognized such resources as Crown property.

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[189] However, it is still difficult to say that these people are the owners of the land. Common law has a strong concept of the Crown and the fiction of the Crown ownership over the land. Even the *Mabo* case and statutory legislation provide specific title but not absolute property rights over land.

Some aspects of the most important natural resources push public property regulation into the constitutional sphere. The main example discussed above is water resources, which directly touch on issues of human rights, long term projects[190] (e.g. irrigation), the environment, and social and political stability. The recognition of such effects may be found in U.N. documents and the texts of the constitutions of different countries. It is difficult to avoid the idea of constitutionalism of property rights over drinkable water, especially in countries which lack water. The Murray–Darling Basin case shows us that the concentration of power (and property rights) over resources is quite important in times of challenges.[191] It is not a foregone conclusion that water resources must be in the nature of public property, but the multi-use characteristic of this resource causes the vast majority of nations to make such resources public property.[192] Australian states possess this legal power, but it was not enough to meet new challenges in interstate cases (such as the Murray–Darling Basin), and the states gave up more rights to the federal body. In this case I see the advantages of a centralized federation such as in Russia: such a system minimizes conflicts between regions on vital resources. However, the experiences of these two federations are not fully interchangeable with one another. The historical prerequisite in the case of Australia was the union of independent colonies, and in the Russian case it was federation "from the top down."

Public property issues need constitutional justification in both Australia and Russia. However, Russia has constitutional provisions that at least provide an understanding of what kind of national framework exists for property. Moreover, the Russian Constitution specifies who is the administrator of federal state property. The Australian written Constitution has not chosen this way; it does not mention public property at all. On the one hand, this is linked with the fact that the main authority over property is the state, but on the other, with the fact that property issues do not necessarily arise, due to the detailed regulations of public entities' rights and their accountability. Australian states do not need constitutional regulation of property because state parliaments may pass any legislation so long as it does not contravene Commonwealth authority. The Russian legal system requires more constitutional compliance from new legislation. Even the legislative body needs to obey the Constitution and pass all new laws according to its principles.

The provisions in Australia's written constitution about the acquisition of property have taken on expanded meaning in light of new clarifications by the courts. The drivers for this trend are ecological problems and international obligations. It was

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190 Stephen R. Dovers, *Sustainability: Demands on Policy*, 16(3) Journal of Public Policy 303 (1997).

191 The location of the Basin on the territory of several states was a prerequisite for the federal intervention. The reform program cost 10 billion AUD.

192 Garret Hardin's formulation of the "tragedy of the commons" explains why it is difficult to restrain overexploitation of water. However, public property is not open access property. Clarke & Kohler 2005.

understandable that the federal system of Australia would transform English law principles and move closer to U.S. standards. The federal structure needs more constitutional regulation in the context of negotiations between the Federation and the states, and also between the states. The English approach to declare public everything that is not private is not acceptable in a federal state. Rather, a strict delineation between public and private is vital in the public property sphere. The fiction of Crown property makes it more difficult to build a simple and effective system of public property. The Commonwealth and the states use the formulation "Crown property." One may ask whether it is always the same Crown or whether each time it is different. Disputes between public entities have shown the problems of the lack of constitutional regulation. I find many constitutional justifications for the Water Act of 2007. Of course, this approach makes it difficult to argue about whether there should be federal priority in special cases (such as the Murray–Darling Basin).

I do not maintain that the Russian approach favoring centralization of most of the authority in federal "hands" is necessarily more progressive and advantageous. But we see from the Australian experience that even highly developed inter-state contractualism may not be enough in special cases. Such an approach may be satisfactory until faced with a situation where another option would result in a win-win situation. In such a case, it may be necessary for a state or region to yield for the sake of the people as a whole.

Acknowledgments

The author thanks Doctor of Law, Associate Professor William Partlett for his kind assistance and fruitful discussions.

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