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## **Delimitation of Public Property.**

### **The Correlation Public Property-Public Domain**

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**Abstract:** The implementation of Law no. 287/2009 on the Civil Code (through Law No. 71/2011) imposed a new scope of the matter, as by this normative act an important part of the Law no. 213/1998, which until that date was considered to be the main regulation, derogating from the common law, intended for the legal regime applicable to public property. In this respect, it was questioned the reasons of regulating public property by the New Civil Code, which, in Art. 2 par. (1) establishes the subject matter of this normative act: “The provisions of this Code regulate the patrimonial and non-patrimonial relations between persons as subjects of civil law”. The controversies in the doctrine, as well as the “parallelisms, the inconsistencies and the contradictions between the different normative acts in the field of property” have led to the inclusion in the Government Decision no. 196/2016 for the approval of the preliminary theses of the draft Administrative Code an chapter on the exercise of the public and private property right of the State and of the administrative-territorial units.

**Keywords:** property law; public property; public domain

#### **1. General Considerations on Public Property**

Implementation of Law no. 287/2009 on the Civil Code (through Law No. 71/2011) imposed a new core of the matter, as by this normative act an important part of the Law no. 213/1998 was repealed, which until that date it was considered to be the main regulation, derogating from the common law, designed for the legal regime applicable to public property.

In this respect, the question of the rationale of regulating public property was raised by the New Civil Code, which, in Art. 2 par. (1) establishes the subject matter of this normative act: “The provisions of this Code regulate the patrimonial and non-patrimonial relations between persons as subjects of civil law”.

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The existence of regulations with a special feature in this field is justified by the general public interest, which the public administration has to accomplish, as shown in the specialized literature (Bălan, 2007, p. 3).

In the common language, the notions of property and ownership seem to be confused, but it cannot be marked as equal the property as an economic relationship and property right as a legal relationship (Bîrsan, 2015, p. 33).

According to art. 858 of the Civil Code, “public property is the right of ownership belonging to the state or to an administrative-territorial unit on assets which, by their nature or by the declaration of law, are of use or of public interest, provided they are acquired by one of the modes provided by law”.

Under another wording, art. 554 par. (1) of the Civil Code has an almost similar content: “The property of the state and of the administrative-territorial units which, by their nature or by the law, are of use or of public interest form the subject of public property, but only if they were legally acquired by them”.

As it can be seen, the definition of public property, inspired by civilian doctrine, sets out two elements specific to the legal regime applicable to it: subjects of public property law (state and administrative-territorial units); the scope of public property, delimited on the basis of the criteria of domaniality.

According to civil law authors, “the right of public property is the property right in which its attributes are exercised by the state and the administrative-territorial units and which are in the public domain, being inalienable, imprescriptible and imperceptible” (Ungureanu & Munteanu, 232) or, in another definition, “the right of public property is that subjective right of property belonging to the State or the administrative-territorial units on assets which, either by their nature or by a provision of law, are of use and of public utility, provided that they have been acquired in one of the ways provided by law” (Bîrsan, 2013, p.164).

## **2. Delimitation of Public Property. Public Property-Public Domain Correlation**

The notion of domain originates in the Latin word “dominium,” which means mastery, ownership. In the course of time, in our legal system, synonyms were used or in close connection with each other: public and private domains; administrative domain; public and private property, and so on. (Podaru, 2011, p. 5).

The notion of public domaniality is the result of numerous research by doctrines, authors of public law and private law (Giurgiu, 1997, p. 12). The well-known Professor Victor Prudhon, in his work *The Public Domain Treaty*, advocated the need to allow an exorbitant legal regime from civil law for certain public assets. Prudhon has the merit of highlighting the relativity of the principle of inalienability of the public domain, considering that it applies for as long as the public service to which the asset of the public domain is entrusted (Iorgovan, 2005, p. 136).

To this notion it has contributed, to a large extent, the jurisprudence, sharing the theories elaborated in this respect in its solutions.

The domaniality theory is an essential change to property in civil law (Giurgiu, 1997, p. 12).

As the reputable professor Jean Vermeulen points out, “the discussions that arise around the notion of a public domain are not only of a theoretical, doctrinal interest, but of a practical interest, the public domain being subjected to a special legal regime that estranges from not only the legal regime of

individual property, but also from the legal regime of the private domain of the state subject to the provisions of the common law” (Vermeulen, 1947, p. 181).

Professor Ion Filipescu considered that all property subject to public property rights are “domineering assets” and make up the “administrative” domain, within it some public property being “public domain”, while others are “private domains”. The thesis of Professor Ion Filipescu considers the French law according to which the public property designates all the assets belonging to the public authorities or institutions (Filipescu, 1994, pp. 75-76).

The assets that make up the administrative area are divided into two categories: some of which are governed by private law rules, others designed for the use of the public, which are not susceptible to individual appropriation, forming the public domain. Its delimitation is made under conditions that differ from the limitations provided by the Civil Code for private property, and the disputes that arise in connection with public assets attract the material jurisdiction of the administrative contentious.

In the specialized literature, it is appreciated that the notion of the public domain should be applied to “the whole of the assets used or exploited by, or for, the human collectivities” (Oroveanu, 1994, p. 417).

The distinction between the public domain and the private domain was made on the basis of the provisions of art. 476 of the old Civil Code, considering that the public domain consists of the goods affected by the general and unsuspecting use of private property. According to this article, “the highways, small roads and streets that are in charge of the state, navigable rivers and streams, shores, shore additions and seaports, natural or artificial ports, shores where the ships can be from all parts of Romania's territory, which are not private property, are considered annexes of public domain.”

After 1989, Law no. 18/1991 distinguishes between lands of public domain and lands of private domain.

The opinions expressed after 1990 on the notions of “public property” and “public domain” are found in several relevant theses: a) the thesis according to which the two notions are equivalent, supported both by authors of administrative law and by authors of Civil law (Mircea Preda, Valentin Prisăcaru, Eugen Chelaru, Gabriel Boroî); b) the thesis according to which the public domain is the exclusive object of the public property law (Corneliu Bîrsan, Valeriu Stoica, Marian Nicolae); c) the thesis which establishes the existence of a relation from the whole to a part, the notion of domain being wider than the notion of public property (Antonie Iorgovan); the identification of a broad sense and a narrow sense of the notion of a public domain (Liviu Pop) (Apostol Tofan, 2015, p. 264).

In contemporary doctrine, the phrase “public domain” has a broader meaning (Iorgovan, 2005, p. 173), which includes not only public property, as listed in Law no. 213/1998, but also the categories of assets in private property of significance and importance that go beyond the interests of their proprietor, leading to the coexistence of two different regimes applicable to them, namely the common law (as it is a right of private property) and an exorbitant regime, which includes public power rules (Vedinaş & Ciobanu, 2011, p. 74).

Therefore, the notion of a public domain is not limited only to public property, but in some aspects belongs to the public domain and assets (mobile or immovable) which is privately owned. These assets, to which a mixed (private and public law) regime applies and which can be found in the property of any subject of law, are included in the national cultural heritage, “being national values to be passed on from generation to generation “have always been the subject of special protection (Iorgovan, 2005, p. 173). In André de Laubadère's view, all of these special rules, derogations from the

common law constitute the “regime of domainiality” (Laubadère & Gaudermet & Venezia, 1988, p. 336).

In the opinion of another author, the notion of a public domain and even of domainiality would rather have a historical connotation, essential in fact being the legal regime applicable to the assets forming the public domain of the state and of the administrative-territorial units, as well that of the assets that make up their private domain (Bîrsan, 2013, p. 161).

The notions of public property and public domain, respectively private and private property, are not synonymous.

Public property is a legal institution, and the public domain is a totality of assets that represent the object of ownership (Balan, 2007, p. 44).

The public domain, in a narrow sense, encompasses all the assets which represent the object of the public property right of the state or of the administrative-territorial units, assets which, according to the law or by their nature or purpose, are of public use or interest (Pop, 2001, p. 70).

In the broad sense, the public domain includes, in addition to public property assets, private property assets which, due to its importance to society, is subject, in part by law, to a legal regime governed by public law (Pop, 2001, p. 70).

In a much broader definition, the broad public domain consists of “public or private assets which, by their nature or by the express provision of the law, must be preserved and transmitted to future generations, representing values intended to be used in the public interest, and subject to an administrative regime or a mixed regime in which the regime of power is dominant, being owned or, as the case may be, guarded by legal persons governed by public law” (Iorgovan, 2005, p. 173).

As far as we are concerned, we consider that the notions of public domain and public property are not identical, but it is necessary to highlight a unitary point of view, as it has also been emphasized in the literature.

### **3. The Content and Limitations of the Public Property Right**

After the entry into force of the Constitution, it can be seen that the exercise of public property prerogatives (possession, use and disposition) presupposes their exercise under the regime of public law.

Art. 2 of the Law no. 213/1998 (repealed by the New Civil Code) specifies the ways of exercising the prerogatives of the public property right in the sense that the state or administrative-territorial units exercise the possession, the use and the disposition on the assets that make up the public domain within the limits and under the law.

On the ways of exercising the prerogatives of the public property right, according to art. 136 par. (4) second sentence of the Constitution, “Under the terms of the organic law, public property may be given to the administration of autonomous regimes or public institutions or may be leased or rented; they can also be put into free use for public utility institutions.”

The right to administer public property assets is constituted under the terms of the organic law, as being a real right, opposed to erga omnes, less to the holder of the right of public ownership.

The right to lease on public property assets is born on the basis of the concession contract, being a real right that includes the attributes of the right to possess, use and disposition exercised on a temporary basis.

The right to use free of charge is constituted by the administrative act of public administration authorities, being a real right, opposed to erga omnes, free of charge, in favor of a private non-profit legal person.

The rental of public property assets is approved by the authorities designated by organic law and is achieved by public auction.

Regarding the limits of exercising the right of public property, art. 862 of the Civil Code stipulates that the exercise of the public property right is achieved within the limits provided by the new Civil Code and the Law, being subject to any restrictions for respecting the private property right insofar as they are compatible with the public use or interest for whom the affected assets are destined.

In the event of incompatibility, it shall be established by agreement between the holder of the public property and the person concerned or, in case of divergence, by judicial means. In such cases, the person concerned is entitled to a fair and prompt compensation from the public property owner.

The limits of the exercise of the right of public ownership take into account the extent to which the limitations are compatible with the use or the public interest to which the goods are intended. The law may limit the exercise of the right to property either in the public interest or in the private interest (article 602).

The Civil Code regulates in Art. 602-625 three categories of limits, namely legal limits, conventional limits and judicial limits (Bîrsan, 2013, p.164). Among the legal limits listed in the Civil Code, we mention public interest or private interest, rules on environmental protection and good neighborliness, rules on water use, rules on distance and intermediate works required for certain constructions, works and plantations, as well as certain limitations regarding the right to pass. Also the legal right to transfer to utilities, the right of re-entry into possession, the state of necessity, as well as certain special rules established by “the provisions of the special laws on the legal regime of certain assets, such as land and buildings of any kind, the forests, the assets from the national cultural patrimony, the sacred goods of the religious cults, and others alike” (article 625 of the Civil Code).

In principle, it is mentioned in the doctrine that the limitations mentioned are not incompatible with the right to public property (Bîrsan, 2013, p. 164).

Conventional limits can be established by legal acts, if public order and good morals are not violated (article 626). Unlike the legal limits, the conventional limits are incompatible with the right of public property, as the owner of the public property right cannot conclude a convention by which he renounces the exercise of the attributes of this right (Bîrsan, 2013, p.164).

The legal limits are intended to overcome the normal inconveniences of the neighborhood (article 630 of the Civil Code), whereby the court may, for reasons of fairness, oblige the owner to “compensate for the injured party and to restore the situation if it is possible”.

#### 4. Conclusions

As a conclusion to those mentioned, the property institution is sometimes encountered in the sphere of civil law, sometimes in the field of administrative law or at the border between them. Essentially, public property is a constitutional institution. The notions of public domain and public property are not identical, but it is necessary to highlight a unitary point of view, as it has been emphasized in the specialized literature.

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