

THE PARTICULARITIES OF ADMINISTRATION PUBLIC PROPERTY OF LOCAL COLLECTIVITIES

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Abstract

Local collectivity is a law subject. Like another's law subjects, local collectivity as the holder of rights and obligations, has its own patrimony. The patrimony of local collectivity is different than the state one and another local collectivities. This patrimony consists of mobile and immobile, corporal and incorporeal goods, and the rights over them. A distinct category of goods are the ones that form public property of collectivity. Over this category of goods, local collectivity exercises the prerogative of general administration which results from national and international legislation.

We will lead our study starting with property theories promoted by French and Romanian school and by their legislation, contributing with some completion with Republic of Moldova legislation, with the scope of clarifying the concept of administration public property and its features.

Key-words: domain, public property, patrimony, administration, administration right, local collectivity

In the following we will analyze property and public property, and, in particular, public property right of the administrative-territorial units, through the lens of the organic law of the Republic of Moldova, as well as through the applicable stipulations, concerning the administration of public patrimony, which is contained in the European Charter of Local Self – Government and from the point of view of the certain provisions with fundamental character relating to property from the Constitution of the Republic of Moldova.

Provisions from the art. 14, paragr. 1 and 2 letter b) and art. 43, paragr. 1, letter c), as well from the art. 29, paragr. 1, letter g) and art. 53, paragr. 1, letter d1) and d2) of the Law of local public administration¹, covers the main tasks (competencies) in administration of public and private domain of the village (commune), town (municipality), and district, which revert to both local councils, as autonomous, deliberative administrative authorities and to mayors and presidents of district, as autonomous executive administrative authorities.

General characteristic. In accordance with the art. 1 of the Law of administrative decentralization², competencies of the local government represent the sum of rights and obligations of local public authorities in areas of activity that are set to them. In order to

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¹ Law no. 436 from 28.12.2006 of local public administration, Official Monitor of RM, no.32-35 from 09.03.2007.

² Law no. 435 from 28.12.2006 of administrative decentralization, Official Monitor of RM, no. 29-31 from 02.03.2007.

realize these competencies local authorities use different resources: institutional, human and patrimonial. All combined they determine the administrative capacity of every single authority.

Article 4 of the European Charter of Local Self – Government³ establish the principle of subsidiarity and stipulate that within the framework of the law, that local authorities have, the entire power of taking the initiative in any matter which is not excluded from the sphere of their competencies, or which is not assigned to another authority.

Thus, the exercise of public power must belong to those authorities which are closest to the citizens and responsibilities which are entrusted to local communities should normally be full and complete. Or, as saying a French Decree of 1852, it can govern, but can only manage to close.

The normative framework. The legal framework which governs the powers of local public administration authorities in the Republic of Moldova in the field of local public property includes a wide spectrum of regulatory acts, among which can be mentioned:

- Law of local public administration,
- Law of administrative decentralization,
- Law of administrative-territorial units' public property,
- Law of the administration and privatization of public property,
- Law of expropriation for public interest,
- Law on concessions,
- Law of condominiums in the housing fund,
- Law of public communal services,
- Civil Code,
- The land code,
- The forest code,
- The subsoil code,

as well as other normative acts like: the Government's decisions, orders of ministries, decisions of local and district councils, and in some cases, the provisions of district presidents and mayors.

Through the prism of the analyzed facts, we note that the existing legislation in the field of competence to administrate the local public property by local public administration, it is quite impressive. However, there still exists, and we will try to prove this, a lot of ambiguities which could disappear, why not, with the unification of all those regulations, for example by adopting a Code of public property, as did France through the adoption in 2006 of a Code General de la Propriete des Personnes Publiques or by adopting Cod al Domenialității Publice in Romania, as is often discussed about the need of its adoption.

Area of activity of local public authorities. According to the current legislation in the sphere of local public administration, local councils as deliberative authorities and elected mayors as the executive ones are the local public authorities of first level administrative-territorial units. Also, district councils, as deliberative authorities and

³ European Charter of Local Self-Government from 15.10.1985, ratified by Republic of Moldova by Parliament Decision no.1253-XIII from 16.07.1997.

presidents of districts as the executive ones are the local public authorities in administrative-territorial units of level II. In this context, in accordance with the law no. 436-XIII/2006, are set out the powers of the local public authorities of level I and II, which are separated into two types of local authorities: deliberative and executive. Besides this we mention that the local public administration authorities exercise three types of competencies: authorities' own competencies, delegated competencies and competencies of cooperation. Consequently, in the art. 4 of the Law 435-XIII/2006, are set local public authorities' of level I own areas of activity, among which letter g) mentions the power of administration goods of public and private domains; in paragr. 2 letter a) of the same normative act, it is stipulated the power of administration goods from the public and private domain of the district, among all areas of activity of the local authorities of level II.

As a result of the amendment of law no. 435-XIII/2006⁴, art. 5 has undergone some changes. In this way was introduced a new paragr. (5) according to which local public administration authorities of level I and II will develop cooperation with the private sector on the basis of public-private partnership, for the purpose of successful fulfilling of local public interests and increasing the efficiency of public patrimony. Therefore we can note that, in the area of local public property, the local public authorities, of the different levels of organization, are empowered with the competencies of cooperation, of course, in compliance with the law and only in order to ensure completion of some projects or public services which require joint efforts of these authorities, including the central authorities.

Even though the areas of activity proper for local public administration authorities are settled by the framework laws, however the local public authorities of all levels, within the limits of the law, have full freedom of action in regulating and managing all matters of local interest which are not excluded from their competence and aren't assigned to another authority.

We will concentrate at this section of the powers (sphere of activity), whereas we want to point that the competencies of local public authorities, in particular the competencies of the executive authorities, and we are referring here to the presidents of districts and mayors, are determined mainly by the need of achieving both the local and national interest. For these reasons, according to law, mayors and presidents of districts have both their own powers and delegated ones too. In other words, mayor and president of district don't exercise their powers in their own name but on behalf of the local community which chose them, and on the other hand, of the state which gave them rights and obligations of public interest. According to the status of the local executive organ, both mayor and president of the district represent and exercise powers pertaining to their competence or delegated powers. In this way, in the area of administration of public property, mayor is responsible for the inventory and administration of public goods and private domain of the village (commune), town (municipality), within the limits of his/her competence [art. 29 paragr. 1, letter g) of the Law no. 436/2006]; and president of the district ensures the establishment of feasibility studies and proposes for approval the lists of goods and services of district level interest for realization of projects of public-private partnership and ensures monitoring and control of projects of public-private

⁴ Law of Parliament no.181 from 15.07.2010, Official Monitor of RM no. 155-158 from 03.09.2010.

partnership where local government authority participates as a public partner (art. 53 paragr. 1, letter d1, d2 of Law no. 436/2006).

And yet, what are the goals, guiding principles and how we might define the administration of local domain, as a competence of local public authority?

The objectives and basic principles of the administration of the local community public domain. Analyzing in detail all the legal provisions relating to the public property of local communities and the provisions of the Law no. 436/2006, Law no. 435/2006 with the provisions of the Law of administration and privatization of public property⁵, Law of the public property of administrative-territorial units⁶, Law of public fields and their delimitation⁷, administration of the local public property is realized on the basis of following principles: efficiency, legality and transparency, in order to:

- to determine the composition and value of local public goods;
- to keep track of local public goods;
- to supervise local public property;
- to harness goods of the public property, the administrative circulation of them, through the means provided by law,
- to defend the rights and legitimate interests of the local community in the area of local public property.

A try to define. By administration of public property of the local community we understand the specific area of activity which belongs to the holder of the right of public property, which encompasses the totality of processes of evidence, monitoring, recovery, preservation and defense of certain categories of public goods, characterized by inalienability, indefeasibility and insaisissability based on the rules of efficiency, legality and transparency, in order to preserve and exploit them for the benefit of the entire local community.

The features of administration local communities' public property. Once defined the administration concept, we will stop in the following over the features (specificities) of administration local communities' public property. First of all, we should specify that we will deduce these particularities from the definition. In our understanding, these are:

- public property right registration;
- public property evidence;
- public property inventory;
- public property protection;
- public property preservation;
- public property exploitation;
- public property protection.

Registration, inventory and accounting of public property. The purpose of the legal rules is to offer the necessary judicial security to the legal circuit. The law by its rules has the task of defending the present rights and those which will be gained by individuals and legal entities, including state and administrative units. The legal system, which is a normative one, tends to perfection as he governs better the delimitation and makes more

⁵ Law no. 121 from 04.05.2007, Official Monitor of RM, no. 90-93 from 29.06.2007.

⁶ Law no. 523-XIV from 16.07.1999, Official Monitor of RM, no. 124-125/611 from 11.11.1999.

⁷ Law no. 91-XVI from 05.04.2007, Official Monitor of RM, no. 70-73/316 from 25.05.2007.

widely known the subjective rights, and is respected more as it is exercised more concisely and accurately. The need for safety of civil legal relations is carried out through the state registration of patrimonial rights to immobile property, which presupposes the registration in the register of immobile goods of the property right and other patrimonial rights over it, and of the holder of such rights. In accordance with art. 4 of the Law of immobile goods cadastre⁸, subjects of registration are the owners of immobile property and other patrimonial rights holders, which are: [...] Republic of Moldova as its administrative-territorial units. Registration is compulsory (art.. 5 Law no. 1543), and the information about the recorded rights is transparent (art.. 6 Law no. 1543).

The registration in the Register of immobile goods is made on the basis of applicant's declaration, in our case we are talking about the mayor of the locality, which is made at the territorial cadastral office in the territory of which the immobile property is located, and presenting an established set of acts. Once registered in the Register, the applicant becomes the owner of the right over an immobile good, consequently, the state assures him/her the protection and right over the goods.

Failure of delimitation of the lands which are public property of the state and those which are the public property of administrative-territorial units, has a direct negative impact on the immobile goods record-keeping, which is with deviations from the legal norms. The main problems of the daily record would be:

- incompatibility of the available data at the central level with the data existing at the local level;
- doubling recording data relating to immobile goods, does not permit the establishment of real data existing in the territory;
- activity area of territorial cadastral offices is not correlated with administrative-territorial division, which does not allow for efficient cooperation with local public authorities of different levels.

Lack of truthful and complete information about existing real estate goods, is jeopardizing record-keeping process and, as a result, creates conditions for irrational use of public resources both of the state and of local communities.

Local public authorities should ensure the demarcation and separate survey of property from the public and private domain. In this regard, in accordance with art. 77 of the Law no. 436, all goods belonging to the administrative-territorial unit, are subject to annual inventory, and reports on their situation, shall be submitted to the particular council. In accordance with art. 14 of the Law no. 523-XIV, inventory of public property of administrative-territorial units shall be made by the competent structures of Government. We note that, in terms of decentralization of property, the legislative itself admits the Government's interference in the process of inventory of public property to the local community, thus going against the principles of local autonomy and decentralization.

Protection and defense of public property. As with any subjective right, the right of public property is defended by the guarantees covered by the various branches of law, emphasizing the importance which it has in the social life of the community.

As regards Romania, under the constitutional aspect, since the Constitution of 1866, the right of property is guaranteed and is considered sacred and inviolable but the

⁸ Law no.1543 din 25.02.1998, Official Monitor of RM, no. 44-46 din 21.05.1998.

Constitution of 1923 declared that the property of any kind would not be guaranteed. The Constitution of 1991, revised, in art. 136 paragr. (1), paragr. (2) mentions that state public property is guaranteed and protected by law. In the same way Constitution of the Republic of Moldova⁹, in art. 127, notes that state protects property. We should point that the quoted constitutional provisions, do not contain any provision indicating that public property would enjoy a preferential protection or that constitutional texts dedicated to the preservation of private property are far more numerous and consistent.

Even if there are guarantees of the public property right in various branches of law, the most guarantees are regulated by civil law. In terms of civil law, defense of property right was defined as the sum of all legal actions through which the holder of the right requests the court to decide whether in order to remove any prejudice or breach of duty of his right, either as actions through which the owner tends to eliminate infringements of his right and to get at its restoration.

Defending the right of public property is realized via actions of requesting the court to determine directly that the applicant is the owner of the property right and concretely via the action in claim. What's more, we will make the specification that defending the right of public property through the action in claim, it is provided by the Romanian legislation and can be deduced from the legislation of the Republic of Moldova. Or, the express provision in this regard, is the article 865, paragr. (3) and art. 564 of the Romanian Civil Code, which establishes that the provisions relating to the action in claim and action in defense of private property right, is applied in a proper way to the right of defense public property too. The Civil Code of the Republic of Moldova, does not contain express provisions nor even reference rules concerning protection of the right of public property, as in the case of the Romanian civil law. However, consequential from the fact that according to article. 296, goods may belong to the public domain or private one and so forming property of these entities, the action in claim is a defense mechanism applied to the public property as well.

In this way, the action in claim can be made by the holder of the right of public property. As regards Romania, in case of local community, representation is assured by the county councils, the General Council of the municipality of Bucharest or by local councils, as it is established in art. 12 paragr. (5) of the Law no. 213/1998. In terms of the legislation of the Republic of Moldova, in the case of the local community, the representation will be provided by the regional councils, the General Council of the municipality of Chişinău, the Popular Assembly of the Autonomous Territorial Unit Găgăuzia or by local councils, as it is established by art. 4 paragr. (1) of the Law no. 523-1455/1999.

Relating to the proof of public property right, this must be done in accordance with the rules of the common law.

The action in claim of goods from public property is indefeasible extinctive, regardless of whether the property is movable or immobile, and to this end, there are no exceptions. Moreover, the action in claim cannot be paralyzed by invoking usucapion, in the case of immobile goods, or invocation of possession in good faith, in the case of mobile goods.

⁹ Constitution of Republic of Moldova from 29.07.1994, Official Monitor of RM, no. 1 din 18.08.1994, with subsequent amendments.

Therefore, the Romanian Civil Code regulates protection of public property right, in consideration of the fact that it is the subjective right, which belongs to state or to local community over the goods which are of public use or public utility, either by their nature or by an express provision of the law. Even though the institution of public property may be treated interdisciplinary, defending the right of public property is an institution of civil law.

Law of the Republic of Moldova of public property of administrative-territorial units, contains a valuable provision, in our opinion, relating to guaranteeing the legal conditions for the exercise of the right of public property of administrative-territorial units. According to this rule, public property of the administrative-territorial units is acknowledged and defended by law. State guarantees the legal conditions for the exercise of the right of public property of administrative-territorial units which are equal legal conditions for the exercise of the right to any other form of property. No one has the right to withdraw forcefully the property from a public owner, except the cases provided by law, and to demand the merging of its goods with the goods which belong to another owner. The public owner has the right to dispose its own property in its own way, without violating the law.

Exploitation and preservation of public property. Concerning to Romania and Republic of Moldova, exploitation of the public property, regarding the doctrine and jurisprudence may be realized: by using public domain by public services and by using of the public domain by individuals, so by the public.

At the same time, we highlight that in the action of exploitation as a component of the administration of the public property, local communities act as public authorities, i.e. issues of administrative law, not civil law. It involves the exercise of the attributes contained in the sphere of competence that the law gives them, and not the exercise of certain rights and obligations of a civil nature.

General administration of the goods which belong to public domain is a way of exercising the right of public property directly, unmediated by the county, city or municipality. The county, town or commune council, are the subjects of law by which a local community expresses its legal will, within the limits established by law. As to Republic of Moldova, the local community expresses its legal will through the district, town or village council. These subjects of law are acting exclusively in their status of persons of public law or administrative persons in the process of general administration of the goods from public domain. That's why, rights and obligations that make up the content of the general administration of the public domain represent only responsibilities within the area of their competence, and not within subjective civil rights¹⁰.

As for conservation, it can be perceived as a fundamental task for the transmission of public patrimony, with all its components, to the future generations. In other words, every local community has an obligation to keep (preserve) public goods and use them for the benefit of the whole community.

¹⁰ E. Bălan, Administrative law of goods, Publishing House C.H.Beck, Bucharest, 2007, p. 90.