

Maintenance in the Portuguese Legal System – Some Notes and Reflections

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Abstract: Family solidarity explains maintenance, alimony and child support as important constituents in Family Law. The legal imperatives inherent to a duty of maintenance, make possible the support of people who are – or were – close. Many family relationships contain this possible obligation, even though the legislator draws certain requirements and limits to this duty. This concern for maintenance in case of need is, likewise, common to several legal systems. In the Portuguese legal system, article 2009 of the Civil Code presents, in a hierarchical manner, those who are obliged to this duty. All of them have a legal-family relationship tie that justifies this. However, the scope of this right varies according to the beneficiary, although it is undisputable – in terms of rules and mechanisms of enforcement – when related to children, as we will see. There are different rules regarding the duty to provide to family members. In fact, maintenance can have different contours if it regards children, adults, spouses, ex-spouses, etc. At the same time, it is also relevant to address the means for reacting to non-compliance when this duty exists and it is not respected. In this text we will present the outline of the Portuguese right to maintenance: its notion, nature and regime; and also a critical standpoint of it.

Keywords: Maintenance, Alimony, Child Support

1. Introduction

The Portuguese legal system presents, in article 2009 of the Civil Code¹, those with maintenance obligations. The list follows a hierarchical order: first, under the terms of paragraph a), the obligation falls on the spouse or former spouse. Then there are the descendants and the ascendants (foreseen in paragraphs b) and c), respectively). With regard to these, the obligation is granted according to the order of legitimate succession, pursuant to the provisions of article 2009 (2). The following paragraphs of article 2009 also present siblings (d); uncles and aunts (during the minority of the nephews/nieces (e)), and the stepfather or stepmother of stepchildren underage who are – or were – under their care at the time of the spouse's death (f).

If any of the aforementioned persons cannot provide maintenance or cannot fully guarantee their responsibility,

the burden falls on the subsequent obliged persons (article 2009 (3)).

Pursuant to the provisions of article 2003 (1), maintenance is understood to be everything which is essential for the sustenance, housing and clothing of a person. In accordance with article 2003 (2), maintenance also includes the education and instruction of the person if he or she is a minor. The notion that the legislator presents is an indeterminate concept insofar as it will be necessary to detail which expenses are included in sustenance or housing, for example.

The measures of maintenance depend on a double combination of factors: the needs of the creditor and the possibilities of the debtor (article 2004 (1) of the Civil Code). Consideration should also be given to the possibilities that the person maintained has to provide for his/her own subsistence, when maintenance is set (article 2004 (2)). This is a general precept in the context of maintenance, and may be slightly derogated according to more specific precepts and unique situations (namely with regard to maintenance relating to minor children and the spouse).

The way in which maintenance is to be provided is

¹ Whenever articles are cited in the text, without expressly indicating the legal document to which they belong, the mention refers to the Portuguese Civil Code (CC).

presented in article 2005. As a rule, maintenance is set as monthly monetary payments, except where there is an agreement or legal provision to the contrary (as well as if there are situations that justify exceptional measures). Paragraph 2 of that precept establishes that if the person obliged to provide maintenance cannot do so in monetary payments, but only in his/her house and company, this may be ordered. This will depend on the judge's case-by-case assessment, naturally not considering this type of benefit 'in kind' when there are reasons of bad personal relationship or when former spouses are involved [2].

The right to maintenance is non-waivable and cannot be yielded, although it may no longer be requested or overdue payments may be waived (article 2008 (1)). If the right to maintenance depends on the needs of the creditor, he/she cannot selflessly bind himself/herself to a future abstention from maintenance, whose need he/she cannot foresee. This consideration will apply to the legal right to maintenance and not to the right to negotiate (article 2014). If maintenance is contractually designed, its genesis and its end will fall on the will of the parties.

As mentioned, the legal right to maintenance is dependent on two changing realities: the needs of the creditor and the possibilities of the debtor. Therefore, if the circumstances determining the setting of maintenance change, maintenance may change accordingly (be reduced, increased or terminated) – article 2012.

In general terms, the right to maintenance may terminate upon death, impossibility of compliance by the debtor, lack of need by the creditor or serious breach of his/her duties towards the debtor (article 2013 (1)). In the event of the death of the debtor or in the impossibility of continuing to provide maintenance, the person maintained may exercise his/her right in relation to the other obliged persons in article 2009, in the order there established (article 2013 (2)). Below, we will look at the specific causes of termination in the case of maintenance after the divorce.

Given the nature of imminent need normally associated with maintenance, this urgency will not always be consistent with the delays of a judicial demand. Hence, the legislator contemplates the possibility of determining provisional maintenance. Until maintenance is definitively set, the court may grant provisional maintenance (article 2007 (1)). There will be no refund of provisional maintenance received, pursuant to the provisions of paragraph 2 of the same article. However, in the event that the applicant has acted in bad faith, he/she will have to indemnify the defendant, in accordance with the general rules of precautionary proceedings. See article 374 (1) of the Code of Civil Procedure (CPC).

These are some general considerations of the right to maintenance. Next, we will briefly analyze the right to maintenance in specific situations: in the sphere of marriage, especially after its dissolution by divorce; within the scope of a non-marital partnership and the maintenance due to minor children.

2. Maintenance During and After the Marriage

The notion of marriage is foreseen in article 1577 of the Portuguese Civil Code. Under this precept, marriage is the contract concluded between two people who intend to start a family through the full communion of life. To that extent, marriage results in certain marital duties, foreseen in article 1672 of the Civil Code. One of these duties is the duty of assistance, which assumes a patrimonial configuration and includes two aspects that do not coexist simultaneously: the obligation to provide maintenance and the obligation to contribute to the responsibilities of family life – article 1675 (1). Contributing to the responsibilities of family life presupposes the existence of a communal life; if that communal life does not exist, the duty of assistance will be translated into the obligation to provide maintenance. As such, these two aspects do not converge at the same time during the marriage (because either the parties live in communal life, or they do not).

Article 1676 (1) links the responsibilities of family life to the home and the education of children. Therefore, all expenses arising from family life and residence will be considered, in light of this paper, as responsibilities of family life. These obligations, within the scope of the duty of assistance, bind both spouses in terms of their capacities. During the marriage, maintenance may be included in this contribution to the responsibilities of family life or become autonomous when the spouses do not live in family communion.

If the marriage was dissolved, it might be thought that there would no longer be any maintenance obligation between the former spouses. However, the Portuguese legislator maintains a link between the parties, a post-marital solidarity [11]. This is the only way to justify the existence of a right to maintenance even when the marriage ends by divorce. Article 2009 (1) (a) includes, in the persons obliged to provide maintenance, in addition to the spouse, the former spouse as well. As Tomé mentions: "It is, as it were, a posthumous efficacy of the marriage bond, an ultra-active effect of the marriage." [9].

Article 2016 (2) states that both spouses are entitled to maintenance, regardless of the type of divorce. In the most recent amendment (Law no. 61/2008, of 31 October) the legislator established, in article 2016 (1), a principle of self-reliance. The Portuguese legislator understood that "the right to maintenance should not last forever, with it being up to the former spouse to provide and strive to provide means of subsistence and not be dependent on the former spouse who, in turn, becomes eternally bound to this obligation" [5]. If it is not possible for each of the spouses to autonomously provide for their own subsistence, they may be entitled to maintenance, regardless of the type of divorce (paragraph 2 of the same article).

Pursuant to the provisions of article 2016-A (1), in setting the maintenance amount, the court must take into account the duration of the marriage, the contribution made towards the

family finances, the age and state of health of the spouses, their professional qualifications and employment possibilities, the time they will possibly have to spend on bringing up their joint children, their earnings and income, a new marriage or non-marital partnership and, in general, all circumstances affecting the needs of the spouse receiving the maintenance and the possibilities of the person providing the maintenance. This will be a realization of the general criterion presented in article 2004. When the law refers to new marriage or non-marital partnership, it is referring to a remarriage of the maintenance debtor. Given that new nuptials or non-marital partnership of the creditor will lead to the termination of the maintenance obligation in accordance with article 2019. As Tomé refers: “Although those in cohabitation are not reciprocally obliged to assistance and cooperation, the non-marital partnership economic conditions of the debtor must be considered when setting the amount of the maintenance obligation.” [10].

In turn, it is now clear that the creditor spouse does not have the right to demand the maintenance of the standard of living that he/she benefited from during the course of the marriage (article 2016-A (3)).

The law does not establish a period for the duration of the maintenance obligation to the former spouse, subjugating the right to maintenance only to the binomial need of those who require it and the possibility of those who provide it^{2 3}. Note that the Draft Law no. 509/X foresaw the addendum of an article (2016-B) whose provisions determined the temporal limitation of the maintenance obligation, even though renewable. This precept did not reach the final version of Law no. 61/2008, of 31 October.

If the former spouse, the maintenance creditor, contracts a new marriage, initiates a non-marital partnership or becomes unworthy of the benefit due to his/her moral behavior, the maintenance obligation terminates (article 2019). Thus, these situations are added to the general causes of termination of the right to maintenance foreseen in article 2013 (1), already mentioned above.

3. Maintenance in a Non-marital Partnership

In accordance with Law no. 7/2001, of 11 May, the

non-marital partnership is the legal situation of two people who, regardless of sex, have been living in conditions similar to those of marriage for more than two years.

This law makes no reference to the right to maintenance and, as we have already seen, and as stated in article 2009, the non-marital partner does not consist, which does not mean that the non-marital partners cannot be contractually bound to maintenance by virtue of their union. However, the parties may undertake, by legal agreement, to provide maintenance pursuant to the provisions of article 2014 (in a cohabitation agreement, for example). This will be a negotiated maintenance obligation and not a legal obligation.

In our system, there is no legal obligation to sustain non-marital partners, either during the union or after its termination. Nor will it be possible to analogously apply the marriage provisions to this matter, given that this is not a loophole, but a deliberate choice by the legislator. The current legal format of non-marital partnerships does not burden the non-marital partners with obligations similar to those that orbit a marriage. In a de facto system, such as the Portuguese one, it is more difficult to take the non-marital partnership further where maintenance is concerned. Most systems that foresee maintenance between partners have a formal union system, as identified by Schwenzer: “All legal systems provide for the duty of spouses to maintain each other. The same is true for those legal systems that recognize some kind of formalized civil union or registered partnership. However, for de facto partnerships, such a duty exists only in selected legal systems.” [7].

The only reference to maintenance within the scope of the non-marital partnership is that expressed in article 2020 of the Civil Code. According to this precept, the surviving non-marital partner who lacks maintenance can demand maintenance from the inheritance of the deceased partner. However, this right terminates in accordance with article 2020 (2), i.e., if it is not exercised within the two years following the date of the death of the author of the succession, and also, if the maintenance creditor contracts marriage, initiates a new non-marital partnership or becomes unworthy of this benefit due to his/her moral behavior (article 2019, “ex vi” article 2020 (3)).

It seems unequivocal that this precept stems from a solidarity conception, where it is understood that it is not reasonable to leave the surviving member of the non-marital partnership unprotected after the death of the other. The Supreme Court of Justice (SCJ) has already had the opportunity to rule on this, stating that: “[the] non-marital partnership does not constitute, according to the model of family law established by our legal system, a ‘family relationship’, and hence it is not correct to attribute to the maintenance foreseen in article 2020 of the CCIV66, the same content resulting from a marital relationship. II - The maintenance obligation consecrated in this precept must therefore be limited to the content indicated by the legislator to the common maintenance obligation and which, pursuant to article 2003 of the same legal document, is guided by what is strictly necessary for sustenance, housing and clothing of

2 This was the opinion of the Court of Appeal of Coimbra, on 22/11/2011, ignoring the seventeen years that had already elapsed since the divorce (“*The determination of the provision of maintenance and the setting of its measure will be done considering the binomial need (of those who require the maintenance) / possibility (of those who must provide it), in accordance with the provisions of article 2004 of the Civil Code, also taking into account the parameters indicated in article 2016 (3) of the same legal document. The fact that maintenance is requested by one of the former spouses against the other, seventeen years after the dissolution of the marriage by divorce, does not constitute abuse of rights if only that circumstance occurs.*”) Proc. no. 4503/08.0TBLRA.C1 available at www.dgsi.pt [consulted on 17/10/2020].

3 However, without prejudice to the legally established hierarchy between maintenance obligations with different creditors: the obligation of child support by the debtor spouse over the obligation in favour of the former spouse, article 2016 (3), prevails.

the maintained person, and not due to what is necessary for the maintained person to maintain the standard of living that the deceased partner provided to the maintenance creditor.”⁴

In the same sense of reorienting the measures of maintenance within the scope of article 2020 to the limits foreseen in articles 2003 and 2004 (and not in article 2016-A, regarding former spouses) [1].

4. Maintenance Due to Children

The problem of maintenance due to children (minors) arises essentially in cases of marital or non-marital partnership dissolution.

Thus, as determined by article 1905, applicable to non-marital partnerships under article 1911 – and which only regulates the resolution of the issue of the provision of maintenance due to the child in the event of an agreement between the parents – that, in cases of divorce, separation, declaration of nullity or annulment of marriage, child support and the form in which it is provided, are regulated by an agreement between the parents, subject to approval; approval is refused if the agreement does not correspond to the interest of the minor.

Pursuant to the provisions of article 1880, it is understood that the allowance set in his/her benefit during the age of minority is maintained until after the age of majority, and until the child reaches 25 years of age, unless the respective education or training process is completed before that date, if it has been freely interrupted or if, in any case, the person obliged to provide maintenance proves the unreasonableness of its demand (article 1905 (2)).

This solution resolves a doctrinal and jurisprudential dispute that existed until then regarding the provision of maintenance to an adult child who was completing his/her education or training. In fact, it was discussed whether the provision of maintenance should terminate when the child turns 18 years of age, applying then for his/her maintenance by fulfilling the requirements pursuant to article 1880, or if it should be maintained, with the parent obliged to ensure maintenance requesting its termination if the requirements of article 1880 were not fulfilled.

Thus, the provision of maintenance for a child of legal age is maintained until he/she reaches 25 years of age and if he/she is completing his/her education or training⁵.

4 Ruling of the Supreme Court of Justice, of 23/09/1998, Proc. no. 98B637, available at www.dgsi.pt [consulted on 17/10/2020].

5 See, in this regard, the Ruling of the Court of Appeal of Guimarães, of 20/03/2018 (771/10.6TBVCT-D.G1), www.dgsi.pt [consulted on 7/10/2020]: “I - The maintenance obligation of parents towards their adult children continues, uninterruptedly, just as in the period of their minority, until they reach 25 years of age, unless the respective education or training process is completed before that date, if it has been freely interrupted or if, in any case, the person obliged to provide maintenance proves the unreasonableness of its demand. II - Maintenance, as a result of responsible parenthood, is not limited to what is essential for the biological subsistence of the children. It embraces everything that is necessary for their sustenance, housing, and clothing of the children, but also includes their education and instruction. III - However, children can never aspire to a standard of living supported by their parents that they cannot provide. As well as the opposite:

If in these cases, the need arises to provide maintenance for a child who is already of age, the child, as an adult, has the legitimacy to bring an action against the parent. In addition, and pursuant to article 989 (3) of the Code of Civil Procedure (CPC), when the need arises to provide maintenance for adult children, the parent who assumes as his/her main responsibility the payment of the expenses of adult children who cannot support themselves, may demand from the other parent the payment of a contribution for the sustenance and education of the children, followed by, with the necessary adaptations, the regime foreseen for minors. The judge can decide, or the parents can agree, that this contribution is made, in whole or in part, to the adult or emancipated children (paragraph 4 of the same article).

If the child, having reached 25 years of age, has not yet completed his/her education, and requires maintenance, it seems to us that he/she should request it in accordance with the general provisions of articles 2003 et seq. (see article 2009), given that the maintenance obligation of the parent to the adult child terminates at 25 years of age.

Article 1905 regulates maintenance set by agreement between the parents and approved by the court in legal proceedings regulating the exercise of parental responsibilities (article 34 (1) of the RGPTC - General Regime of the Civil Guardianship Process) or approved by the Public Prosecutor, in cases where divorce by mutual consent is required by the Civil Registry Office. “It is thus up to the judge or the PP to control the compliance of maintenance allowance with the child’s interests, i.e., with their needs and standard of living, taking into account the parents’ income and assets, carrying out the necessary steps for the effect under the inquisitorial principle (article 34 (2) of the RGPTC)” [8].

If the parents are not in agreement regarding the setting of maintenance for the child, the matter must be resolved by the court, pursuant to article 1906, as one of the issues included in the exercise of parental responsibilities.

We will not comment on the setting of the amount of maintenance and the criteria to be observed for this purpose or on how it is provided, given that these matters were already analyzed in the first part of this text. We cannot, however, and in this regard, fail to include some particular notes regarding child support.

Maintenance is understood to be everything that is essential for sustenance, housing and clothing of a person, also including the education and instruction of the person if he or she is a minor (article 2003). When setting the measures of maintenance, the needs of the child and the possibilities of the debtor parent must be taken into account (article 2004 CC).

The provision of maintenance for a minor child is not

children are not obliged to undergo deprivations of any order that their parents can provide. IV - Thus, if it is proven that a child, although already an adult, must bear an increase in expenses resulting from his/her training, the respective parent must contribute, as much as possible, to the payment of these expenses.”

measured, however, by the strict needs for sustenance, clothing and housing, but rather an economic standard of living similar to that of the parents or that which the parents had during the marriage or the non-marital partnership must be assured [3, 8].

The debtor parent must have a portion of his/her income set aside to meet his/her essential needs, with respect for the dignity of the human person. Therefore, and according to Marques, there is the need: “to determine the portion of the parent’s annual income without custody, which is necessary to reserve for the cost of their own basic needs (a type of free or exempt income, a minimum for self-survival, or a minimum self-survival reserve, on which allowance is reflected) – e.g., expenses for clothing, footwear, costs related to new housing, commuting to work, free time, etc. An amount that will be deductible from the overall income of that parent”⁶. [3].

It has been discussed, in doctrine and jurisprudence, the question of, if the economic and financial situation of the parent is not known, should maintenance be set. In fact, if it is not set, there will be no possibility of, if necessary, activating the *Fundo de Garantia de Alimentos devidos a Menores* (Guarantee Fund for Maintenance due to Minors - Law no. 75/98, of 19 November, with subsequent amendments). On the other hand, how can it be set, taking into account the provisions of article 2004 (1) of the Civil Code, which requires the consideration of the debtor parent’s possibilities? In order to set maintenance, several rulings from the higher courts were pronounced⁷.

The District Attorney General of Lisbon, on its website, presents the following guidance: “Although the existence of income held by the parent may not be known – either due to lack of knowledge regarding its respective whereabouts or unawareness of his/her economic situation – and, as well, when it is precarious, the ruling must impose on him/her the obligation to provide maintenance. In fact, the duty to provide maintenance for the minor child is inherent to parental responsibility, which, in addition to being a

constitutional imperative under the provisions of article 36 of the CRP, is also pursuant to article 2009 (1) (c) of the Civil Code. Furthermore, the intervention of the FGADM (Guarantee Fund for Maintenance due to Minors) would be prohibited, due to the lack of one of the essential requirements, that is, the judicial setting of the amount of maintenance. Such setting must, in these cases, be determined by criteria of equity.”⁸.

Marques considers that the provision of maintenance must always be set by one or both parents, even if they are unemployed and have no means of subsistence, not following the principle of proportionality arising from article 2004 CC. The author understands that “the rights and duties of parents towards minors are always due, regardless of their economic resources (...), given that these are rights whose exercise is mandatory and a priority in view of the person and the interests of the minor” [3].

Ramião presenting an opposite point of view, but given the current position of the SCJ regarding the problem, maintains that only: “in cases where it is demonstrated in the records the absolute impossibility of the parent to contribute with a provision of maintenance, namely in a situation of disability retirement, where the amount of the social pension does not make it possible, survives on a social benefit (Social Insertion Income), because it may affect his/her survival with a minimum of human dignity, or for reasons of disability or other illness that prevents him/her from raising means of subsistence, maintenance should not be set.” [6].

For a short analysis of the main problems surrounding child support, and with a jurisprudential analysis, see [4] and [8].

It should be noted that, regarding the form of provision of child support, the law does not require a certain form, but it must be provided so that the debtor parent can prove that he/she complied with it (e.g., bank transfer). Pursuant to article 45 of the RGPTC, there may be a change in the amount of maintenance initially set whenever there is an agreement or a change in circumstances.

5. Means for Reacting to Non-compliance

As for non-compliance with the provision of maintenance, the legislator allocated different means to enforce the obligation.

The first one that must be mentioned, only applicable to the maintenance due to minors, under the terms mentioned in the previous point, results from article 48 of the General Regime of the Civil Guardianship Process - RGPTC. Thus, when the person legally obliged to provide maintenance does not provide the amounts owed within 10 days following the due date, the following is observed: a) if he/she is a public servant, the respective amounts are

6 In this regard, see, for example, the Ruling of the Constitutional Court no. 306/2005 (8/06/2005) – available in *DRE* no. 150, 2nd series, of 5/08/2005, pp. 11186-11190 (or www.dre.pt), where an invalidity pension for the parent who must not be deprived of it was at stake, due to the deduction of a portion from it for a minor child, from the income necessary to meet his/her own essential needs.

7 For example, the rulings of the Supreme Court of Justice (SCJ) of 12/07/2011 (4231/09.0TBGMR.G1.S1), 27/09/2011 (4393/08.3TBAMD.L1.S1), 15/05/2012 (2792/08.0TBAMD.L1.S1), and 25/06/2012 (10102/09.2TCLRS.L1.S1); of the Court of Appeal of Lisbon (TRL) of 21/11/2002 (0084376), 29/11/2006 (10079/2006-7), 19/06/2007 (4823/2007-1), 26/06/2007 (5797/2007-7), 28/06/2007 (4572/2007-8), and 9/11/2010 (6140/07.8TBAMD.L1-1); of the Court of Appeal of Porto (TRP) of 21/06/2011 (1438/08.0TMPRT.P1), and 27/06/2011 (1574/09.6TMPRT.P1); of the Court of Appeal of Coimbra (TRC) of 17/06/2008 (230/07.4TMCBR-B.C1), 28/04/2010 (1810/05.8TBTNV-A.C1), 4/05/2010 (1014/08.8TMCBR-A.C1), and 21/06/2011 (11/09.0TBFZZ.C1); and of the Court of Appeal of Guimarães (TRG) of 15/03/2011 (4481/09.9TBGMR.G1), which is currently the majority. In the opposite sense, see, among others, the rulings of the TRL 18/01/2007 (10081/2007-2), 4/12/2008 (8155/2008-6), 17/09/2009 (5659/04.7TBSXL.L1-2), 5/05/2011 (4393/08.3TBAMD.L1-2), and 6/12/2011 (3464/08.0TBAMD.L1-6); and of the TRP 28/10/2003 (0324797), all at www.dgsi.pt, [consulted on 7/10/2020].

8 See

http://www.pgdlisboa.pt/leis/lei_mostra_articulado.php?artigo_id=775A2003&ni d=775&tabela=leis&pagina=1&ficha=1&so_miolo=&nversao=#artigo [consulted on 7/06/2020].

deducted from his/her salary upon request from the court and addressed to the public employer; b) if he/she is an employee or salaried, it is deducted from his/her salary or wages, and the respective employer, who is in the position of trustee, is notified for this purpose; c) if he/she is a person who receives income, pensions, allowances, commissions, percentages, fees, gratuities, contributions or similar income, the deduction is made from these benefits when they must be paid or credited, with the necessary requests or notifications made and with the notification of those in the position of trustees (1). The amounts deducted also cover the maintenance that is overdue and are given directly to the person who should receive them (2).

Also, for these cases, Law no. 75/98, of 19 November, with subsequent amendments, regulated by Decree-Law no. 164/99, of 13 May, foresees the Guarantee Fund for Maintenance due to Minors. The aforementioned law foresees, in article 1, that when the person legally obliged to provide maintenance to a minor residing in national territory does not meet the amounts owed, and the person maintained does not have a gross income higher than the amount of the social support index (IAS) nor does he/she benefit in that measure of income from another person in whose custody he/she may be, the State ensures the payments foreseen in this law until the effective fulfilment of the obligation begins. The payment of child support to which the State is obliged, in accordance with this law, terminates on the day the minor reaches 18 years of age, except in the cases and circumstances foreseen in article 1905 (2) of the Civil Code. As for the conditions and requirements for the allocation of the Fund, see, in particular, article 3 of Decree-Law no. 164/99, of 13 May, which regulates the guarantee of child support.

Another applicable means – to all non-compliances within the maintenance obligation – provided for in articles 933 et seq. of the CPC, is the special maintenance enforcement proceedings, for the payment of overdue and falling due amounts. During maintenance enforcement, the petitioner may request the adjudication of part of the amounts, salaries or pensions that the defendant receives, or the pledge of income belonging to him/her, for the payment of overdue and falling due amounts, rendering the adjudication or the pledge independently of seizure (1). When the petitioner requests the adjudication of the amounts, salaries or pensions referred to in the preceding paragraph, the entity in charge of paying them or processing the respective payrolls will be notified that it is to pay the adjudicated part directly to the petitioner (2). When requesting the pledge of income, the petitioner immediately indicates the assets to which this applies and the enforcement agent will order that the assets considered sufficient to meet the maintenance due and falling due be pledged. The defendant may be heard for this purpose (3).

A criminal penalty is also foreseen for those who do not comply with the obligation to provide child support. Thus, article 250 of the Criminal Code determines that whoever is legally obliged to provide maintenance and in a position to do so, and fails to comply with the obligation within two

months following the due date, is punishable with a fine of up to 120 days (1). The repeated practice of the crime referred to in the previous number is punishable with up to one year of imprisonment or a fine of up to 120 days (2). Anyone who, being legally obliged to provide maintenance and in a position to do so, fails to comply with the obligation, endangering the provision, without the assistance of a third party, of the fundamental needs of those who are entitled to them, is punishable with up to two years of imprisonment or a fine of up to 240 days (3). Whoever, with the intention of not providing maintenance, places him/herself in a position of non-compliance and violates the obligation to which he/she is subject, creating the danger foreseen in the previous number, is punishable with up to two years of imprisonment or a fine of up to 240 days (4). Criminal proceedings require a complaint to be lodged (5). If the obligation is then fulfilled, the court may waive or set aside the period of the sentence not served in full or in part (6).

The maintenance creditor is also the holder of a real guarantee right (a legal mortgage, under the terms of article 705 (d) of the Civil Code). See, on this matter, the Ruling of the SCJ of 13/09/2018 (1231/14.1TBCSC.L1.S1): “(...) VII. The legal mortgage referred to in article 705 (d) of the Civil Code is consecrated to guarantee maintenance resulting from the law or legal agreement and which has a minor or any other subject, with or without legal capacity, as a creditor.”⁹

Finally, failure to pay the maintenance obligation may cause the debtor to incur in a fact that justifies his/her disinheritance as a legitimate heir. In fact, article 2166 (1) (c), stipulates that the author of the succession may, in a will, with express declaration of the cause, disinherit the legitimate heir, depriving him/her of what is legitimate, when any of the following occur: “(...) c) If the successor, without just cause, refused the author of the succession or his/her spouse the due maintenance”. The person disinherited is equated as unworthy for all legal purposes (2).

These mechanisms – identified above – clearly and unequivocally reflect the importance that the effective provision of maintenance due is valued by the Portuguese law.

6. Conclusion

Maintenance can have different outlines when it regards to spouses, ex-spouses, children, etc. However, all these legal settings are inherent to a family solidarity bond. As analyzed, the scope of this maintenance varies according to the beneficiary.

Not only it was important to present the legal framework for maintenance, but it was also relevant to address the means for reacting to non-compliance when this duty exists and it is not respected.

It is true that, ideally, the rules that regulate this matter would be ‘dead letter’, without need to a practical applicability. However, unfortunately, in reality it has proved

⁹ Available at www.dgsi.pt [consulted on 7/10/2020].

to be a right with undeniable urgency in the Portuguese legal and judiciary scenario, even though many citizens are unaware of its legal aspects.

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