RAIS Journal for Social Sciences | VOL. 3, No. 2, 2019
ISSN 2574-0245 (Print) | ISSN 2574-1179 (Online) | DOI: 10.5281/zenodo.3549507

Legal Regime of the Public Property in Romania

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ABSTRACT: In Romania, the subsoil richness's, the communication ways, air space, waters with energetic potential which could be exploited and those which can be used for public interests, beaches, territorial sea, natural resources of the economic area and of the continental plateau, represent an exclusive object of public property. Also, according to the constitutional provisions, as well as those of the Civil Code, other goods forming the exclusive object of public property may be established by law. The other goods belonging to the state or to the administrative-territorial units are, as applicable, part of the public or private domain thereof, but only if acquired by one of the means stipulated under the laws in force. Romanian laws do not offer an exhaustive enumeration of the assets forming the object of the right of public property, but only specify certain goods of public use of interest, forming the public domain. As one could notice from our study, the affiliation of a good, property of the state or of the territorial-administrative units, to the public domain may be deduced by using two criteria: express indication of the lawmaker and the nature of the good, meaning that this is of public use (the good is affected to the direct public use) or of public interests (the good is affected to a public service).

KEYWORDS: property, public property, right of public property, unalienable, indefeasible, indistinguishable, expropriation, public domain, public unit, administration, concession

Introduction

Public property is defined in art.858 Civil Code (Law no. 287/2009 on Civil Code, published in the Official Gazette of Romania, Part I, no. 511 of July 24th, 2009) as being „*the right of property belonging to the state or an administrative-territorial unit on the goods which, by the nature thereof or by the declaration of law, are of public use or interest, provided that they are acquired by one of the modalities provided by law*".

Romanian laws do not comprise a clear, concrete and comprehensive listing of the goods forming the object of the right of public property. We can find listings of the goods object of public property in the Constitution of Romania, in the Romanian Civil Code but also in special laws. Thus, art. 136(3) of the Constitution of Romania, (the Constitution was adopted during the meeting of the Constituent Assembly of 21 November 1991, it was published with the Official Gazette of Romania, Part I no. 233 of 21 November 1991 and it came into force following its approval by the national referendum of 8 December 1991. It was reviewed and republished in the Official Gazette of Romania Part I no. 767 of October 31st, 2003), lists a series of goods which constitute exclusive object of public property, respectively: public interest subsoil resources, the air space, national interest waters with energetic potential that can be capitalized, beaches, the inland sea, the natural resources of the economic area and of the continental shelf. This article also regulates the possibility for the lawmaker to

establish by organic laws also other goods which might represent object of public property. The conclusion arises from the analysis of the text of Art. 136 (3) of the Constitution of Romania that the constituent lawmaker has offered only a generic listing of the goods which could be exclusive object of public property.

A provision identical to the one in Art. 136 of the Constitution of Romania is found also in the Art. 859(1) Civil Code. The fact is imposing to be specified that Art. 859(2) Civil Code provides for that the other assets belonging to the state or to the administrative-territorial units are, as applicable, part of the public or private domain thereof, but only if acquired by one of the means stipulated under the law.

Besides the legal provisions comprised in the Constitution and the Civil Code, we can find determinations of goods object of public property also in other enactments [e.g.: Law no.18/1991- Law on Land Fund, (republished in the Official Gazette of Romania, Part I, no. 1 of January 5th, 1998, as subsequently amended and supplemented), Law no. 213/1998 – Law on the goods public property (published in the Official Gazette of Romania, Part I, no. 448 of November 24th, 1998, as subsequently amended and supplemented), Law no.85/2003 - Law on Mines (published in the Official Gazette of Romania, Part I, no. 197 of March 27th, 2003)], in which, as examples, the goods composing the public domain of the state and of the administrative-territorial units are specified.

However, even though the laws in force do not give us an exhaustive listing of the good object of the right of public property, the belonging of a good, property of the state or of the administrative-territorial units, to the public domain is deducted, as also showed in the legal doctrine (Boroi, Anghelescu and Nazat 2013, 59; Chelaru 2019, 92) by „*using two criteria: express indication of the lawmaker and the nature of the good, meaning that this is of public use (the good is affected to direct public use) or of public interest (the good is affected to a public service)*". Examples of goods from the category of *public use* are markets, bridges, public parks, etc, in other words goods which by the nature thereof are of general use, and examples of goods *of public interest* are the goods intended for being used or exploited within a public service, like: the railways, national roads, networks for transportation and distribution of electricity, buildings of the public institutions etc. (Pop and Harosa 2006, 125; Vedinaș 2011, 1, 6-16; Săraru 2010, 11, 90-107; Jora and Ciochină-Barbu, 2017,1, 84-106).

Public property holders/subjects

Art. 136 (2) of the Constitution, in its final thesis, as well as Art.858 Civil Code provide for clearly, unequivocally and restrictively that *the state and the administrative-territorial units can be holders/subjects* of the right of public property.

Therefore, the lawmaker, by the restriction made, excluded from the scope of the subjects of law who can be holders of the right of public property any other legal person, of private or public law, any natural person. However, we must underline that the law allows for the legal persons of public law to receive in *administration* goods from the public domain, and other natural or legal person may *concession*, *lease or use for free* such goods. In other words, these subjects of law do not become holders of the right of public property, but only holders of the right of administration, of concession or of use (Stoica 2017, 206).

Legal features of the right of property

The fact results from the corroborated analysis of the provisions of Art.136 (4) of the Constitution of Romania and Art.861 (1) Civil Code that the goods object of public property are *inalienable, indefeasible and unseizable* (Apostol Tofan 2012, 1, 12-30).

The right of public property is inalienable, therefore the goods forming the object of public property are excluded of the general civil circuit namely they cannot be alienated by civil legal acts, under the sanction of total nullity of such acts of alienation. Although, according to Art. 136 (4) Civil Code, goods public property may, under the conditions of organic law, be given in *administration* to the autonomous regies or public institutions or may be *concessioned or leased*; also, they may be given for *free use* to the institutions of public utility. The fact should be mentioned that the giving for administration, concessioning or leasing, as well as giving for free use, do not represent neither a modality of alienation nor a modality of acquiring the goods from the public domain, but they *represent only specific modalities of exercising the right of public property* (Urs and Ispas 2015, 333; Chelaru 2019, 103-107).

The Civil Code in Art. 861 (2), provides for that the property on the goods public property" is not extinguished by non-use and cannot be acquired by third parties by usucapio or, as appropriate, by possession in good faith on movable assets." Also, as the specialized doctrine (Boroi, Anghelescu and Nazat 2013, 61) also considers, no beneficial rights of the right of property (usufruct, use, habitation, easement or superficies) can be established on the goods object of the right of public property.

Finally, we must specify that the inalienability of the good operates as long as the good belongs to the public domain. But if the good is transfered, subject to compliance with the legal provisions in this field (this study is not aimed at analyzing this field) from the public domain to the private domain, then it could be alienated according to law.

Our courts of law ruled also according to those specified above, showing that the "inalienability of the goods forming object of the right of public property imposes not only the interdiction of the alienation thereof, but also the impossibility of acquiring thereof by third parties by any means of acquiring regulated by law, the legal documents concluded in violation of this principle being stricken by absolute nullity". (Iasi Law Court, Civil Sentence no. 69022 of May 18th, 2017, accessible on https://www.jurisprudenta.com/jurisprudenta/speta-12lngywz/).

The right of public property is *indefeasible*, which means that it is not extinguished by non-use, and the fact results from the interpretation of Art. 861 (1) Civil Code, according to which the right of public property is indefeasible, in general, that it is indefeasible both in *extinctive* as well as *acquisitive* way.

The indefeasibiliy under extinctive aspect means that the action for recovery of a good public property may be exerted at any moment in time, and under aquisitive aspect means, as resulting from the art 861 (2) Civil Code part II, that the right of property on the goods public property cannot be acquired by a third party by usucapio or, as appropriate, by possession in good faith of the movable assets. Also, as it is shown in the specialized doctrine too (Bîrsan 2017, 179) the goods public property cannot be acquired by occupation (art. 941-947 C. civ.) and the fruits they might produce cannot be acquired by the holder in good faith of the good of productive character (art. 948 C. civ.).

The right of public property is *unseizable*, which means that the goods from the public domain cannot be pursued by the creditors of the owners of right of property.

Modalities of acquiring the public property

According to the provisions in Art. 863 Civil code, the right of public property is acquired by: public procurement, performed according to law; expropriation for cause of public utility, according to law; donation or legacy, accepted according to law, if the good, by its nature or by the will of the orderer, becomes of public use or interest; convention with by onerous title, if the good, by its nature or by the will of the orderer, becomes of public use or interest; transfer of a good from the private domain of the state

into its public domain or from the private domain of an administrative-territorial unit into its public domain, according to law; other modalities established by law.

Regarding the *expropriation for cause of public utility* which, in our opinion, is the most important modality of acquiring the public property as it consists of *depriving a person of its property,* we must specify that Art. 44 (3) of the Constitution of Romania states that ”no one can be expropriated, unless for a cause of public utility, established according to law, with fair and prior compensation”. Regarding the compensation, according to Art. 44 (6) of the Constitution, it is established” by mutual agreement with the owner or, in case of divergence, by the court”.

In the same way, Art. 562 Civil Code having the marginal ”*Extinction of the right of property*” (which is established in the Civil Code in Title II - private property) provides in par. (3) that the ”Expropriation can only be made for a cause of public utility established according to law, with fair and prior compensation, established by mutual agreement between the owner and the expropriator. In case of divergence on the quantum of compensations, this one is established in court.” The provisions specified are resumed and are found also in the Law no. 33/1994 on expropriation for cause of public utility (republished in the Official Gazette of Romania, Part I, no. 472 of July 5th, 2011) which in Art. 1 provides for that ”Expropriation of real estates, entirely or partially, can only be made for cause of public utility, after a fair and prior compensation, by court decision”.

Last, but not least, the First Additional Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, concluded in Paris on March 20th, 1952 (published in the Official Gazette of Romania, Part I, no. 135 of May 31st, 1994), stipulates in Art.1 that "no one may be deprived of his property except for a cause of public utility, under the conditions provided by law and by the general principles of international law”.

According to these general principles, "any dispossession implies an obligation to compensate the holder of the property right, and in establishing this compensation, the principle of proportionality must be taken into account, namely the necessity of carrying out a fair balance test" (Suceava Court of Appeal, Decision no. 1032 of 22 December 2015, available on the website https://www.jurisprudenta.com/jurisprudenta/speta-ble18fy/).

Based of the constitutional provisions and of the national and international legislation in force, the expropriation was defined as "*an act of public power by which the forced acquiring of the private properties on the real estates necessary for the execution of the works of public utility is performed, in exchange for a compensation*” (Boroi, Anghelescu and Nazat 2013, 46; Bîrsan 2017, 137; Stoica 2017, 172; Chelaru 2019, 73).

Exercising the right of public property

According to Art. 136 (4) of the Constitution, goods public property may be given in *administration* to the autonomous regies or public institutions or may be *concessioned or leased*; also, they may be given for *free use* to the institutions of public utility. The constitutional provisions are also resumed in Art. 861 (3) Civil Code which provides for that ”according to law, the goods public property may be given in administration or use and may be concessioned or leased.” Also, from reading Art.866 Civil Code, it follows that the real rights corresponding to the public property are *the right of administration, the right of concession and the right of use for free.*

At the same time, the constitutional provisions are supplemented and correlated with other regulations contained in other normative acts that determine the legal regime of the exercise of the right of public property. For example, with Art. 14 of the Law

no.213/1998 on the goods of public property (published in the Official Gazette of Romania, Part I, no. 448 of November 24th, 1998, as subsequently amended and supplemented), according to which: Thelease of the goods public property of the state or of the administrative-territorial units is approved, as applicable, by a decision of the Government, of the county council, of the General Council of the Municipality of Bucharest or of the local council, and the lease agreement will include clauses that can ensure the exploitation of the leased property, according to its specificity (art. 14).

We also mention Art. 15 of the same normative act, according to which, the concession or lease of public property goods is made by public procurement, according to the law, or those of Art. 124 of the Law no. 215/2001 of the local public administration (republished in the Official Gazette of Romania, Part I, no. 123 of February 20th, 2007), which provides for the possibility of local councils and county councils to use for free, for a limited time, movable and immovable property, whether public or private, local or county property, as applicable, of non-profit legal entities carrying out charitable or public utility activities or of public services.

Right of administration

The right of administration arises by giving in administration the goods public property and is regulated in Art. 867-870 Civ. Code and represents a real right corresponding to public property.

For this purpose, Art. 867 (1) Civil Code, provides that the right of administration *is constituted by a decision of the Government, of the county council or, as the case may be, of the local council*, and from reading the Art. 868 (1) Civ. Code, we find out that the *holders* of this right are: *autonomous regies, central or local public administration authorities and other public institutions of national, county or local interest.* The holders of the right of administration may, according to paragraph (2) of Article 868 Civil Code, use and dispose of the good given in administration under the conditions established by the law and, if applicable, by the deed of establishment (Stoica 2017, 209-210).

Therefore, from the corroborated analysis of Art. 867 (1) and Art. 868 (2) Civ. Code it results that the right of administration, as a real right corresponding to public property, may arise by decision of the Government, of the county council or the local council, allowing its holder to use and dispose of materially of the good received in the administration under the conditions established by the law or the deed of establishment. Thus, by Government decision, which represents the act of establishing the right of administration, the content of this real right is established unilaterally, including as regards its scope. *Considering that the determination of the content of the administration right is in the exclusive duty of the one who constitutes it, it follows that this real right can target a good, in its materiality, either in whole or in part* (High Court of Cassation and Justice, section II Civil, Decision no. 724 of April 13th, 2017, available on website http://www.scj.ro/1093/Detalii-jurisprudenta?customQuery%5B0%5D.Key=id&custom Query%5B0%5D.Value=136844).

In the process of constituting this real right, between the holder of the good public property (the state and the administrative-territorial units) and the beneficiary of the administration right, *subordination relations* are born, and the giving in administration of the goods public property to the beneficiaries is performed by an act of power, that is *an administrative act with individual character.* Based on these subordination relations, the Civil Code, in Art.867 (2), *establishes a right of control* over the way in which the holders exercise the right of administration in favor of the *bodies that have ordered the constitution of the right,* respectively the Government, the county council or the local council.

The right of administration of goods public property is a *real right with a mixed legal nature, both administrative*, in relation to the holders of the right public property *as well as civil*, in relation to the other subjects of law. The administrative nature makes the subdivision of the right to administer public property goods impossible, and the civil nature has as a consequence the opposability of the real right of subdivision to the other subjects of law For example, if the holder of the right of administration is prevented from exercising his right, he may exercise the *confessoria actio* against any person, even against the holder of the public property right [art. 870 (2) and Art. 696 (1) Civ Code.].

Having the origin from the right of public property, the right of administration has the same legal features as this one, that is, *it is an inalienable, unseizable and indefeasible right* (Bîrsan 2017, 177-179).

Although from the reading the text of Art.869 Civ. Code it results that the cessation of the right of the public property can be performed by: *cessation of the right of public property* or *revocation*, under the conditions of the law and if the public interest imposes it, the text of the mentioned article *is not exhaustive*, other distinct ways of ceasing the right of public property being identified, namely: *by the material loss of the good* public property as a result of external, fortuitous causes, beyond the owner's control; the *passing of certain goods from the public domain into the private domain*, which means that the public domain goods can be passed into the private domain by *decision* of the Government or the county council, of the General Council of the Bucharest Municipality or the local council, unless otherwise provided for by the Constitution or by law; reorganization or *dissolution of the autonomous regies or of the public institution* (Stoica 2017, 211-212; Chelaru 2019, 116-117).

Right of concession

As also mentioned above, the goods public property can be concessioned. The possibility that the goods public property of the state or of the territorial administrative units to be allowed to be concessioned is clearly and unambiguously regulated in Art. 136 (4) of the Constitution of Romania, in the Civil Code Art.871-873, as well as in other normative acts like Art.15 of the Law no. 213/1998, Art. 123(1) of the Law no.215/2001 - Law of local public administration or Government Emergency Ordinance no.54/2006 on the regime of concession contracts for public property goods (published in the Official Gazette of Romania, Part I, no. 569 of June 30th, 2006),

The concession right is "*a real right, which arises from the concession contract and which awards the holder (concessionaire), natural or legal person, the possession and use of the good belonging to the public or private domain, transmitted by the concessor, within the limits of the law and the contractual provisions*" (Urs and Ispas 2015, 347).

It results from the analysis of this definition that the holders of the concession right on goods public property are: the *concessionaire* who, according to Art.6 of the Government Emergency Ordinance no.54/2006, may be "any Romanian or foreign natural or legal person" and the *concessor* who may be the ministries or other specialized bodies of the central public administration, for the goods public property of the state, as well as the county councils, the local councils, the General Council of the Municipality of Bucharest or the public institutions of local interest, for the goods public property of the county, city or commune (Art. 5 of the GEO no. 54/2006).

Also, it is observed that the goods public property can be concessioned by concluding a *concession contract* which, in Art.1 (2) of GEO no. 54/2006, is defined as being "that contract concluded in written form by which the public authority, called the *concessor*, transmits, for a fixed period of time, to a person, called a *concessionaire*,

who acts at his own risk and responsibility, the right and the obligation to exploit a good public property, in exchange for a *royalty*". Even though the legislation in force does not define this concept, by *royalty* we can understand the amount of money that the concessionaire owes periodically to the concessor in exchange for the exploitation of the good public property. Therefore, the *royalty* is the main obligation of the concessionaire and is one of the most important elements of the concession contract (Cercel 2002, 139).

The *concession contract* is considered to be an "*administrative contract*" (Stoica 2017, 214), *intuitu personae*, solemn, sygnallagmatic, with onerous title, commutative, with successive performance and constituting real rights (Sebeni 1999, 8, 3-20).

The concession contract ceases in the following situations provided in Art.57(1) of the GEO no.54/2006: at the expiration of the period established in the concession contract; if the national or local interest imposes it, by termination for convenience by the concessor, with the payment of a fair and prior compensation incumbent upon him/her, in case of disagreement the court being competent; in case of non-observance of the contractual obligations by the concessionaire, by termination by the concessor, with the payment of compensation by the concessionaire; in the case of non-observance of the contractual obligations by the concessor, by termination by the concessionaire, with the payment of compensation incumbent upon the concessor; at the disappearance, due to a cause of force majeure, of the concessioned good or in the case of the objective impossibility of the concessionaire to exploit it, by renunciation, without payment of a compensation.

We must show that, as provided for in paragraph (2) of the aforementioned article, upon termination of the concession contract, the concessionaire must return, in full property, free of any encumbrance, the concessioned good (Gherghina and Sebeni 1999, 11, 3-22).

Finally, regarding the legal features of the right of concession on public property goods, we mention that it is *inalienable, unseizable and indefeasible*, but *temporary*, that is to say, it is concluded for a fixed period (49 years, but with the parties' will the maximum period can be 73 years and six months).

Right of free use

The possibility that the goods public property of the state or of the administrative-territorial units will be given for free use to certain natural or legal persons is provided both in Art.136 (4) of the Constitution, as well as in other normative acts. Thus, based on Art.874 (1) Civil Code, "the right of use over public property goods is granted, for free, for a limited time, in favor of public utility institutions" and Art.124 of the Law no.215/2001 provides for the possibility of local councils and county councils to give for free, limited-term use, movable and immovable goods public or private local or county property, as the case may be, to non-profit legal entities, which carry out charitable activities or of public utility or public services (Dimitriu 2013, 3, 48-57).

In other words, the fact results from the interpretation of the mentioned provisions, that *the right of free use is a real, temporary right that* is born by acts of the public authorities *and has as object immovable property, public property of the state or movable or immovable assets of the administrative -territorial units.* Also, it results that the right of free use of the goods public property of the state or of the administrative-territorial units has as beneficiaries only legal persons, non-profit developing a charitable activity or of public utility or public services. According to Art. 874 (2) Civil Code, in the absence of provisions to the contrary in the deed of establishment, the holder of the right of free use does not benefit from the civil fruits of the good.

Regarding the legal regime of the right of free use, the rules regarding the right of administration shall apply accordingly, in which sense Art. 874 (3) Civil Code stipulates that "the provisions regarding the establishment and cessation of the administration right shall apply accordingly".

Lease of the goods public property

Although the Civil Code does not contain special provisions regarding the lease of public property goods, this possibility is acknowledged in Art.136 (4) of the Constitution, as well as in Art. 14 (1) of the Law no. 213/1998 which orders that "the lease of the goods public property of the state or of the administrative-territorial units is approved, as the case may be, by a decision of the Government, of the county council, of the General Council of the Municipality of Bucharest or of the local council, and the lease agreement shall include clauses likely to ensure the exploitation of the leased good, according to its specificity.

The lease agreement can be concluded, as the case may be, with any natural or legal person, Romanian or foreign, by the holder of the right of property or administration [Art. 14 (2) of the Law no.213/1998], and according to the provisions of Art.15 of the Law no. 132/1998, the lease of goods public property is performed by public procurement, according to the law, and the amounts collected from the lease or concession of the goods public property are, as the case may be, becoming income to the state budget or to local budgets [Art. 16 (1) of the Law no.213/1998].

If the lease agreement is concluded by the holder of the administration right, he has the right, based on Art. 16 (2) of the Law no. 132/1998, to collect from the rent a share between 20-50%, established, as the case may be, by decision of the Government, the county council, the General Council of the Municipality of Bucharest or of the local council through which the lease was approved.

As the legal doctrine also specified (Bîrsan 2017, 194), "*unlike the concession contract, which leads to the birth of a real right over the concessioned good, having the concessionaire as holder, the lease agreement gives rise to a binding legal relation*".

Cessation of the right of public property

According to Art. 864 Civ. Code, "the public property right is extinguished if the good has perished or passed into the private domain, if the use or public interest has ceased, in compliance with the conditions provided by law". In other words, the right of public property *extinguishes when the good perished or when the good is transferred to the private domain*, if the use or public interest has ceased.

The transfer of the good from the public domain to the private domain is performed, as the case may be, *by decision* of the Government, respectively of the county council, of the General Council of the Municipality of Bucharest or of the local council, unless otherwise provided by the Constitution or *the law* [Art. 10 (2) of the Law no. 213/1998].

Conclusions

Therefore, as a conclusion of our study we mention that the legal regime of the right of public property is generally provided for in Art.136 (4) of the Constitution of Romania, which states that "Goods public property are inalienable. According to the organic law, their administration may be assigned to the public companies or institutions or they may be granted under concession or leased; moreover, they may also be granted for free use to public utility units". As one could observe, although, of the specific characteristics of the public property right, the constitutional text regulates only the inalienability, a

complete enumeration thereof being found in Art. (1) Civil Code, which provides that "the goods public property are inalienable, indefeasible and unseizable".

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