

# Owners of public property in Romania

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## **Abstract**

*This article analyzes the owners of public property: the state and the territorial administrative units. The article analyzes various theories about the quality in which the State exercising the right of public property (independently of the a legal person, based on the national sovereignty or as a public law legal person). Similar is analyzed the quality in which the administrative-territorial unit exercises the right of public property. In this article are analyzed also the meanings of the term "administrative territorial unit".*

**Keywords:** *right of public property, state, territorial administrative units, legal person of public law, administrative law.*

**JEL Classification:** K11, K23

## **1. Introduction**

Art. 136 (2) of the revised Constitution states that "Public property is guaranteed and protected by law, belongs to the state or territorial administrative units". Also art. 858 of the Civil Code states that public property is ownership of what belongs to *the state or the territorial administrative unit*, of the goods which by their nature or by declaration of law are by use or public interest, provided to be acquired through one way prescribed by law.

From these mandatory provisions, it follows that *any other subject of public or private property cannot be holder of public property rights* but can have, at most, derived rights of this, such as the right of management, concession<sup>2</sup> etc. Thus, according to art. 136 (4) of the Constitution, *under the terms of the organic law, the public property can be managed by autonomous régies or public institutions, or can be granted or leased; also, it can be transferred for free usage to public utility institutions*. Therefore the private legal persons<sup>3</sup> and the natural persons may not hold in property, assets belonging to the state public domain or the

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<sup>2</sup> See Eugen Chelaru, *Administrarea domeniului public și a domeniului privat*, C.H. Beck Publishing House, Bucharest, 2008, Second edition, p. 56; Corneliu Bîrsan, *Drept civil. Drepturile reale principale*, Hamangiu Publishing House, third edition, Bucharest, 2008, p. 87; Marian Nicolae, *Considerații asupra Legii nr. 213/1998 privind proprietatea publică și regimul juridic al acesteia*, in Dreptul no. 6/1999, p. 6, 7.

<sup>3</sup> See also Constitutional Court Decision no. 107/2004 published in the Official Gazette no. 392 of 4 May 2004.

administrative-territorial units, but only under a concession or a rental. The non-profit legal persons (associations and foundations) of public utility can obtain in conditions of the organic law, the right of free use of the public property assets. Also, the public institutions and the autonomous régies may receive in administration of public domain goods in the terms of the organic law, without that they become owners of these goods.

Similar art. 4 (2) of Law on the land resources no. 18/1991<sup>4</sup> provides that the public domain may be of national interest, in which case the property on it, under public law regime, belongs to the State, or it may be of local interest, in which case the property, under public law regime, too, belongs to communes, towns, municipalities, or counties.

## 2. The State

The State exercises the right of public property, over assets from the public domain of national interest, as a legal entity of public law based on public power prerogatives. These assets are given in the general administration of the Government.

In doctrine there were various theories over the years about **the quality in which the State exercising the right of public property** (independently of the legal person, based on the national sovereignty or as a public law legal person):

**A. The State - legal entity *sui generis*.** Some authors found that the state has the quality of legal entity only in the private law relations, while in public law relations, acts as the holder of sovereignty (of the public power prerogatives) and not as a legal entity. The theory has its origins in France and among the first authors who have supported it we can list H. Berthelemy<sup>5</sup> which showed that the state exercises the right of public power (the right to order, the right to impose taxes, the right to put at constraint on population) that authority, with no need to have legal personality for this. In the Romanian doctrine this theory has been supported mainly by private law authors<sup>6</sup>. The theory starts from the idea that a legal person can act only in the sphere of the legal relationships that do not involve the exercise of state authority. It was argued therefore that only "in certain categories of legal relationships - which do not relate directly to achieving their

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<sup>4</sup> republished in the Official Gazette. no. 1 of 5 January 1998, as amended.

<sup>5</sup> H. Berthélemy, *Traité élémentaire de droit administratif*, first edition, Paris, 1900.

<sup>6</sup> See Yolanda Eminescu (coord.), *Subiectele colective de drept în România*, Academy Publishing House, 1981, p. 51; C. Stătescu, *Dreptul civil. Persoana fizică. Persoana juridică. Drepturile reale*, Didactic and Pedagogical Publishing House, Bucharest, 1970, p. 471; Nicolae Popa, *Teoria generală a dreptului*, All Beck Publishing House, Bucharest, 2002, p. 268; Mircea N. Costin, Călin M. Costin, *Dicționar de drept civil de la A la Z*, Hamangiu Publishing House, 2<sup>nd</sup> edition, Bucharest, 2007, p. 921 („stat”). In the administrative law, to support this theory in the interwar period see George Costi, *Noțiunea contractului administrativ*, Central Printing House, Bucharest, 1945, p. 7 and 17.

competence, but is in some way connected with it - the State organs may occur as legal persons"<sup>7</sup>.

An author from the interwar period show that "the administrative person has a dual character: public power and private person. In the first quality, the administrative person follows a special legal regime: its acts have certain features that distinguish it from those committed by individuals and who escapes of the censorship of the ordinary law courts. As a private person, the public authority acts are subject to the legal regime applicable to those performed by individuals"<sup>8</sup>.

This theory was combated considering, rightfully, that any organization can be the subject of the patrimonial legal relations only if it is equipped with legal personality. In other words, only if an entity is recognized by legal order as being person she can participate as such at relationships of a patrimonial legal nature<sup>9</sup>. If through legal person shall take into account any organization which is itself the subject of distinct legal relations, whatever their nature, it is irrelevant whether the State appears in these relations on an equal footing legal or holder of sovereignty; it is also in one case and another, a distinct subject of legal relationship, equipped, because only thus can be subject, with legal personality<sup>10</sup>. Elimination of the State from the legal persons category based on the impossibility of applying general rules are not justified, both to the legal provisions which distinguish only two categories of legal subjects, i.e. individuals and legal persons, and to assembly unequivocally by the state of the constituent elements of legal personality<sup>11</sup>.

**B. The theory of dual personalities of the state.** The State as a legal person exercises two types of responsibilities: some public, others private. From here some authors have advocated the theory of dual personalities of the state: on the management of the State assets in the private domain would have a personality of private law and in as regards the management of public domain assets and performing acts of authority, a public law personality<sup>12</sup>. In this respect an author shows that "a categorical distinction should be made between the quality of the state or the administrative-territorial units of private law legal persons, holders of private domain and the quality of public law legal persons, holders of public domain. For the "administering" of the private assets, the State comes into ordinary civil relations by virtue of civil law capacity, while for "administering" of the

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<sup>7</sup> Nicolae Popa, *cited work*, p. 270.

<sup>8</sup> George Costi, *cited work*, p. 7.

<sup>9</sup> See Dan Claudiu Dănișor, Ion Dogaru, Gheorghe Dănișor, *Teoria generală a dreptului*, 2<sup>nd</sup> edition, C.H. Beck Publishing House, Bucharest, 2008, p. 324

<sup>10</sup> See Dan Claudiu Dănișor, Ion Dogaru, Gheorghe Dănișor, *cited work*, p. 90

<sup>11</sup> Yolanda Eminescu (coord.), *cited work*, 1981, p. 52.

<sup>12</sup> René Jacquelin, *Une conception d'ensemble du droit administratif*, Paris, 1899, p. 19; M. Hauriou, *Précis élémentaire de droit administratif*, Société anonyme du Recueil Sirey, 1925, p. 150; G. del Vecchio, *Lecții de filozofie juridică*, Europa Nova Publishing House, 1995, translated by J. C. Drăgan, p. 217. In the Romanian law for discussion on this theory see M. Stancu-Țipișcă, *Persoanele juridice de drept public*, C.H. Beck Publishing House, Bucharest, 2006, p. 73 și urm.

public domain assets, he enters into relations of power by virtue the capacity of administrative law...<sup>13</sup>.

We believe that under Romanian positive law, this theory can no longer be accepted for the following reasons. First it assumes that the state to have two legal personality, as if it were two separate legal entities, each with organization of course independent, own patrimony and purpose affected of the social interests. If things would stay like this, could not explain how the satiation of the state creditors for claims arising from the operation and maintenance of public assets (which are part of the patrimony of the State as a legal person of public law) can be achieved through the forced execution of private property assets (that would is part, according to this theory, from the State patrimony as a legal person of private law) under the terms of Ordinance no. 22/2002 *on the payment obligations of public institutions established by executive titles*<sup>14</sup> and the Civil Code. Therefore, it is more than obvious that the state can only have a single legal personality, which incorporates the prerogatives of public power respectively the public law legal personality.

**C. The theory of the unique personality of the State** A high percentage in doctrine has *the theory of the unique personality of the State*, which promoting the idea of existence just a public law legal personality. This theory was supported in France by Esmein, Michoud, Ripert and in Romania by Paul Negulescu and Anibal Teodorescu, who said that from the beginning the State was subject of law, of all times exerting all the rights, or patrimonial, or of public authority<sup>15</sup>. It was felt that just by adopting of the thesis that the State has a single legal personality can explain the "continuity of the State, government debt being binding on another government, because the government that fell, has not engaged on himself, but the state, moral person"<sup>16</sup>.

The same view is supported in the current Romanian doctrine. Thus it is considered that it is not conceivable that the same legal entity to have two personalities, one of public law and another of private law, determined by different tasks they perform, and by the legal acts which they conclude. The State has the same single legal personality and when adopting or issuing an act of public law, and entering into an act of private law, because - and in one case and in the other - if does not respect its obligations, shall be liable and pay damages for the damage caused, either by acts of public law or private law<sup>17</sup>.

<sup>13</sup> A. Iorgovan, *Tratat de drept administrativ*, vol. II, fourth edition, All Beck Publishing House, Bucharest, 2005, note 3, p. 171

<sup>14</sup> Published in the Official Gazette. no. 81 of 1 February 2002 and approved with amendments by Law no. 288/2002 (published in the Official Gazette. No. 344 of 23 May 2002), as amended.

<sup>15</sup> A. Iorgovan, *cited work*, vol. I, p. 50, note 1). For details see also M. Stancu-Țipișcă, *cited work*, p. 76 et seq

<sup>16</sup> M. Văraru, *Tratat de drept administrativ român*, Socec Publishing House, Bucharest, 1928, p. 69

<sup>17</sup> V. I. Prisăcaru, *Tratat de drept administrativ român. Partea generală*, second edition, revised and enlarged, All Publishing House, Bucharest, 1996, p. 44

Given the doctrinal guidelines and current legal regulations, we believe that the state is a *legal entity of public law*<sup>18</sup>, quality in which is the holder both of the public property rights over public domain assets of national interest, and of the private property rights, over private domain assets of national interest.

### 3. The administrative territorial units

*De lege lata*, are administrative units: village, city, county; under the law, some cities may be declared municipalities (Article 1 (2) letter i) of Law no. 215/2001 *on local public administration*). The administrative territorial units exercise the right of public property on the public domain assets of local interest. These assets are given in the general administration of local councils, county councils or the General Council of Bucharest. However, in spite of art. 136 (2) of the Constitution, in art. 28 (8) of Law no. 1/2000<sup>19</sup> is found the incorrect formulation of "public property of local councils", instead of the public property of the village, city or municipality, as appropriate.

**The meanings of the phrase "administrative territorial unit"**. The phrase "administrative territorial unit" has two distinct meanings, of **local territorial collectivity**, and of **administrative-territorial circumscription**<sup>20</sup>. In one sense, the territorial administrative units signifies the administrative districts of the state territory, namely the area of territorial competence of the decentralized state bodies<sup>21</sup>. In the second instance, the territorial administrative units signifies the local territorial collectivity, ie citizens living on a certain portion of the state territory, with an administrative organization and its public interests, local, defining the regime of administrative decentralization or of local autonomy<sup>22</sup>. The administrative-territorial unit is subject of law (legal person) only when it has the meaning of local territorial collectivity and not when, represents an administrative territorial circumscription, simple portion of the state territory, simple area of the state bodies competence<sup>23</sup>.

**The quality in which the territorial administrative unit exercises the right of public property.** *Mutatis mutandis* the above analysis of the quality in which the State exercises the right of public property is also applicable at the administrative-territorial units. After 1989, the Law no. 69/1991 *of local*

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<sup>18</sup> See D. C. Dănișor, I. Dogaru, Gh. Dănișor, *cited work*, 2008, p. 324

<sup>19</sup> Law no. 1/2000 for the reconstitution of ownership of agricultural land and forest, required under the provisions of the Law on the land resources no. 18/1991 and Law no. 169/1997 published in the *Official Gazette*. no. 8 of January 12, 2000, as amended.

<sup>20</sup> See Corneliu-Liviu Popescu, *Autonomia locală și integrarea europeană*, All Beck Publishing House, Bucharest, 1999, p. 32, 33. Although not used the phrase "administrative territorial unit", the distinction between "collectivity" and "circumscription" is underlined by French doctrine concerning the administrative division of the territory – see Jean Rivero, Marcel Waline, *Droit administratif*, 15<sup>e</sup> édition, Dalloz, Paris, 1994, p. 287

<sup>21</sup> Corneliu-Liviu Popescu, *cited work*, p. 33.

<sup>22</sup> *Idem*, p. 33

<sup>23</sup> *Ibidem*, p. 35

*government*<sup>24</sup> will consecrate **the dual legal personality of the administrative-territorial units**. Thus, art. 4 show – „The communes, towns and counties shall be legal persons. They shall have full capacity, own a patrimony, and hold the initiative in everything related to the administration of local public interests, exercising authority, under the terms of the law, within their established territorial-administrative limits. *As civil legal persons*, they shall have in their property assets from the private domain, and *as legal persons under public law*, they shall be owners of the assets of the public domain of local interest, according to the law”.

**The theory of the unique personality of the administrative-territorial units** is embraced by the current law of local government, Law no. 215/2001<sup>25</sup> that shows in art. 21 (1): „The administrative territorial units are legal persons of public law with *full legal capacity* and its own patrimony. These are legal subjects of tax law, holders of the tax reference number and of the accounts opened to the territorial units of treasury and bank units. The administrative territorial units are holders of rights and obligations arising from the contracts concerning the administration of assets belonging to public and private domain in which they are parties, as well as from relations with other natural or legal persons, according to the law ”.

Therefore considering the doctrinal guidelines and current legal regulations, we believe that the administrative-territorial units are *legal persons of public law*<sup>26</sup>, quality in which they are holders both of the public property rights on public domain assets of local interest as well as of the private property rights on the private domain assets of local interest.

#### 4. Conclusion

The holders of public property rights are, according to art. 136 (2) of the Constitution and art. 858 et seq. of the Civil Code, the state and the territorial administrative units. The state and the administrative-territorial units are legal persons of public law, quality in which they are holders both of the public property rights on public domain assets of national interest, respectively local, as well as of the private property rights on private domain assets of national interest, respectively local.

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<sup>24</sup> Published in the "Official Gazette of Romania", Part I, no. 238 of 28 November 1991; republished in the "Official Gazette of Romania", Part I, no. 79 of 18 April 1996, as amended and repealed by Law no. 215/2001 on local government.

<sup>25</sup> republished in the "Official Gazette of Romania", Part I, no. 123 of 20 February 2007, as amended.

<sup>26</sup> See D. C. Dănişor, I. Dogaru, Gh. Dănişor, *cited work*, p. 324.

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