

Gratuitous right of use, regulated by the new Civil Code

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Abstract

The gratuitous right of use is regulated by the new Civil Code as one of the rights corresponding to the public property. The paper aims to analyse this right in the context of the current legislation, in view of the beneficiaries, the content and the juridical characteristics, as well as the legal limits of the gratuitous right of use. There are identified the categories of legal persons who can exercise the gratuitous right of use and the conditions which should be fulfilled in order to exercise it. The rules of the new Civil Code are written in relation with special legislation in force, as well as from a historical perspective. Finally, there are analysed the aspects regarding the way in which this right should be exercised and protected. The right of gratuitous use, located at the intersection between civil law and administrative law, raises interesting practical problems, and also problems related to the interpretation of legal rules, which the present study is aiming to put into light.

Keywords: Right of use, public institutions, new Romanian Civil Cod, public property.

JEL Classification: K11

I Preliminaries

According to art. 136 para. (4) in the Constitution, all public property assets are inalienable. Under the terms of organic laws, they can be given to autonomous administrations or public institutions to be managed or they can be transferred or leased; also, they can be given to a public benefit institution with gratuitous right of use.

Art. 874 in the new Civil Code² materializes this text, by regulating one of the real rights listed under art. 551 din new Civil Code, namely the gratuitous right of use³. It is also an application of the general provision included in art. 861 para. (3) in the new Civil Code; according to this provision, the public property assets can be given to be managed or used, or they can be transferred or leased.

Thus, the gratuitous right of use regulated by art. 874 in the new Civil Code must be understood within the system of rights corresponding to the public

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² Concerning the regulation of public property in the new Civil Code, see Cătălin-Silviu Săraru, *Discuții referitoare la reglementarea proprietății publice în noul Cod civil*, „Dreptul” no. 11/2010, pp. 90-107.

³ The contract of award for gratuitous usage of public property has juridical nature of administrative contract – see Cătălin-Silviu Săraru, *Contractele administrative. Reglementare. Doctrină. Jurisprudență*, C.H. Beck Publishing House, Bucharest, 2009, pp. 350-353.

property. According to art. 866 in the new Civil Code, the following real rights can be constituted for the public property:

- a) The management right, whose beneficiaries are the autonomous administrations or, as the case may be, central administration authorities and other national, county or local public institutions;
- b) The concession right, whose titular can be any physical or legal person (of either public or private law) and
- c) The gratuitous right of use, whose beneficiaries are the public benefit institutions.

II. Beneficiaries of the gratuitous right of use

Regarding the beneficiaries, when it refers to the management right, the new Civil Code takes into account the „public institutions of national interest”; when it refers to the gratuitous right of use, it takes into account the „public benefit institutions”. In a very reasonable way, this difference caused the conclusion that the first case is about legal persons of public law and the second case takes into account only legal persons of private law⁴. When the law-makers referred to public institutions, it used the notion of „public institutions of national, county or local interest” (like in art. 868 para. 1).

Moreover, the range of beneficiaries of the gratuitous right of use appears as limited to the class of legal persons of private law, and the law-makers take into account exclusively the legal persons with non-lucrative purpose, namely the foundations and associations. These are the only legal persons designated with the concept of „public benefit”.

The law-makers of the new Civil Code take over the phrase used in art. 136 para. (4) in the Constitution: „public benefit institutions”, although they have in mind associations and foundations that is legal persons of private law. The term „legal person” instead of „institution” (generally, associated with the public law subjects) would correspond better to today’s purpose of the law-makers in regulating the gratuitous right of use⁵.

The concept of „public benefit” is used and defined in the Governmental Ordinance no. 26/2000 regarding associations and foundations⁶, as any activity performed in fields of public interest or in the interest of collectivises.

⁴ See, V. Stoica, *Drepturile reale*, CH Beck Publishing House, 2009, p. 196; F. Baias, *Proprietatea publică*, in „Noul Cod civil. Comentariu pe articole”, CH Beck Publishing House, coord. F. Baias, E. Chelaru, R. Constantinovici, I. Macovei, 2012, p. 903. Thus, it is stated that the right of use shall be constituted for public benefit institutions that can be only legal persons of private law, since the gratuitous right of management can be constituted for public institutions.

⁵ It has been suggested the express clarification according to which the titulars of the gratuitous right of use are the „legal persons of private law with non-lucrative purpose and of public benefit”, by taking into account the fact that the notion of „institution” is not accurate enough. See, Al. S. Ciobanu, *Aspecte specifice privind regimul domeniului public în România și Franța*, Univers Juridic Publishing House, 2012, p. 343.

⁶ Published in the Romanian Official Gazette, part I, no 39 of 31 January 2000, approved by the Law no 246/2005, published in the Romanian Official Gazette, part I, no 656 of 25 July 2005, with further

It is not therefore a quantitative interpretation; there is no number of beneficiaries beyond which the use becomes public. On the other hand, public benefit does not mean everyone's benefit, without exception. It rather means the vocation of all people or of a group of people that is of interest for society organized as a state to have an advantage from the activity performed by the respective organization.

To note that the right to be given assets of public property was previously regulated by art. 17 in the Law no 213/1998 regarding public property assets⁷, but only to the benefit of a larger group of associations and foundations, not only to the benefit of those recognized as being of public benefit. The text was abrogated by the Law no 71/2011 for the enforcement of the new Civil Code.

Also, art. 126 in the Law of the local administration no 215/2001⁸ stipulates: „local councils and county councils can give, with gratuitous right of use, and for a limited duration, movable assets and immovable assets that are either local or county public or private property, as the case may be, to legal persons without lucrative purpose that perform benevolent activities or public benefit activities or public services”⁹.

III. Recognition of the character of public benefit

The vocation to acquire the gratuitous right of use depends therefore on the recognition of the character of public benefit. This recognition is done by the Romanian Government, to the extent to which the association or the foundation fulfils certain requirements. These requirements have been recently made harsher by the Law no 145/2012, for the modification and completion of the Governmental Ordinance no 26/2000¹⁰, adopted after the entering into force of the new Civil Code. Currently, an association, a foundation or a federation can be recognized by the Romanian Government as being of public benefit if the following requirements are cumulatively fulfilled:

modifications. For an analysis of the provisions regarding the legal persons of public benefit, see also R. Dimitriu, „Privire de ansamblu asupra Legii nr. 246/2005 pentru aprobarea Ordonanței Guvernului nr. 26/2000 cu privire la asociații și fundații”, *Dreptul* no 12/2005, pp. 36-49.

⁷ Published in the Romanian Official Gazette, part I, no 448 of 24 November 1998. the initial title of the law, „Law regarding the public property and the juridical regime of the public property” was later on modified by the Law no 71/2011 for the enforcement of the Law no 287/2009 regarding the Civil Code, published in the Romanian Official Gazette, part I, no 409 of 10 June 2011. Regarding the unconstitutionality of Art. 17 of Law no. 213/1998 in relation to Art. 136 para. (4) of the revised Constitution see Cătălin-Silviu Săraru, cited work (*Discuții referitoare la reglementarea proprietății publice în noul Cod civil*), p. 106.

⁸ Published in the Romanian Official Gazette, part I, no 123 of 20 February 2007.

⁹ As mentioned before, „the final part of this text, that allows to give assets of public property with gratuitous right of use to legal persons that are not of public benefit can be considered as implicitly modified by the entering into force (later on) of the revised Constitution, that limit, in art. 136 para. (4), the range of the beneficiaries of this right to the group of public institutions”. See, F. Baias, *cited book.*, p. 904.

¹⁰ Published in the Romanian Official Gazette, part I, no 517, of 26 July 2012.

a) its activity is performed in the general interest or in the interest of a collectivises, as the case may be;

b) it has been operating for at least 3 years and it has achieved some of the proposed objectives¹¹, and it can prove continuous activity with significant actions;

c) it submits an activity report reflecting a significant previous activity in programs or projects that are specific for its purpose, accompanied by annual financial statements and budgets of revenue and expenditure for the last 3 years¹² before the submittal of the application for the recognition of the statute of public benefit;

d) it possesses a patrimony, logistics, members and employed staff¹³, to fulfil the established purpose;

e) it can prove the existence of cooperation agreements and partnerships with public institutions or associations or foundations, either Romanian or foreign;

f) it can prove significant results in the field of the proposed goal or it can prove recommendation letters from Romanian or foreign competent authorities that recommend the continuation of the activity.

The possibility to grant exemptions to organizations that do not fulfil these requirements was annulled.

The recognition of an association or foundation as being of public benefit is done through a Governmental decision. A federation can be also recognized by the Romanian Government as being of public benefit if at least 2 / 3 of the number of associations and foundations that make it up are recognized as being of public benefit. The legal person interested in this respect shall submit a demand to the General Secretariat of the Government and the General Secretariat of the Government shall submit it, within 15 days, to the competent special body of the central public administration¹⁴.

¹¹ It seems that the law-makers could not decide regarding the extent to which the activity already performed by the organisation could be taken into account. Initially, it was required that the organization had to have achieved „a part of the established objectives” (first version of the Governmental Ordinance no 26/2000), then „the majority of the established objectives” (Governmental Ordinance no 37/2003), then this criterion was completely removed, and it was required only „a significant previous activity” (Law no 246/2005), and currently, the requirement is again that the organization must prove „a part of the established objectives”.

¹² Moreover, the recognition of the public benefit is done, according to art. 42 in the Governmental Ordinance no 26/2000, for an unlimited duration.

¹³ We are reluctant regarding to the new requirement that the organization should have „hired staff”. The organizations that may request the statute of public benefit are non-profit, and they most often work with volunteers. We believe that volunteering should be stimulated and not discouraged, following the impossibility to fulfil the requirements requested by the law after acquiring the statute of public benefit.

¹⁴ The demand shall be accompanied, along with the proof of having fulfilled the requirements, by the following documents:

- a) copies of the articles of incorporation and of the statute of the association or of the foundation;
- b) copy of the proof of legal personality;
- c) proof regarding the solvency of the association or of the foundation, issued by the bank where the account is open;
- d) copy of the proof of the juridical state of the office of the association or of the foundation;

The Romanian Government decides upon this demand and it can *accept it or reject it*. This provision gives minimal requirements for the recognition of the public benefit, in the sense that they are compulsory to obtain recognition but they are not sufficient, since the Government can decide, however, that it does not recognize the association or the foundation as being of public benefit. In this context, one of the practical problems regarding the recognition of the statute of public benefit, which has as a consequence the gratuitous right of use of public property assets is: if the legal person fulfils the requirements for the recognition of the statute of public benefit, and administrative authorities reject its demand, will it be able to obtain this recognition in court?

Regarding this aspect, the administrative and fiscal contentious section of the High Court of Cassation and Justice¹⁵ decided:

„According to art. 38 in the Ordinance 26/2000, regarding associations and foundations, if an association or a foundation fulfils cumulatively several requirements expressly stipulated in the law, the organization can be granted the character of public benefit. The suppletive character of this norm makes the refusal of the Government to issue the decision to recognize the character of public benefit be not unjustified, even if the requesting association fulfilled all the legal requirements”.

The High Court of Cassation and Justice considered that, although the legal requirements are met, the Government can reject a draft law regarding the recognition of an association as being of public benefit, and it has the possibility to estimate the appropriateness of the adoption of such an act. Regarding the appropriateness to adopt this statute, The High Court of Cassation and Justice stated that there must be taken into account the requirements to fulfil in order to be considered and public benefit, defined as „any activity performed in fields of general public interests or in the interest of collectivises” and the consequences of

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- e) name and address of the physical persons, namely the name and the office of the legal persons with which the association of the foundation works on a regular basis to achieve its object of activity for which it requests the recognition of the statute of public benefit;
 - f) annual financial statements and budgets of revenue and expenditure for the last 3 years;
 - g) list of people employed and copies of their labour contracts;
 - h) copies of the collaboration conventions, qualifications, letters of recommendation and others similar

The requirement to submit the last 3 justifying documents was introduced by the Law no 145/2012.

¹⁵ Decision no 3683 of 3 October 2007. The plaintiff Association S requested against the defendant the Romanian Government - the General Secretariat that the sentence that would be pronounced by the court to decide to annul the decision of 26 April 2006 to reject its demand to be granted the statute of public benefit, requested according to art. 40 of the Governmental Decision no 26/2000, and the defendant had to issue another decision to grant this title.

The plaintiff justified its action in the sense that the decision issued by the defendant to reject its demand is not justified and unlawful as the documents submitted to support the request to be granted the statute of public benefit reflect that the requirements stipulated by art 38 para (1) in the Governmental Ordinance no 26/2000 are complied with, and the Ministry of Culture and Cults suggested the Government to recognize the association as being of public benefit, and despite this, the demand was rejected without an obvious reason.

the recognition of the public benefit that gives the association or the foundation certain rights and obligations and the Government shall be the most appropriate body to assess the admissibility of such a demand.

If the association or the foundation of public benefit enjoys certain rights, among which the most significant is the gratuitous right of use of public property assets, these legal persons shall correlatively have a set of obligations:

- The obligation to preserve the level of activity and the performance that determined the recognition;

- The obligation to send to the competent administrative authority all the modifications of the articles of incorporation and of the statute as well as the activity reports and the annual financial statements; the administrative authority shall have the obligation to allow any interested person to have access to these documents;

- The obligation to publish, in a summary, in the Romanian Official Gazette, Part IV, and in the National Registry of the legal persons without patrimonial purpose, within 3 months since the end of the calendar year, the activity reports and the annual financial statements¹⁶.

The governmental document that recognizes the statute of public benefit for an association or foundation is revocable. If the association or the foundation no longer fulfills one or more requirements that allowed the recognition of the public benefit, and in case of failure to fulfill the obligations undertaken as a result of the recognition of the statute of public benefit, the Government, upon the proposal of the competent administrative authority, can withdraw the recognition act.

The Governmental Ordinance no 26/2000 initially stipulated the possibility of any other association or foundation to inform the competent administrative authorities about such situation. Currently, there are no specific circumstances stipulated for persons who can submit such and informing notification; it is only stipulated that it can be done by „any interested physical and legal person”.

In case of withdrawal of the recognition of the public benefit for the respective legal persons, this shall be mentioned in the Special Registry of the associations and foundations. The litigations regarding the recognition of the public benefit for associations and foundations shall be solved according to the Law on administrative contentious no 554/2004.

We consider that, since the gratuitous right of use is recognized exclusively for institutions of public benefit, the withdrawal of the document recognizing the public benefit shall automatically entail the end of the gratuitous right of use.

¹⁶ According to art. 12 para. (1) in the Order of the minister of justice no 1417/2006 regarding the access to the National Registry of legal persons without patrimonial purpose, published in the Romanian Official Gazette, part I, no 578 of 4 July 2006, the un-certified copies of the records in the National Registry, of justifying written statements and activity reports and statements sent by the associations, foundations and federations recognized as being of public benefit shall be issued only after the requesting person pays the fee for the copying services, under the Law no 544/2001 regarding the free access to information of public interest.

IV. Contents and juridical characteristics of the gratuitous right of use

The gratuitous right of use regulated by art. 874 in the NEW CIVIL CODE has the following elements:

- Like the public property right whose juridical elements it takes over, the gratuitous right of use is inalienable, undistrainable and imprescriptible;
- It has a gratuitous character (unlike, for instance, the concession right which implies the obligation of the lessee to pay a royalty);
- It is constituted for a non-fixed duration. To note however that the public benefit is recognized to the titular for a non-fixed duration (according to art. 42 para. 1 in the Governmental Ordinance no 26/2000);
- It has an *intuitu personae* character, because it is constituted by considering the quality of „public benefit institution” for the titular¹⁷;
- It is constituted by decision of the Government, of the county council or, as the case may be, of the local council (like the management right). The body that ordered the gratuitous right of use to be constituted shall have the right to oversight the way in which the right of use is exercised. A distinction shall be made regarding the statute of public benefit: on the one hand, there is an oversight of the use of the statute of public benefit and a distinct oversight of the way to exercise, the gratuitous right of use by a legal person of public benefit;
- The end of the gratuitous right of use occurs in all cases where the management right ends (art. 874 para. (3) makes this point of view a mere reference to art. 869). The gratuitous right of use ends, therefore, when the right of public property ends, or through the annulment of the document issued, under the law, if the public interest imposes, by the body that constituted the gratuitous right of use. To add however that, in case of withdrawal of the statute of public benefit of the titular of the gratuitous right of use, it is compulsory that the gratuitous right of use should end. However, since the law does not stipulate this case among the cases where the gratuitous right of use may end, it derives that in such a case, there is a need of an annulment document issued by the body that constituted the gratuitous right of use. It is a distinct administrative document, different from the document that withdraws the statute of public benefit.

The gratuitous right of use gives the beneficiaries the right to possess, use and do what they may like with the asset, under the law and according to the document that constituted the gratuitous right of use¹⁸. The gratuitous right of use can have as object any assets, both movable and immovable¹⁹.

¹⁷ See, V. Stoica, *cited book.*, p. 197

¹⁸ *Idem*, p. 198.

¹⁹ Art. 17 (currently abrogated, as mentioned before) in the Law no 213/1998 regarding the public property assets initially referred only to immovable assets („the state and the administrative-territorial units can give buildings from their patrimony with gratuitous right of use, for a limited duration, to legal persons without lucrative purpose that perform benevolent activities or activities of public benefit, or to the public services”), and it is the Law no 215/2001 of the local public administration that extends this right over movable assets. Later on, it was lawfully consecrated

The gratuitous right of use, together with other rights corresponding to the right of public property, have been called „administrative rights” in the doctrine, and the *de lege ferenda* was suggested to eliminate their regulation in the Civil Code and the return to the regulation in the Law no 213/1998²⁰.

We consider that, despite its specificity and despite the fact that it is constituted through an administrative act, the gratuitous right of use, as a real right corresponding to the right of public property, seems to have found its accurate regulation in the Civil Code.

V. Limits of the gratuitous right of use

The titular of the gratuitous right of use cannot exercise the disposal right because this prerogative of the property right was missing in the public property law it arose from (the new Civil Code calls these real rights listed under art. 866 „rights corresponding to the public property”).

The use of the asset has a specific limit: according to art. 874 para. (2) in the new Civil Code, unless otherwise stipulated in the constitutive document, the titular shall not enjoy the right to the civil aspects of the asset. As mentioned before, *per a contrario*, the titular shall enjoy the industrial or natural aspects²¹, even without an express stipulation in this respect in the constitutive document.

Art. 874 mostly refers to the provisions regulating the management right; except for the beneficiaries who are different, for the two types of real rights, the defining elements are similar. The gratuitous use was actually called atypical management²².

VI. Protection of the gratuitous right of use

Art. 875 stipulates that the protection, in court, of the gratuitous right of use lies with the titular of the right, namely the legal person of interest.

The provisions regarding the confessory action on real estate occupancy included in art. 696 para. (1) in the new Civil Code are correspondingly applicable. The confessory action on a real estate occupancy has been defined as the action by which the plaintiff, titular of a real estate right who has lost the material possession of his right, brings to court the defendant and requests the court to recognize his right and to force the defendant to allow full and unencumbered exercise and to return the material possession that is specific for his real estate right²³.

the expansion of the range of assets that can be the object of this right (in art. 136 para. (4) in the revised Constitution).

²⁰ Al. S. Ciobanu, *cited book*, p. 332.

²¹ See, F. Baias, *cited book*, p. 904.

²² Al. S. Ciobanu, *Dreptul de folosință gratuită a bunurilor proprietate publică*, Annals of the Bucharest University – Law IV/2007, p. 28.

²³ See L. Pop, L.M. Harosa, *Drept civil. Drepturile reale principale*, CH Beck Publishing House, Bucharest, 2009, p. 309.

As a result of such an action, the legal person of public benefit that is a titular of the gratuitous right of use will be able to defend itself against any person that prevents the exercise of this right, including against the owner of the public assets given with gratuitous right of use.

As mentioned before, the plaintiff, which claims the capacity of titular of the gratuitous right of use, shall be able to prove its right only through the constitutive administrative act²⁴, issued under the art. 874 in the new Civil Code.

The right to the confessorial action on a real estate occupancy is imprescriptible, like the right it defends.

Conclusions

The gratuitous right of use regulated by art. 874 in the new Civil Code must be understood within the system of rights corresponding to the public property. According to the legal text, the gratuitous right of use is granted upon the public propriety assets, for a limited duration, to public benefit institutions.

The law-makers of the new Civil Code take over the phrase used in art. 136 para. (4) in the Constitution: „public benefit institutions”, a concept also used and defined by the Governmental Ordinance no 26/2000 regarding the associations and foundations.

Since the gratuitous right of use is recognized exclusively for institutions of public benefit, the withdrawal of the document recognizing the public benefit shall automatically entail the end of the gratuitous right of use.

The body that ordered the gratuitous right of use to be constituted shall have the right to oversight the way in which the right of use is exercised. Therefore, on the one hand, there is an oversight of the use of the statute of public benefit and on the other hand a distinct oversight of the way to exercise, the gratuitous right of use by a legal person of public benefit

The gratuitous right of use ends when the right of public property ends, or through the annulment of the document issued, under the law, if the public interest imposes, by the body that constituted the gratuitous right of use. In case of withdrawal of the statute of public benefit of the titular of the gratuitous right of use, it is compulsory that the gratuitous right of use should end. However, since the law does not stipulate this case among the cases where the gratuitous right of use may end, it derives that in such a case, there is a need of an annulment document issued by the body that constituted the gratuitous right of use. It is a distinct administrative document, different from the document that withdraws the statute of public benefit.

The right of gratuitous use, located at the intersection between civil law and administrative law, has been „claimed” by both categories of authors, some of them even suggesting eliminating this right from the Civil Code and regulating it by administrative legislation. We consider however that, despite its specificity and

²⁴ See V. Stoica, *op. cit.*, p. 493.

despite the fact that it is constituted through an administrative act, the gratuitous right of use, as a real right corresponding to the right of public property, seems to have found its accurate regulation in the Civil Code.

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