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A NEW APPROACH TO "THE HOMESTEAD EXEMPTION ACT"- AN ENCOURAGEMENT TO RE-ESTABLISH THE "CASAL DE FAMÍLIA" IN PORTUGUESE LAW

UMA NOVA ABORDAGEM SOBRE "THE HOMESTEAD EXEMPTION ACT" - UM INCENTIVO AO RESTABELECIMENTO DO "CASAL DE FAMÍLIA" NA LEGISLAÇÃO PORTUGUESA

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ABSTRACT: Housing is a fundamental right enshrined in the Constitution. As a structural element of family organisation, the family residence becomes a necessary instrument for achieving the minimum values of human dignity in its family dimension. The Portuguese legal system that constitutionally enshrines the inviolability of the human person's dignity, the protection of the family and the right to housing, attributes a vulnerability to the family residence, allowing it to be seized, with very few exceptions. The "casal de família" institute, which finds its place in the North American Homestead, can recommend a feasible and possible solution to protect the family residence. Under Portuguese law, this institute was in force between 1920 and 1977, assuming the terminology of "casal de família". We will analyse the legal regime of Homestead and the modus operandi of the "casal de família" in Portugal. We wonder whether the Portuguese legal system should again consider the existence of "family property" or "family couple". We believe that such a concept would encourage the family, strengthen its values, strengthen its ties, and solve a pressing social problem, not resolved by the Portuguese law n ° 13/2016, of May 23.

Keywords: Portuguese Law. Homestead. Housing rights. Family Law. Casal de Família.

RESUMO: O direito à moradia é um direito fundamental consagrado nas Constituições. A residência familiar, como elemento estruturante da organização familiar, torna-se um instrumento fundamental para a concretização dos valores mínimos da dignidade humana, na sua dimensão familiar. O ordenamento jurídico português, que consagra constitucionalmente a inviolabilidade da dignidade da

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pessoa humana, a protecção da família e o direito à habitação, atribui uma vulnerabilidade à residência familiar, que permite a sua penhora, salvo raríssimas excepções. O instituto do "casal de família", que encontra a sua base no *homestead* norte-americano, pode tornar-se uma solução viável e possível para a proteção da residência familiar. De acordo com a legislação portuguesa, este instituto vigorou entre 1920 e 1977, assumindo a nomenclatura de "casal de família". Analisaremos o regime jurídico e o modus operandi da "casal de família" em Portugal. Acresce que questionamos se o ordenamento jurídico português deve voltar a considerar a existência de "bens de família" ou " casal de família". Acreditamos que tal conceito iria encorajar a família, a reforçar os seus valores, a estreitar os seus laços e a resolver um problema social premente, não resolvido pela Lei portuguesa n.º 13/2016, de 23 de maio.

Palavras-chave: Direito português. Homestead. Direito à moradia. Direito da família. Casal de Família.

INTRODUCTION

Marital home means the dwelling and real property occupied by a person and that persons' spouse as their family residence and in which either or both of them have a property interest. Through the European juridical tradition, this institution has been the representation of family protection.

The community property system is an institution peculiar to civil law. It is now almost believed that the community property systems' origin is in old Germanic customs and folk laws. However, it was the Roman-Christian tradition inspired by the Visigoth's codes, which produced the French model of "majorat", the Italian institute of "morgatto", the Spanish concept of "mayorazgo" and the Portuguese "morgadio" (BURGE, 1838, pp. 218-230).

The "morgadio" was a term for an arrangement giving the right of succession to a specific parcel of property associated with a title of nobility to a single heir, based on male primogeniture. A "morgadio" would be inherited by the oldest son or the nearest relative if there was no son. This law existed in some European countries and was designed to prevent wealthy estates' distribution between many family members, thus weakening their position. One of the requirements to inherit a "morgado" was to pass down the family name related to the "morgado". Women with no brothers could inherit a "morgado": their children would inherit the

mother's name in that case. If the husband were also a "morgado", the children would inherit both names. This led to a tradition of very long family names in the Portuguese nobility (LOBÃO, 1841, pp. 7-33).

The Mayorazgos and the Morgadios accompanied the overseas expansion of Portugal and Spain, especially in the New World. In fact, several ones were established including the morgadio of Casa da Ponte, in Bahia, the morgadio of “casa da Torre”, in Minas Gerais and the morgadio of Cabo de Santo Agostinho, in Pernambuco, all in Brazil, and the mayorazgo de la rioja, in Argentina and the mayorazgo Guadalajara, Mexico.

According to historian Luis Weckman, this mayorazgo of Guadalajara, set in 1619 by Diego Porres Baranda which lasted for four generations included properties in Texas and by the same author, the mayorazgo of San Miguel de Aguayo Marquis contained properties in Texas (WECKMAN, 1992, pp. 371-377).

As we know, Texas was initially Spanish territory and then part of Mexico, before becoming an independent Republic in 1836. This seems to clearly show that the mayorazgo regime has been the Homestead exemption act's genesis, which would emerge three years later.

It was the assumption that one gains ownership of an unowned natural resource by performing an act of natural appropriation, which became intangible, that turns out to be the basis of the American law's homestead exemption. The Homestead exemption act is the historical symbol of protecting marital homes, preventing its execution from satisfying creditors.

This act originated in Texas, in the nineteenth century, joins John Lock's homestead principle with the Spanish and Portuguese laws ("Leys de Toro" Act and “Ordenações Filipinas”) which established the “mayorgazo” and the “morgadios” in the New World.

Although its roots can be based on the ancient Iberian morgadios and mayorazgos (CORDEIRO, 1933, p. 22). It is common to find in the doctrine that this concept of family property protection was born in the Republic of Texas in 1839 with the homestead exemption act (BUREAU, 1895, p. 45). Rufus Waples (1906, p. 74)

defines it as the family residence, owned, occupied, dedicated, limited and in various ways, inalienable, as requirements established by law.

The law of the Homestead protected the real estate from being seized. This concept was adopted by a diverse set of countries, "Homestead exemption" in Canada ("bien de famille" in the state of Quebec), "bem de família" in Brazil (since 1916), "auberge de famille" in Switzerland, "bien de famille" in the French Republic (between 1909 and 2013), "casal de família" in Portugal (from 1920 to 1977) and "patrimonialefondo" in Italy (since 1942). Also, the English, Scottish and Irish legal systems have a similar solution. The same is true concerning Argentina Mexico and Chile (MARTÍNEZ, 1994).

Strangely, the Portuguese legal system that constitutionally enshrines the inviolability of human dignity, the protection of the family and the right to housing, do not effectively safeguard the marital home, allowing it to be pawned.

In Portugal, the property's social function has seldom been peaceful and never managed to lose a political porosity that comes either from the Portuguese civil war (1828-1834) or from the land characteristics, small properties in the north and centre, and large estates in the south. One of the issues that opposed the Liberals to the absolutists in that civil war was precisely the maintenance of the morgadios; on the other hand, the extinction of the old "vínculos" that liberal legislation enshrined was a hotly debated subject in Portuguese society then. The stand-by Alexandre Herculano (1866, p. 86) and Xavier Cordeiro (1933, p. 33) for the "morgadios" became famous.

Moreover, even Casal de Família existed between 1920 and 1977, it was preceded by discussions that went on for long, reducing its implementation (CORDEIRO, 1933, p. 9).

However, due to Portugal's crisis, one question must be urgently asked: Should Portugal and the Portuguese citizens implement the marital home's protection, re-establish the "Casal de Família" in Portuguese Law?

To that question, we seek the answer. Nevertheless, and as we will demonstrate, the answer will be affirmative because the family function of property

is essential to ensure the survival and economic stability of Portuguese families by preserving the family heritage (CAMPOS, 2016) and maintaining the family members' human dignity.

Thus, it is an opportunity to bring the theme of human dignity to the discussion. We will demonstrate that the right to housing, especially the "casal de família" is not a purely academic concept. Our understanding that such a legal design would be a stimulus to the family, strengthening its values, the resurgence of their ties, and solving a pressing social problem.

The argument that this type of solution only affects the upper classes will be analysed. We will demonstrate that argument is fallacious because family corporations already solved the maintenance and transmission of the most privileged clans' family heritage.

1 THE FAMILY AND THEIR RIGHT TO HOUSING

Indeed, man's dignity presupposes an original knowledge, before the law, which necessarily has a community and family dimension, to safeguard our well-being, to affirm our survival and to safeguard our heritage and off-spring.

The family is the core of social and natural order. According to Jean-Jacques Rousseau (2003, p. 14) "The oldest of all societies and the natural one is the family". As a sociological and biological entity, pre-existent to the law and beyond the law, the family is the oldest creation. The best way that man found to protect himself as a species and multiply. Other individualistic forms of a social organisation only fulfil its function punctually (ATTALI, 1999, p. 157). The "Eudomonia" of Aristotle, the protection that accompanies man throughout his life and creates harmony and balance between man and cosmos, is fulfilled in the family.

The family is constitutionally protected in Portugal. With this constitutional protection, the family becomes, as we learn from Pereira Coelho and Guilherme de Oliveira (2003, p. 153), "the subject of an institutional guarantee." It is also protected by the European Convention on Human Rights (Article 8), the Universal Declaration of Human Rights (Article 12) and the Charter of Fundamental Rights of

the European Union (Article 7). The European Convention on Human Rights, for example, provides in Article 8 "1. Everyone has the right to respect for his private and family life, his home and his correspondence." There is a link here between the family and the home. Still, the notion of "home" is an autonomous concept (CHIRAGOV and others v. Armenia (2015) § 206 (Application n.º 13216/05), 16/06/2014) that depends on factual circumstances, namely the existence of enough and continuous links with a specific location (AFFAIRE Winterstein et autres c. France (2013) § 141, (Requête nº 27013/07), 17/10/2013).

This protection of the family emerges from a double standard, the defence of society's scope and safety (SOARES, CAMPOS, 1990, p. 5). Simultaneously, the right to housing is essential to living with the minimum of health and well-being and is inseparable from human societies.

In this regard writes the eminent Portuguese jurist, the eighteenth and nineteenth centuries, Sousa de Lobão (1817, p. 1), assuring the role of housing trough history, since even the universal flood.

Housing is intrinsic to the human *modus vivendi* and is necessary for our innate aspiration of well-being. According to Schopenhauer (2001, p. 120), "The main and fundamental motivation, both in man and animal, is selfishness, that is, the impetus for the existence and well-being."

Thus, and even though the law does not define a marital home. We can understand it as the reference that unifies family into a physical space of stability, harmony, and fulfilment of humankind.

To Guilherme de Oliveira, the marital home is the "headquarters," the "place where the family fulfils its functions in respect of spouses and children, and which takes its commitments to third parties";

In turn, Capelo de Sousa defines it "the habitual residence of the main household, determinable case by case, that its stability and solidity is the headquarters and main centre of most of the interests, aspirations and family traditions in question";

Leonor Beleza identifies it as "the place normally inhabited by minor children and spouses";

Yves Chartier defines it as "the centre of family life where spouses are obliged to community life. Principal place of residence must meet, on the other hand, a double standard that is real and stable";

Lacruz Berdejo sees the family residence house as "a teleological unity in which part of the habitual residence and objects necessary for life in common included in it" (CID, 1996, pp. 22-33).

Just as Sartre wrote, the *pour-soi* is not more than the pure use of *en-soi*, the marital home is no more than a pure expression of the family, without which would lose its structure and start drifting at the theodicy.

According to Pinto Furtado (1992, p. 533) "It seems an unquestionable duty to recognise housing as shelter, and to reserve family, privacy is fundamental to the development of the human being, an existence without a roof is not acceptable."

For Yves Guyon (1966, p. 23), "the protection of family housing is not an end in itself, but a means to ensure family stability and a means of protection of the family."

As a means of family protection, the marital home can only fulfil its function if it is protected from third parties.

The present status quo of marital homes in Portugal could be considered unconstitutional because our entire text protects the dignity of the individual, the family, their right to housing and because various international law rules also protect these fundamental rights.

According to Kant, things have a price and people have dignity: "everything has either a price or a dignity. Whatever has a price can be replaced by something else as its equivalent; on the other hand, whatever is above all price, and therefore admits of no equivalent, has a dignity" (KANT, 1785, p. 435). The mercantilist solution that the Portuguese legislator found inverts this categorical imperative. The credits are allocated to dignity, and people, they are given a price.

Miranda and Medeiros (2005, pp. 665-666) do not share our opinion, considering: “the right to housing should not be confused with the right to have a dwelling in a building owned by a citizen, as for the attachment alone does not deprive housing those who may dwell. "

This argument does not convince us, to the extent that the effects of attachment, that it has been the family residence, namely the sale, they deprive the family of that housing. If the family does not have economic conditions for another dwelling, it will be left without housing (which seems likely, since they did not have the financial needs to stop the execution). Moreover, this fact alone, in the light of the principle of human dignity, should not be admissible.

If there is a right to housing should measures not be available to families to protect this right, such as the “Casal de Família”?

II A PANORAMIC VIEW OF THE PORTUGUESE “CASAL DE FAMÍLIA”

After the arrival of the Republic, born from the industrial and urban outbreak that began with the 1890 crisis, Portugal experienced a turbulent political period, embodied in the constellation of governments and state of financial degradation, as Sousa Franco (1997, p. 213) wrote, "political instability eventually brought with its economic instability (...) and the consequent instability."

To this backdrop, the "Republica Nova", which means the "new republic", was proclaimed in December 1917 by the President Sidónio Pais, which brought together Republicans and monarchists, including members of the "Integralismo Lusitano", in what João Medina (1997, p. 61) called "a republic made by monarchists" and which lasted precisely one year.

The “integralismo lusitano” was a Portuguese monarchical and traditionalist movement, with a humanistic and avant-garde nature to which belonged part of, among others, José Hipólito Raposo, António Sardinha, Pequito Rebello, Xavier Cordeiro and Ramalho Ortigão. It was originated in the most conservative circles of

the University of Coimbra (CRUZ, 1982, p. 137) and distinguished himself by the Republic's opposition, to parliamentarism and later to the "Estado Novo"[3].

According to Jaime Nogueira Pinto (2007, p. 38), the Integralists were significantly influenced by Action Française of Charles Maurras, opening "A cultural war, more than against the Republic, is against their ideological, egalitarian, Jacobin, revolutionary bases. Integralists distinguished themselves from simple conservative and liberal monarchists. Attracted as Maurras in France, traditionalists, consisted of Catholics and important military, technical and university sectors. Nevertheless, they would always be, and almost only, a core of intellectual activists, encouraging an elite among top young cadres".

In turn, Filipe Ribeiro de Menezes (2009, p. 35) believes that "the Integralismo Lusitano" was proud of its intellectual value, with their leaders willing to win the Republic and other competitors in the field of ideas".

The Integralists had collaborated with the "new republic" in the discussion and elaboration of various decrees (RAPOSO, 1945, p. 38) and the joint electoral candidacy (CRUZ, 1982, p. 142).

It was precisely in this context of close cooperation between Integralists and the regime, that saw Antonio Sardinha, Pequito Rebello. The Viscount of Sardoal and Adrian Xavier Cordeiro elected to the Senate (CRUZ, 1982, p. 142). Now, leaving to the Integralists the function of "inspiring doctrine and collaborate on some political renewal of diplomas" (RAPOSO, 1945, pp. 36-37), Xavier Cordeiro presented in 1918 a legislative proposal aimed at the establishment of a real estate's institute like the North American Homestead, which would only be adopted on October 16, 1920, due to the murder of Sidónio Pais in December 1918 and the turmoil that followed. Note that in January 1919, Paiva Couceiro had tried to restore the monarchy in an uprising known as the "North Monarchy" and counting in its ranks, with the support of several Integralists (MEDINA, 1997, p. 68).

[3] Please note, that the "integralismo lusitano" was an intellectual movement that differs from the Brazilian Integralism, which was much more radical and turned to the population's control. Cfr. BERTONHA, João Fábio, Plínio Salgado, "O integralismo brasileiro e as suas relações com Portugal (1932-1975)", *Análise Social*, vol. XLVI (198), 2011, pp. 65-87.

The Decree nº. 7033 of October 16, 1920, which established the "Casal de Família", aimed to protect the small farm and "defend it from the main elements of destruction: mortgages, bidding, disaggregation by its successive fractionation, resulting from legal principles of succession".

In fact, due to the crisis, the first great war only made it worse; it was essential to protect the small farm and increase productivity to reduce the external deficit - it is still a paradox, as noted by Antonio Telo (1997, p. 221) "an essentially rural country has to import a significant part of their food. The main food is imported wheat (...), but they are also bought in substantial quantities outside of potatoes, rice, beans, meat and cattle".

On the other hand, the family occupied a central place in the ideology of the Integralismo Lusitano and the "casal de família" symbolised the protection of the family, the family heritage and continuity of old bonds, as noted Antonio Sardinha (1959, p. 286) and Braga da Cruz (1982, p. 154): "society is composed of families and non-individuals", and this "understood how the fundamental unity of society is strengthened by its connection to the land, which is the way to guarantee the family their material well-being against the eventualities of fortune, the continuation of house, the name and the virtues of the ancestors (...) ".

However, the republican regime of October 5, 1910, had collapsed after the coup of May 28, 1926, and in course, Salazar came to power.

The "Estado Novo" with Salazar's leadership tried to synthesise and juxtapose a set of ideas of traditional and reactionary movements; naturally, the "Casal de Família" established by the Integralists ranks has not been revoked.

Maybe it was because Salazar conceived of the family as the nation's base - "Behold, the base, the family, irreducible social cell, the original nucleus of the parish, the commune and thus the nation" (1991, p. 59).

Maybe It was because he had to hold the Integralists hosts beginning to fight the regime - as noted Braga da Cruz (1982, p. 137): "In carrying out this political and ideological synthesis of class interests, Salazarism established commitments, safeguarding or sacrificing one now the other components of the movements and

ideologies that it brought together. Earlier, however, the integralists would come to separate themselves despite some of its most outstanding elements to join the ranks of the opposition to the Salazar regime".

Or, it could even have been because Salazar believed in fact, the "Casal de Família" merits: "The family calls itself two other institutions: private property and inheritance. First, the property, the ownership of assets that we can enjoy and even confined goods. The intimacy of family life requires comfort, isolation, in a word, requires a house, detached house, the house itself, our house (...) The family that takes shelter under its roof is naturally more economical, more stable, better made. (...) The legacy reflects the perpetuity institute on the property" (SALAZAR, 1991, p. 95).

The truth is that Salazar not only kept the "Casal de Família" but expanded its scope. Thus, it is approved by Decree-Law nº. 18 551, of July 3, 1930, stating that. It was part of that "Any householder could constitute an indivisible and inalienable Casal de Família, which can only refer to understand the house that the holder and his family live indwell, and also necessary facilities for the performance of any mechanical craft exploited for the benefit of the family; (...) The Casal de Família can only be part of the settlor's real estate and on which Does not weigh any burden or charge, except for dowry, servitude or long lease; (...) It is not liable to seizure or attachment, is inalienable, except in the case of expropriation or exchange for other goods."

Indeed, the "Casal de Família" goods were inalienable and unsuitable (Article 9). It was a voluntary Institute, and the title that served as the basis for registration was the institution's homologation certificate (Article 36). However, the voluntary nature "beneficiaries of economic houses (...) are obliged to institute them as a Casal de Família" (Código do Registo Predial, 1970). What matters for needy families, who purchase housing at controlled costs, could not alienate or mortgage, for his protection and safeguarding. This exception is a clear spirit that animated the institute's "Casal de Família", to protect and ensure the family.

Again, the Estado Novo went further and gave it constitutional protection. Article 14 nº. 1 of the Constitution of 1933 protected the "Casal de Família", recommending that it would be up to the state and local authorities to promote the establishment of "Casal de Família." Despite the protection that the Ancien Régime assigned to the "Casal de Família," Hipolito Raposo criticised its low deployment (CORDEIRO, 1933, p. 9). Over its lifetime, "agricultural "Casais de Família" and the use of uncultivated", through Law nº. 2014 of July 27, 1946, and amended by Decree-Law nº. 36 709, of January 5, 1948, and the Decree-Law nº. 37 054, of September 9, 1948, have also been established.

The 1976 Constitution omitted any reference to the Casal de Família, and in 1977 the legislature prevented the establishment of new "Casais de Família", with Decree-Law nº. 329/82 of August 17, 1982, determining the end of this regime, allowing the registration, endorsement and burden of registration and charges on the Casal de Família.

It is understandable that during the revolutionary period, due to the land reform, the institute was extinguished, because it represented the opposite of the foundations of agrarian collectivism. However, we no longer understand why the Casal de Família had not been re-established after this reform.

We paraphrase the words of Salter Cid (1996, p. 112) that "can be an effective protection of the marital home, although dependent on the will for their institution in Casal de Família."

III A CONTRIBUTION TO THE FUTURE: THE RE-ESTABLISHMENT OF "CASAL DE FAMÍLIA" IN PORTUGUESE LAW

The Portuguese legislator provides some protection for the marital home. Since the preferred assignments of marital homes in the event of death, as set out in Articles 1106º, 2103º-A and 2103º-C of Portuguese the Civil Code (CC); to the imposition of the consent of both spouses for their alienation, encumbrance, lease or establishment of other personal rights over it (Article 1682º-A, CC); The same happens (CAMPOS, CAMPOS, 2020, pp. 308-309) in the lease, in which it enforces both consent to the resolution, opposition to the renewal or termination of the lessee

by the leaser and the sale of tenant position and revocation of the lease by mutual consent (Article 1682-A nº 1 b), nº 2). This protection occurs if the property leased a family dwelling. In this case, landlords' communication, for termination or modification of income in old leases, is to be addressed to both spouses (Article 12 of Law 6/ 2006 of February 27). Still, when the leased site is the marital home, and the applicant shall state also required as the spouse of the lessee that is not part of the lease (Article 6 of Decree nº. 1/2013 of January 7). Equal protection occurs when imposed on spouse's marital home of choice by agreement (Article 1673º CC); moreover, the protection of the marital home at the relatively united in fact (Article 4 and 5 of Law 7/2001 of May 5); Or even the protection of the marital home in the event of divorce. As can be read in a case of the Guimaraes Court of Appeal (24/01/2008): "The right to lease the marital home should be attributed to the spouse or former spouse who most need it; the urgency of the need is the main factor to meet; on the 'net worth' of the spouses or former spouses, it is to know what is the income and earnings of each individual, once the divorce or legal separation of people and goods has been decreed, as well as the respective charges; we will still consider age and health of spouses or former spouses to be a "special case", the location of the house concerning the workplace of one or the other, the fact that some of them possibly have another at home you can establish your residence, etc.; the critical factor is the need or the urgency of the need, leaving here judge the personal and financial position that more was made vulnerable as a result of divorce".

Nevertheless, we understand that the protection of the marital home in our legal system is far from the Constitution's principles. We should consider a new approach.

In this sense, the recommendation nº. R (81) 15, adopted by the Committee of Ministers of the Council of Europe suggests the following "National legislation may provide for a registration of the right of occupation that makes the latter enforceable against third parties."

On the other hand, because of the economic crisis that families go through, it is necessary to protect the family from others and its members.

Currently, under Portuguese law, the family residence may be liable for a debt of one of the spouses, when he owns the house, or of debt of both spouses, whether the home is shared or clean. To ensure better protection of the family residence, the legislator and allocating a particular intervention to the accused's spouse have also set limiting requirements for these assets' seizure. Due to the rule of paragraphs a) and b) of n.º 3 of Article 751 of the Code of Civil Procedure, it is understood that it is only possible to seize property intended for the defendant's permanent domicile. What happens when the seizure of other property probably does not allow creditors' satisfaction, at the latest within 12 months; if the debt does not exceed half the value of the court's jurisdiction of the first instance; or do not allow satisfaction of the creditor within 18 months if the debt exceeds half the value of the court's jurisdiction of the first instance.

Excessive protection may hinder access to credit for those who can only give their house as collateral. Therefore, the French government abolished the family's property (Law n° 2011-1862, 13/12/2011 (Article 12)) and provoked drawn-out debate (TERRE, SIMLER, 2001, p. 60). However, we preferred a solution that limits the execution of the family "seat" rather than this current inability to protect the family dwelling effectively.

Consequently, we understand that the Portuguese legal system could contemplate two solutions.

First, it would be useful to settle the inability to seize the marital home. Thus, it should be possible to register a property in the land registry as a marital home. In the event of default on the mortgage constituted for the acquisition, to avoid the risk of families losing their home, we quote the words of Antonio Martins (2014), "without prejudice to the settlement of property compliance mortgaged, the borrower should have the right to enter into a lease agreement with the mortgage lender - or the person who acquired the property in court proceedings - and provide for supplementary lease arrangements, if there were no agreement between the

parties, including that regime determination of income by applying the rental market criteria in the geographical area of the property." We see here a similar situation to the sale and lease-back (MORAIS, 2011; MARQUES, 2001; CAMPOS, 1994).

The second solution that the Portuguese legislator could contemplate would be the “Casal de Família” institution.

In this sense, a family or a group of people united by family ties could freely establish a property as a "Casal de Família". This fine family or couple would, in principle, be executed and be inalienable. This institution would be exclusively for real estate and only produce its effects after being registered in the Land Registry. The sale or exchange of the family residence would only be possible only by the rules of the settlor of the covenant "Casal de Família" and power up would impose rules on the vote in the family assembly.

As with the Brazilian law, the prohibition of seizing a property has exceptions such as claims resulting from the lack of maintenance of payment or cases where the property's acquisition, registered as a "Casal de Família" arose funds from illicit activities. In Chilean law, family property attachment is limited to assets occupied by the debtor and his family, but provided that this property does not have a tax value greater than 50 monthly tax units or when it is an emergency residence (art. 445, n.° 8, of the Chilean Code of Civil Procedure). In Argentina (BOSSERT, ZANNONI, 2008, p. 273), once assigned as family property, the property cannot be seized by credits born after the date of registration. The law provides for certain exceptions, namely: tax credits or costs that directly affect the property; credits derived from privileges constituted with the consent of the spouse, or in the absence of judicial authorisation if there is a severe cause or manifest utility for the family; and construction credits or property improvements (Law 14394, of 1954, Articles 34 to 50). This is by way of example.

It is our understanding that these two recommended solutions, the prohibition on seizing a family dwelling, on the one hand, and the "Casal de família" institution on the other, is a sufficient measure to assure the right to housing by

households. It contributes to solving the pressing social problem and at the same time, would represent a stimulus to the family, the strengthening of its values and strengthening of family bonds.

By itself, the "Casal de Família" would be a solution set for protecting the marital home and maintaining the property in the family sphere and, especially, would be a way to protect the property a family income still exists.

The consecration of the “Casal de Família”, by the national legislature, would be a consistent way for the property to fulfil a social function, have a family purpose, keeping respect for the autonomy of the family's wishes and citizens, given the voluntary establishment of the Casal de Família who propose.

The argument that it only serves the upper classes is not valid because the family corporations (CAMPOS, 2004), commercial or civil society has long since solved maintaining and transmitting the most privileged clan’s family heritage. Thus, it is estimated that over 70% of all companies in Portugal have a structure and are family-owned. Which may mean that the most privileged families have already found in the corporate world, whether the commercial is civil, or fiduciary contours, solutions that enable the maintenance of assets within the family. Thus, we conclude that the Casal de Família institution and the consecration of the prohibition of seizing family dwelling could be a credible alternative to apparent protection of the marital home and a feasible way of materialising the family dimension of human dignity in Portuguese law and society.

Note that in January 2016 three projects were approved on the prohibition of seizing the marital home but only in exceptional cases. As we recommend, the prohibition of seizing the family dwelling in these projects is an exception and not the rule. One of them is intended to ensure immunity from seizure and the impossibility of foreclosure of permanent property for tax debts (Bill nº. 86 / XIII / 1st). Another object is to protect the marital home under tax enforcement procedures (Bill nº. 87 / XIII / 1st). The third establishes the prohibition of seizing the family home and sets permanent restrictions on attachment and foreclosure (Bill nº. 88 / XIII-1st).

Recently, with Law nº. 13/2016, of May 23, it was recognised the extreme importance that the family residence has for the family's stability. It was not possible to sell it in the context of tax debts. However, the interpretation of Law nº. 13/2016, of May 23, was not unanimous.

According to a decision of the Portuguese *South Central Administrative Court*, of December 6, 2018: the legislative amendment operated by Law 13/2016, of 05/23, in Article 244, of the Code of Procedure and Tax Procedure (CPPT), came to establish a legal impediment to the sale of the taxpayer's own and permanent housing, to safeguard the taxpayer's right to housing, which takes precedence over the tax authority's credit.

However, the legislator did not intend to include the law's scope and competition situations between creditors. Therefore, this inability to sell the pledged property has not been extended to other creditors (Case of the Relação de Guimarães of January 17, 2019, (relatora Alexandra Rolim Mendes)). When there are several creditors other than the tax authorities, enforcement should take place under normal conditions. Consequently, housing seizure protection only exists if the family has no other creditors than the state.

Thus, the Portuguese Guimaraes Court of Appeal, in a decision dated May 30, 2019, determined the execution of the family home, without prejudice to the attachment, with previous registration, of the same asset in tax foreclosure.

CONCLUSION

The Portuguese legal system that constitutionally enshrines the inviolability of human dignity, protection of the family and the right to housing, calls for adequate protection of the marital home and allowing it to be pawned.

At a time marked by a deep economic crisis, when many families are at risk of losing their homes, it is urgent to find solutions.

We believe that the legislature should adopt one of the two proposals that seem adjusted to the economic crisis and citizens and families' needs. First, the duty

would be to establish the prohibition of seizing the family dwelling. Second, establish Casal de Família in Portugal, like what happens in Brazil with the voluntary "Bem de Família" (MARTINS, 2008).

Indeed, the consecration of prohibition of seizing the family dwelling and the institution of Casal de Família in Portugal could play a leading role:

- in carrying out the family dimension of human dignity,
- responding to a severe social problem that affects thousands of families,
- and for which has not yet found an appropriate answer.

We believe that the legislator, with Law nº. 13/2016, of May 23, should have opted for more effective and less controversial measures. First, if the legislator intended to protect the family's residence extensively, he could enshrine the non-seizure of this property, approaching the legislative option adopted in the Brazilian legal system. On the other hand, not wanting to completely rule out the impossibility of seizing the family's resident, he could have established a rule according to which property could be seized according to the tax debt amount. To protect the interests of creditors and avoid eviction and invasion of the family's private life, the legislator could have thought of creating a rule that would allow the family to continue living at home as tenants to market conditions.

That said, we believe that it is necessary to rethink the legislative options adopted to find a measure capable of safeguarding the family residence and, therefore, protecting a right of enormous social importance, the right to housing. We suggest that the first step to be taken is the "casal de família" institution.

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