

Article

Public Property and Concessions in The Common Law System and Common Law Countries

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Abstract: Concessions and public property are important elements of legal system for managing public infrastructure, improving efficiency and services, attracting private investment, reducing public spending and risks, generating public revenue, maintaining public control and strategic control. No comprehensive study exists on the public property and concessions in the common law system and in common law countries. Current study explores the notions of "public property", but also that of "concession", from the perspective of the United Kingdom, the United States of America, and New Zealand, by examining the two previously mentioned notions in a separate manner, in the case of each of the mentioned states, with the aim of creating and providing accessible explanations for the regulations on public property and on concession. The study also highlights Romanian legislation for the same.

Keywords: act; agency; concessionaire; common law system; public property; common law countries

1. Introduction

Public property is defined as "land, buildings, etc. that are owned by the government and can be used by everyone"¹. Concessions is defined as a "right or an advantage that is given to a group of people, an organization, etc., especially by a government or an employer"².

Common Law system and accordingly common law countries have a rather different view on the concept of property owned by either the state itself or one of its agencies, unlike the Civil Law system, which has a more exact take on these subjects. The study explores some of the regulations regarding public property and concessions in some of the Common Law countries, e.g., United Kingdom of Great Britain and Northern Ireland, United States of America and New Zealand (Georgeta 2015).

2. Public property in UK

In the United Kingdom, public property is regulated through different acts adopted by Parliament, law principles and public policies. One of the key acts is the "Law of Property Act 1925"³ along with the nationalization and privatization acts, Common Law principles, the specific provisions incidental to the Governmental Departments, local regulations and the "National Planning Policy Framework"⁴. Worth mentioning is the fact that "Public property" bears different names, those being "Crown land", "Public land", "Local authority land" or "Common land", depending on what agency administers the public property land in question.

Although "Law of Property Act 1925" has most of its provisions regulating private property, it also contains the terms "freehold" and "leasehold", which represent types of legally recognized land interests and also have appliances into public property law. Along with these two notions, the act that was expressly mentioned before also offers legal grounds regarding modern English land law. Furthermore, local regulations are harmonized with that at the central level, to the extent that local authorities manage and own properties, and are granted powers in this regard through various acts issued by Parliament.

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¹ Oxford Learner's Dictionary, <https://www.oxfordlearnersdictionaries.com/definition/english/public-property>

² Oxford Learner's Dictionary, <https://www.oxfordlearnersdictionaries.com/definition/english/concession>

³ United Kingdom Parliament, Law of Property Act 1925

⁴ <https://www.gov.uk/government/publications/national-planning-policy-framework--2>

In addition, the nationalization and privatization acts are those normative acts through which the State gains or cedes property, or the so-called “Statute Laws”, which are issued by Parliament for specific public sectors, including railway or healthcare sectors. Moreover, Common Law principles grant the notions “Ownership” and “Rights of access”, which govern some of the grounds referring to public property law. In addition, government departments, such as the Ministry of Defense, the Ministry of Health, administer certain elements of public property under their own regulatory acts, or under the general authority of the government.

Last, but not least, National Planning Policy Framework has the task of planning and of establishing governmental policies in England, therefore influencing the use of public lands, so they could be appropriately developed.

3. Concessions in the UK

Currently, in the United Kingdom, “Procurement Act 2023”⁵ regulates legal relations specific to the concession. This act implements through its contents, significant upgrades regarding any concession law provisions, that have their origins from EU-issued acts. “Procurement Act 2023”, therefore, replaced “Concessions Contracts Regulations 2016”, and also implemented new concepts, such as “assessment summary”, “standstill period”, and “contract award notice”.

First of all, the concept of “assessment summary” is a report that has to be issued by the grantor for each and every concessionaire, but only after each contract has been signed. The assessment summary has a secret character. Under the provisions of the “Procurement Act 2023”, the grantor has to provide, in its summary, feedback about both the offer made by grantor, and about the concessionaire. Secondly, the new act states that there is a new concept, called “standstill period”, which essentially is a deadline that begins to run right after the grantor has publicly announced the contract, and this deadline has a timespan of 8 working days.

The Procurement Act 2023 also brings changes to the issue of the de jure suspension of concession contracts. Under the old regulation, it was sufficient for a claim to be issued and the contracting authority to be notified before it concludes a contract in order for the de jure suspension of the contract to be invoked. However, under the new regulation, under Section 101(1), the claim must be issued and the contracting authority must be notified during the standstill period in order for the de jure suspension to be invoked. If the claim is issued after the standstill period has ended, the plaintiff will no longer be able to invoke the de jure suspension. However, the public authority, as a defendant, can request in court the lifting of the de jure suspension, on various grounds, such as public interest.

4. Public Property in the USA

Public property in the U.S is regulated, by legal norms that are applicable at the federal level, such as the “Federal Land Policy and Management Act of 1976 (FLPMA)”⁶, by Title 40 of the “United States Code”, as well as by specific laws for certain types of land, such as the “National Forest Management Act”⁷. However, state or local regulations are not excluded, which are composed of State Constitutions, and local Statutes, as well as Administrative Codes and Local Ordinances. It is worth mentioning that in the U.S., the notion of “public property” is qualified as “public lands” or “federal lands”.

At the federal level, Section 102 of the “Federal Land Policy and Management Act of 1976”, states that the policy for the conservation of lands that are the object of public property of the United States of America is determined by declaration of Congress, with the exception of the situation in which, following the identification of a national interest, certain lands will be ceded as a result of the land use planning procedure regulated by this normative act.

The United States Code provides, in Section 623 of Title 40, regulations on the existence, organization, and operation of the Federal Real Property Council. This Council's role is to provide guidance and ensure the implementation of effective strategies for the management of public real property. Furthermore, the Council's role is to identify opportunities favorable to the Federal Government, through which public property can be administered and managed in the most productive manner, and last but not least, the Council's role is to reduce the costs of property administration, including those of management, maintenance, and security.

At the local scale, the State, through its governor, delegates to counties and cities the authority to make use of public property lands, through the issuance of local Ordinances, especially regarding both land use and development questions.

5. Concessions in the USA

In the American legal system, the concession is included and regulated in a plurality of normative acts, some mentioned in Chapter IV of this report, such as the “Federal Land Policy and Management Act of 1976 (FLPMA)” incidental to public property lands managed by the Bureau of Land Management, but also in other normative acts, such as the “National Park Service Concessions Management Improvement Act of 1998”⁸ in the instance of public property lands managed by the National Park Service. These two normative acts are applicable at the federal scale, and in a secondary plan, the concession is regulated by the Title 36, Part 51 of the “Code of Federal Regulations”⁹, which is circumscribed in the area of competence of the agencies, and which regulates the bidding procedures and the award of concession contracts in national parks.

For example, the National Park Service Concessions Management Improvement Act of 1998, located in the United States Code, Title 54, provides that in the matter of granting concession contracts, the Secretary of the Interior is required to initiate a request that has to obey a publicity procedure by which to make known, by any available means, the possibility of signing certain

⁵ <https://www.legislation.gov.uk/ukpga/2023/54/contents>

⁶ <https://www.ebsco.com/research-starters/science/federal-land-policy-and-management-act-flpma>

⁷ <https://www.fs.usda.gov/sites/default/files/national-forest-management-act-nfma1976.pdf>

⁸ <https://www.nps.gov/subjects/concessions/law-regulation-policy.htm>

⁹ <https://www.govinfo.gov/app/collection/CFR>

concession contracts, respectively, to conduct a competitive selection process, thus including a simplified procedure for small companies. Of course, the request must meet certain advertising requirements, including the fact that it must appear at least once in a national, local or trade publication, either electronically or in a newspaper, and the fact that the request must include in its content, both the minimum requirements necessary to be achieved by the concessionaire, and the facilities and services offered by the Secretary to the concessionaire, including taxes and other forms of compensation due.

As for agencies, the Code of Federal Regulations, Title 36, Part 51, regulates the award procedure, which begins with the agency director issuing a prospectus inviting concessionaires to bid. The prospectus, among other elements, must contain mentions of the minimum funds required by the concessionaire to invest to fulfill its obligation arising from the contract, the terms and conditions of the eventual contract, as well as fees or compensations owed to the concessionaire by the agency director.

6. Public Property in the New Zealand

New Zealand includes in its legal system a multitude of normative acts regarding public property, intended to regulate different categories of public property, depending on their destination. Also, the notion of "public property" is called "Crown land", similar to that found in the legislation of the United Kingdom of Great Britain.

The "Land Act 1948"¹⁰, which represents the main legal framework in the matter of both public property and expropriation, stipulates that the term "Crown land" means any land vested in the Sovereign (currently, the King of the U.K.) which is not reserved for any public purpose or which is held by any person under a vectigal regime (royalty, in the sense of Roman law).

Relevant for regulating the land ownership registration system is the "Land Transfer Act 2017"¹¹ the purpose of which is to ensure the transfer of land that constitutes public property between state authorities, in order to preserve the property titles over these lands, through an electronic register, in which other legal relationships between authorities are concluded, regarding public property lands.

We cannot exclude from the issue of public property owned by the New Zealand state the claims made by members of Māori tribes, under the "Treaty of Waitangi Act 1975"¹², which states the existence and operation of Waitangi tribunals, whose judges rule on cases regarding claims to public property lands, and implicitly order the reparation of damages caused by the Crown in violation of the Treaty of Waitangi of 1840.

7. Concessions in New Zealand

In New Zealand law, concession, unlike the legal systems of the United Kingdom and the United States of America, can have two meanings: concessions for the use of public land and public-private partnership concessions. Regarding the first meaning, we can consider the normative act "Conservation Act 1987"¹³, which contains provisions on the subject of concession, and which provides that the Minister is the one authorized to grant a concession contract, in the form of a lease, license, permit or easement in relation to any activity. Obligations are also provided for the concessionaire, in the sense that he must apply for a concession, which must contain information regarding the place, date, type of concession, reasons for the concession, etc.

According to the second of the two meanings mentioned above, namely that of the public-private partnership concession, those public-private partnerships are managed by New Zealand through The Treasury and the National Infrastructure Agency, based on a plurality of legal norms, such as the principles of common law, sector-specific laws, such as the "Local Government Act 2002",¹⁴ and the PPP (Public-Private Partnership) policy framework¹⁵, developed by the Treasury. The rationale behind this legal concept is that the Government benefits from entering into a legal relationship with a private entity, with the aim of financing, constructing and managing certain projects over a significant period of time, usually more than 30 years.

8. Concessions in Romania

Law no.18 of 1991, the Land Fund Law, provided in art. 18 paragraph (3) that "*Unassigned lands, remaining at the disposal of the commission, pass into the private domain of the commune, city or municipality, and will be made available to those who wish to establish or develop agricultural holdings, by lease, concession or sale, under the terms of the law*". Therefore, until the amendment of these provisions, by Law no.67 of March 31, 2010¹⁶ for the amendment of paragraph (3) of art.18 of the Land Fund Law no. 18/1991 in the form "*Unassigned lands, remaining at the disposal of the commission, or from the private domain of the state, from the same locality or from other localities, may be returned, upon request, under the terms of the law, to the former owners or their heirs who were registered in the annexes regarding compensation to the regulations for the application of the land fund laws*", it was possible to concession private property lands under the following conditions:

- the lands, which were part of the public domain, should not have been assigned and therefore be at the disposal of the commission,
- as a result of this situation, the lands passed into the private domain of the commune, city or municipality,
- the purpose of the concession was the establishment or development of an agricultural holding.

¹⁰ <https://www.legislation.govt.nz/act/public/1948/0064/latest/whole.html>

¹¹ <https://www.legislation.govt.nz/act/public/2017/0030/latest/whole.html>

¹² <https://www.legislation.govt.nz/act/public/1975/0114/latest/whole.html>

¹³ <https://www.legislation.govt.nz/act/public/1987/0065/latest/dlm103610.html>

¹⁴ <https://www.legislation.govt.nz/act/public/2002/0084/latest/DLM170873.html>

¹⁵ <https://www.treasury.govt.nz/information-and-services/public-sector-leadership/partnerships/public-private-partnerships>

¹⁶ <http://legislatie.just.ro/Public/DetaliuDocument/117659>

However, the modified form of Law no. 67 of 2010 was repealed by Law no. 165 of May 16, 2013 on measures to complete the process of restitution, in kind or equivalent, of real estate abusively taken over during the communist regime in Romania¹⁷.

Law 50 of 1991 on the authorization of construction works¹⁸, in Chapter II Concession of land for construction, allows the concession of assets in the private domain of the state, because in art. 13 paragraph (1) it is stated: Land belonging to the private domain of the state or of administrative-territorial units, intended for construction, may be sold, concessioned or leased by public auction, according to the law, under the conditions of compliance with the provisions of the urban planning and territorial development documentation, approved according to the law, in order to carry out the construction by the owner.⁸ Therefore, it is possible to concession land privately owned by the state under the following conditions:

1. land privately owned by the state or administrative-territorial units must be designated as land for construction. In the case of land concessions for the construction of homes and associated built spaces, some surface limits are also established according to the provisions of local urban planning regulations, as follows⁹:

a. in urban localities: up to 450 sq m for an apartment in a building with a ground floor or ground floor and a first floor; up to 300 sq m for an apartment in a building with a ground floor and a first floor, with two apartments; up to 250 sq m for an apartment, in the case of buildings with a ground floor and more floors, with a maximum of 6 apartments; for buildings with more than 6 apartments, the land surface will be established according to the urban planning documentation;

b. in rural localities, up to 1,000 sq m for a home.

c. for the construction of a holiday home, a land surface of up to 250 sq m can be concessioned.

2. the construction of constructions must be included in the urban planning and land development documentation.

3. urban planning and land use planning documentation must have been approved in accordance with the law.

Paragraph 3 of Article 13 of Law 50 of 1991 states the following: the concession is made on the basis of offers submitted by the applicants, in compliance with the legal provisions, aiming at the superior exploitation of the land potential. By way of exception, land intended for construction may be concessioned without a public auction, with payment of the royalty fee established in accordance with the law, if the concession is for¹⁰:

a) the achievement of public utility or charitable objectives, of a social nature, non-profit-making, other than those carried out by local authorities on their land;

b) the construction of housing by the National Housing Agency, in accordance with the law;

c) the construction of housing for young people up to the age of 35;

d) relocation of households affected by disasters, according to the law;

e) extension of buildings on adjacent land, at the request of the owner or with his consent;

f) works to protect or enhance historical monuments defined according to the law, with the approval of the Ministry of Culture and Religious Affairs, based on urban planning documentation approved according to the law.

The exception to the concession is “free construction land under the administration of local councils that is the subject of requests for the reconstitution of the property rights of former owners formulated within the term provided for by Law no. 10/2001 on the legal regime of certain buildings taken over abusively between 6 March 1945 and 22 December 1989, republished, with subsequent amendments and additions.”

An opinion on the current legal regime of the concession right over land intended for the construction of a dwelling, shows that an administrative-territorial unit cannot currently constitute a concession right over land in its private domain. This opinion is based on the fact that “the framework regulation of concessions was represented by Law no. 219/1998 on the concession regime; this normative act had as its object “the regulation and organization of the concession regime both for a) public or private property of the state, county, city or commune; and for b) public activities and services of national or local interest”. Currently being repealed, “the regulation maintained the initial integrative vision, also promoted by Law no. 50/1991, in the sense that assets belonging to the state or UAT could be concessioned regardless of the domain in which they were included: not only in the public domain, but also in the private domain”. The repeal of Law no. 219/1998 on the concession regime by O.U.G. no. 34/2006 on the award of public procurement contracts, public works concession contracts and service concession contracts, created a legislative vacuum regarding the concession of private property. Therefore, in the above-mentioned opinion, “Interpreting *per a contrario* the legislation in the field, it is found that, for the purpose of building houses, since the repeal of Law no. 219/1998 (i.e. from 30.06.2006), land belonging to the private domain could no longer be concessioned (as provided for in Law no. 50/1991), but only land from the public domain”.

It is also stated that “jurisprudence has uniformly rejected the interpretation according to which the substantive jurisdiction regulated by art.66 of OUG. no. 54/2006, with subsequent amendments and completions, regarding the resolution of disputes arising in connection with the award, conclusion, execution, amendment and termination of the concession contract, should also extend to concession contracts for privately owned goods concluded on the basis of Law no. 50/1991. The lack of an adequate legal framework for regulating the procedure for organizing the tender for the award of such a contract cannot be compensated for by special provisions, the express object of regulation of which is the concession of publicly owned goods.

9. Conclusions

This study analyzes the two notions, namely that of “public property” and that of “concession”, as they are found in the legal systems of the United Kingdom of Great Britain, the United States of America and New Zealand. Unlike the regulations on public property and concessions in the Romanian legal system, those in the states mentioned in this article have a much larger scope of applicability, are much more extensive in terms of the number of situations they regulate, and generally offer much more guarantees

¹⁷ <http://legislatie.just.ro/Public/DetaliiDocumentAfis/147937>

¹⁸ <http://legislatie.just.ro/Public/DetaliiDocument/1515>

of procedural transparency to both the grantor and the concessionaire. The fact that a state has a sufficiently developed legal framework can demonstrate how interested it is in investing in the development of its public domain, not only by transferring certain assets that may be subject to public property rights to private legal entities, but also by regulating certain situations in order to provide and obtain the most effective guarantees in the event of non-fulfillment of the obligations assumed under the concession contract. Equally notable is the fact that the UK, USA, and New Zealand have certain specific features regarding regulations on public property, determined in particular by the form of government that each state has, especially when we present both the normative acts in force and the principles of Common Law, when we talk about the United Kingdom of Great Britain, when we analyze the delegation of powers at federal, state or municipal level, when we present the legislative framework of the United States of America, or when we consider the distinct normative provisions applicable to compensation for members of Māori tribes, when we refer to New Zealand.

Regarding the private domain goods concession, the Romanian current regulations are not corroborated so that we have a clear regime for the concession of goods in the private domain of the state. This is because the concession is in the vast majority of cases associated with the public domain and goods in public ownership of the state. In this regard, the most important regulations, previously mentioned, are:

- art. 136 paragraph (4) of the Romanian Constitution, which from the "perspective of a restrictive interpretation of the constitutional provisions, we consider that the only conclusion that could be drawn would be that private property goods cannot be concessioned". However, Emergency Ordinance no. 57 of July 3, 2019 on the Administrative Code speaks of concession as a way of administering both the public and private domain of administrative-territorial units¹⁹. The concession of public property goods is detailed between art. 302 and 331 and Article 363 states that "(1) The private property of the state or of administrative-territorial units may be given under administration, concession or leased (3) The provisions regarding the giving under administration, concession, lease and free use of the property belonging to the public domain of the state or of administrative-territorial units shall be applied accordingly." Therefore, it is necessary to achieve a better corroboration of the normative acts or even to amend them.

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¹⁹ <http://legislatie.just.ro/Public/DetaliiDocumentAfis/215925>.