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The Legal Regime of the Right to Administrate Public Property

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Abstract: The traditional institutions for administrative law, public property and the public domain have been the subject of numerous specialized papers from the interwar period. After 1990, the two institutions were discussed in light of the new legislative rules. Within this article we propose to analyze, based on the distinction between the notions of public property and public domain, the legal regime of the right to administrate assets of public property. Is this a real right appropriate for public property or just a simple competence of administration and management of public domain assets? Analyzing and comparing the opinions, the arguments expressed by specialists and the current legislation in this area, we conclude that the administrative right is a real right suitable for public property.

Keywords: public domain; public property; private property; the right to administration

1. Introduction

The New Romanian Civil Code, which entered into force in 2011, has led to changes in the sphere of public property the traditional notion for administrative law.

As shown in the specialized literature (Bălan, 2007, p. 64), the right to property has occurred at a certain stage of development of the society, when "*the economic relationship of property has received its features in legal form, the appropriation of material assets has become a right of ownership, of approaching, established and maintained by the coercive state power*."

The right to property, a fundamental right guaranteed to citizens, "*represents that real right that grants to the holder the attributes of possession, use and disposal, attributes that only it can be exercised in its plenitude, in its own power and interest*". (Pop & Harosa, 2006, pp. 78 and the next)

The right to property has two forms, the right to public property and the right to private property, as stipulated in the Constitution of Romania [article 136 par. (1)].

The existence of multiple forms of ownership is established by the constitutions of other European countries such as Italy (article 42)[2] and Spain (article 33)[3].

Between traditional institutions of administrative law, which led to controversy in the specialized literature is that of public domain (Vedinaş, 2009, p. 143). The Constitution of Romania establishes

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[2] "The property is public or private. The economic assets belong to state, institutions or legal entities." (The Constitution of the Italian Republic, 1998)

[3] "It recognized the right to private property and inheritance." And according to article 132 paragraph (1) "The law regulates the legal regime of assets belonging to public domain and villages, based on principles of inalienability, imprescriptibility and imperceptibility, as their decommissioning." (The Spanish Constitution, 1998).

only the notion of property with its two forms. This is why currently there cannot be a unitary concept of the presentation way for the notion "public domain". Moreover, many authors have considered the domain theory as a creation of the doctrine, which led to a variety of views on this matter (Adam, 2000, p. 76; Vedinaş & Ciobanu, 2001, p. 5).[1] However, most opinions conver the idea that the concepts of public domain and public property are not synonymous (Iorgovan, 2002, p. 169)[2], the scope of the public domain being higher than the sphere of public property, in the sense that it includes not only public property assets, but also some private assets that should be preserved and transmitted to future generations (Iorgovan, 1994, p. 41), whose cultural, historical, economic significance justifies the affiliation to the public domain. (Vedinaş & Ciobanu, 2001, p. 17)

But in the current civil doctrine it is believed that there is an "overlap" between the two notions. (Boroi, Anghelescu & Nazat, 2013, p. 56)

The well-known Professor Jean Vermeulen shows that all discussions "*that occur around the concept of public domain represent not only a theoretical, doctrinal interest, but also it provides practical interest, the public domain being subjected to a special regime, which removes it not only from the legal regime of individual property, but even from the legal regime of the state's private domain*." (Vermeulen, 1947, p. 181)

Property, according to the doctrine (Alexandru, Cărăuşan & Bucur, 2009, p. 360), is a legal institution, while the domain represents a totality of assets, which are the object of public property. French doctrine distinguishes between public property and the public domain, as to the public domain it belongs also certain assets of private property of public persons. (Beauregard-Berthier, 2007, p. 29)

The existence of the public domain, as specified in the specialized literature (Albu, 2008, p. 137) gets new meaning as long as the assets in this area are put into good use, by their use and exploitation, in order to meet the general interests of the national or local communities, in terms of good administration.[3]

2. Regulating the Right to Administration

The establishment of real rights based on public property right, such as the right of administration, does not represent acts of alienation, but "*specific ways of valuing and exploitation of public domain assets, established by legal administrative acts or administrative contracts subject to administrative legal regime*" (Bălan, 2007, p. 93). As mentioned in the specialized literature (Bălan, 2007, p. 101), the doctrine and the positive law have not outlined a unified and coherent view on the legal nature of the right to administration of the autonomous public institutions on the goods of the public domain, views ranging from the nature of real derived right from the public property and the mere competence of administration and management of public domain assets. (Oroveanu, 1994, p. 60)

[1] Some authors consider being the same, the public domain and public property.

[2] According to the quoted author the public domain "means those public or private assets that by their nature or express provision of the law should be preserved and transmitted to future generations, representing values which are intended to be used in the public interest, directly or through public service and subject to administrative law regime, namely a mixed regime, under which the power regime is dominant, being in the property or, where appropriate, under the security of the legal entities of public law".

[3] Good administration is defined by the Council of Europe in the Recommendation CM / Rec (2007) as being a component of good governance, adding that good administration is not restricted to the legal ways of manifestation, which is required also by the quality of organizing and managing structures and resources, in terms of efficiency, effectiveness and adaptation to the needs of society, *being necessary to ensure protection and care of public property and public interests* (http//wcd.coe.int).

Article 136 paragraph (4) of the Constitution provides that the public property assets can be given in terms of the organic law, for autonomous administrations or public institutions.

The Law no. 213/1998, article 12 paragraph (1)[1] specifies that the assets of the public domain can be granted as appropriate, to the autonomous administrations, prefectures, to the authorities of the public central and local administration, other public institutions of national, county or local interest.

At the same time, the law on local public administration no 215/2001 contains provisions on the right to administration: "*the local and county councils may decide that the assets of public or private domain, of local or county interest, as applicable, may be granted to autonomous administration and public institutions, to patent or to rent. They decide on the purchase of assets or the sale of property belonging to the private sector, of local or county interest, according to the law*" [article 123 paragraph (1)].

However, the new Civil Code, in article 868, paragraph (1) provides: "*The right to administration belongs to the autonomous administrations or, where appropriate, to the authorities of the public central and local administration and other public institutions of national, county or local interest.*"

The doctrine states that autonomous administrations are considered legal entities of mixed nature, of public and private law (Iorgovan, 1994, p. 99). They act on behalf of the state or territorial administrative units, as applicable, for the provision of public services and the enhancement of public domain assets.

The public domain assets can be managed by individual administrative acts, usually between the holder of the public domain, the state and administrative-territorial units, on the one hand and the holder of the right to administration on the other; there are hierarchical subordination relationships, granting the right to administration is achieved by the holder of the public domain through a legal act of public law.

3. Holders of the Right to Administration

The subject of law, which can receive for administering a public property asset, according to article 868 paragraph (1) of the Civil Code, may be represented by: autonomous administrations or, where appropriate, authorities of public central and local administration and other public institutions of national, county or local interest.

As for the autonomous administrations, by Law no. 15/1990, the state economic units were reorganized as autonomous administrations and companies. According to article 2 of this law, autonomous administrations are organized and operate in strategic sectors of the national economy such as the arms industry, energy, mining and natural gas exploitation, post and rail transport, but also in some domains belonging to other sectors established by government.

Autonomous administrations can be established by the decision of the government for those of national interest, or by the decision of the county and the municipal councils for those of local interest, which are legal entities and they function based on economic management and financial autonomy. (Albu, 2008, p. 143)

The domains that can organize autonomous administrations of local interest are: water supply, sewerage and wastewater treatment; production, transport and distribution of thermal energy; local

[1] Article 12, paragraph (1) was repealed by section 3 of Law no 71/2011 from 01.10.2011.

public passenger transport; management and maintenance of housing, markets, stock market, fairs and community roads and green spaces, building, maintaining and modernizing roads and bridges of county interest.

The act of setting up the administration determines its activity objective, the patrimony and also the name and main headquarters.

In accordance with article 5 of the Law, autonomous administration is the owner of the assets in its patrimony, and in the exercise of the right to property it has, uses and disposes, independently of the assets that it has in its patrimony or it picks up the resulted goods, as appropriate, in order to achieve the purpose for which it was created.

According to the opinions of specialists, the formulation of Law no. 15/1990 the "*autonomous administration is the owner of the assets in its patrimony*" covers only the assets that entered in the patrimony with the owner's title, and not the assets that came into its patrimony with an administration title. (Stoica, 2004, p. 435)

The autonomous administrations are, by law, under a line ministry or a local public authority, by the act of which it was established and under the control of which it operates. The autonomous administrations' patrimony, along with the right to administration, there are identified other real rights, namely, the right to private property and rights derived from this right, and other patrimony rights.

The public institutions, subject to public law, are established by the Constitution, laws or administrative acts of the State or local government. Broadly speaking, by the notion of a public institution it is understood any public authority, i.e. authority of the public administration.

In a more restrictive sense, it is mentioned in the specialized literature (Tofan, 2008, p. 6; Petrescu, 2009, p. 23) the term public institution which *evokes only subordinated structures of some public administration authorities, operating from budget revenues, and extra-budgetary sources*.[1]

Usually the financial institutions of national interest are provided from the state budget and the financial means of local public institutions are insured by local budgets.

The scope of services provided by local public institutions is much larger than that of the autonomous administrations bodies of local or county interest (Petrescu, 2009, p. 25). Therefore, local and county public institutions are more diversified. For example, there are organized and they operate educational public institutions (kindergartens, schools, colleges, etc.), cultural public institutions (cinema, libraries, theaters, opera), public health institutions (dispensaries, clinics, hospitals). (Preda, 2002, p. 286)

4. The Content, the Legal Nature and the Enforceability of the Right to Administration

Apparently, the content of the right of administration is similar to that of property (Albu, 2008, p. 146). By law, the holder of the administration right may possess, use and dispose of its assets, given the act by which the asset was given into administration.

Between the possession of the holder's right to property and that of the holder of the administration right there is a distinction on volitional, at psychological level (Bîrsan, 2007, p. 103), the holder of the administration right may use the asset under the intention to be considered an administrator and not an

[1] For example, the Romanian Academy and its subordinate research institutes.

owner of assets (Bălan, 2007, p. 104). Possession is, in the case of the administration right, the expression of owning the asset and not its appropriation. (Albu, 2008, p. 147)

Regarding the use, the most important attribute of the administration right, its attribute grants to the holder of the right to administration the possibility of using public domain assets in order to achieve its activity object. In this respect, the autonomous administrations or public institutions can pick up the resulted goods (natural and material) produced by the public domain's assets, and, under certain conditions, the civil ones as well. (Albu, 2008, p. 147)

Since the right of administration is an inalienable right and it cannot be dismantled, the availability attribute contains only the material provision, without including the legal one (Lupulescu, 2013, p. 33)[1], the holders of the administration right having no right of property onto the assets that were assigned by the act of the public property right holder.

In the litigations regarding the right to administration, the holder of the right will be in court on its own. In the litigations regarding the right to the property, the holder of right to administration is required to show the court who is the holder of the right to property, according to the Code of Civil Procedure.

In the litigations regarding the right to administration, the state is represented by the Ministry of Public Finance and the territorial-administrative units are represented by the county councils, the General Council of Bucharest Municipality or local councils, who give written mandate, in each case, to the county council president or the mayor. It may designate another state official or a lawyer to represent him in court (article 12 paragraph (5) of Law no. 213/1998 as amended by section 4 of Law no. 71/2011).

Regarding the legal nature of the right to administration, the specialized literature has not defined a unified point of view.

Thus the opinions vary from the nature of real right divided from the right to public property, by the simple competence of administration and management of the public domain assets. (Oroveanu, 1994, p. 418). In this sense, some authors considered that the right to administrate the public property assets as a real right with a mixed legal, administrative and civil nature generates significant practical consequences (Boroi, Anghelescu & Nazat, 2013, p. 80). The administrative law feature of the real right to administration would exclude the enforceability against the holders to the right of public property and the impossibility of dismantling the right to administrate public property assets, a possibility specific to civil law.

The civil legal nature of the right to administrate public property assets, according to the civil law specialists, has resulted in the enforceability of this right to other subjects of law, the holder of the right to administration being able to use specific defense means specific to civil law (Boroi, Anghelescu & Nazat 2013, p. 80).

However, in accordance with article 866 of the New Civil Code, the right to administration is a real right appropriate for public property, along with concession rights and the right to use it free of charge.

The legal characteristics of the right to public property (inalienability, imprescriptibility and imperceptibility) are characteristics for the right to administration as well. (Bîrsan, 2013, p. 184)

[1] Under the right of material provision, the owner has the opportunity to decide upon the asset's substance, and also to abandon it, under the law. While the right to legal provision allows the owner to do acts of alienation, lease, renting, establishment documents of some main real rights and accessories in the favor of other people.

The right to administration, as any real right, has an absolute feature, being enforceable *erga omnes*.

A feature of this law refers to the unenforceability against the holder of right to public property - state or territorial-administrative unit. Thus, regardless of the method of its creation, it can be revoked by a symmetric act of the initial act. The right to administration may be revoked only if the holder does not exercise its rights and it does not perform its obligations arising from the transmission act.

The unenforceability of the right to administration compared to the right to public property, according to the theorists, is a consequence of legal relations of public law, relations in which the right to administration appears as a real right of administrative nature. (Pop & Harosa, 2006, p. 73 and the next)

The revocability is manifested only in relations between the autonomous administrations and public institution beneficiary of the right to administration and the holder of the right to property on the public asset. Therefore, any act of this nature issued by another public authority which has no legal competence in this area can be appealed, according to Law no. 554/2004, by the holder of the right to administration.

The termination of the right to administration may occur by its revoking either by the public authority which established it or by other means, such as, for example, the abolition of the autonomous administration or the beneficiary public institution or the termination of the right to public property based on which it was established.

5. Conclusions

Real right established by the right to public property, the right to administration represents a specific way to enhance the assets of public domain. To the right of administering public properties assets it is applied an administrative legal regime, which leads to practical consequences. Thus for the litigations that had as object administering public property assets will have the competence the courts of administrative contentious, and the legal defense of this right is assigned to the holder of the right, i.e. the autonomous administrations, local authorities or central public administrations or other public institutions of national county or local interest.

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