

CONCEPTUAL ASPECTS REGARDING THE DOMICILE AND RESIDENCE OF THE INDIVIDUAL (Part II)

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Summary

The concept of domicile is to be researched in terms of both national and international regulations, because this term does not have the same meaning, or the scope of the term is much wider and should not be identified with the notion of „domicile” in the sense of the right to own a dwelling. The importance of establishing the domicile or temporary residence is determined by the legal effects it produces from the point of view of constitutional, civil, criminal, family law, etc. This study, divided into two parts, is an attempt to define the basic terms, identify situations for establishing the domicile in the case of minors, protected persons, rules and exceptions regulated both nationally and internationally.

Keywords: *domicile, residence, temporary, home, space.*

[https://doi.org/10.52327/1857-4440.2021.1\(19\).24](https://doi.org/10.52327/1857-4440.2021.1(19).24)

CZU: 347.171

Introduction. In the first part of this study, we defined the terms „domicile” and „residence” in terms of national regulations, we also analyzed doctrinal opinions, and in the present part, we aim to identify ways to register the domicile according to legal provisions, as well as the conditions for registration and evidence of the residence or domicile of foreigners found on the territory of the Republic of Moldova.

Purpose of the study. As a continuation of the ideas presented in the first part of the study, establishing the extent of the legal effects of domicile and temporary residence, as well as identifying the procedures for registration of the inhabitants of the Republic of Moldova determines the purpose of this study.

Methods and materials applied. In order to achieve the proposed goal and the direct implementation of the study, we used the method of deduction, synthesis, analysis, the systemic and comparative method by consulting the national legislation, as well as the relevant international framework, the legislation of other states.

Results and discussions. According to pt. 91 of the Regulation on Issuing Identity Documents and the Registration of the Inhabitants of the Republic of Moldova (hereinafter - Regulation), „evidence of residents is kept by their registration at the domicile and/or the temporary residence in public or private property, or in other habitable dwellings regulated by the legislation in force” [19]. In the same vein, the Regulation imposes a restriction; persons can have only one domicile and/or one temporary residence at a time. If they have several dwellings, they may register their domicile or temporary residence in any of them.

The legislator regulated the way of establishing the temporary residence, without changing the person’s domicile, so that the registration of the person in temporary residence does not entail the obligatory deregistration from the domicile records [19, pt. 100].

Depending on the person’s connection with the state of the Republic of Moldova, the

competent authorities for registration at the domicile or in temporary residence and deregistration from the records are determined, as follows:

- for the citizens of the Republic of Moldova - the services for issuing identity documents (Public Services Agency) [2];
- for foreign citizens – the Bureau for Migration and Asylum of the Ministry of Internal Affairs of the Republic of Moldova [3].

The application for the registration of the domicile or temporary residence shall be accompanied by the following documents, in the original:

- 1) identity card for internal use;
- 2) the document certifying the right of ownership or use over the dwelling;

In cases where the right holder submits in writing a declaration confirming that his property right over the dwelling is registered in the Real Estate Register, the submission of documents certifying this right is not mandatory, if the competent authority can verify, through automated information resources of the real estate cadastre the veracity of the declared data.

3) proof of payment of taxes and fees established for registration or deregistration. If the payment of taxes and fees has been made by electronic payment instruments, the proof of payment shall be verified through the institutional information systems by the responsible person within the competent authority, without requiring proof of payment on paper [19, pt. 102].

In accordance with pt. 103 of the Regulation [19], in the case of registration of the person at the domicile or in temporary residence in the private property dwelling over which he/she does not have the right of ownership and does not have a document certifying the right of use (such as, a lease, loan agreement), in addition shall be submitted in writing, as appropriate:

- 1) the declaration of receipt in the living space by the owner or co-owners of the dwelling
- natural person, which can also be drawn up at a notary;
 - 2) the request for reception in the living space by the owner or co-owners of the dwelling
- legal person.

The normative framework of the Republic of Moldova regulates the situation in which the owner of the dwelling is a legal person, so in addition to the documents specified above, the applicant additionally submits the extract from the State Register of Law Units to establish the administrator of that legal entity. Although it is expressly provided that the submission of this extract is not mandatory, if the competent authority can verify this information through the State Register of Law Units, in reality, this extract is most often requested.

The Regulation mentions the possibility of registering the domicile or temporary residence of the tenant's family members, under the conditions of a lease contract, concluded according to legal provisions, unless the lease contract provides otherwise. In this case, the declaration of receipt in the living space is submitted by the tenant and the adult members of his family, who are already registered at the domicile or in temporary residence at the respective address [19, pt. 103].

The situation of the persons who have concluded contracts for renting the dwellings, under the conditions of the legal provisions regarding the dwellings, is provided in pt. 103¹ of the Regulation. Thus, in the public property subject to privatization, transmitted for use until November 29, 2015 under the lease concluded under the legal provisions on housing, in force at the date of conclusion of this contract, the persons included in the distribution voucher or in another act of legal distribution of the respective dwelling and their family

members are registered at the domicile or in temporary residence. In the case of registration of persons included in the distribution voucher, the declaration of receipt in the dwelling space by the persons, who are already registered at home or at the temporary residence at the respective address, is not submitted [19, pt. 103].

For the registration at the domicile or in temporary residence of the family members of the persons included in the distribution voucher or in another act of legal distribution of the dwelling, additional documents are required, namely, the declaration of reception in the living space by the persons already registered at the domicile or in temporary residence at that address.

The use of the share dwelling property, which has several main entrances to which separate addresses have been assigned, requires the presentation of the declaration of receipt in the living space for registration at the domicile or in temporary residence. This declaration is required only from the owner or co-owners of the share in whose use the entry is.

The application for registration at the domicile or in temporary residence is submitted in person. If the change of domicile or temporary residence does not condition the change of identity document, the submission of the application by other persons is allowed, and the regulated situations are mainly related to the minors, namely:

- in the case of a minor, including the one on whom guardianship or trusteeship is established, as well as in the case of the person subject to the measure of judicial protection in the form of guardianship, the appropriate legal representative (parent, guardian, curator) acts as applicant;

- in the case of the child separated from the parents over whom guardianship or trusteeship is not established, the application is submitted by the guardianship authority;

- in the case of the child separated from the parents on whom guardianship or trusteeship is not instituted or revoked under the legal provisions and who is placed in the foster family or residential placement service or in the institution of public social assistance, education, treatment, or in another similar institution, the application shall be submitted by the administration of that institution;

- by the representative empowered by power of attorney authenticated by a notary or by other persons empowered by law;

- in the case of a person with mental illness or physical, mental or psychological deficiencies, in maintenance in the treatment or social institution on which the protection measure is not established in any form, the application is submitted by the administration of the respective institution [16].

The declaration of reception in the living space, the declaration of the owner or co-owners of the dwelling, by which they declare that they are right holders of the dwelling, shall be submitted in writing in person or by the authorized representative by power of attorney authenticated by notary or other persons authorized by law to the person empowered with functions of registration of persons at the domicile or in temporary residence or is authenticated by a notary or other persons empowered by law.

Pt. 106 of the Regulation expressly stipulates the documents attesting the right of ownership or use over the dwelling [19]:

- the document of ownership over the dwelling, concluded under conditions of validity provided by the legislation in force and registered with the cadastral body. If the owner of the dwelling, due to certain circumstances, cannot submit the respective document, he/she

is entitled to submit the extract from the Real Estate Register issued by the cadastral body, which is valid for a period of 2 months from the date of issuance;

- the public property distribution voucher, subject to privatization under the legal provisions, issued by the local public administration authority (mayor's office) after November 29, 2015, or, as the case may be, reconfirmed by the local public administration authority (mayor's office) if it was issued until November 29, 2015;

- the lease contract, concluded under the conditions of chapter VIII of Law no. 75 of April 30, 2015 on housing, between the beneficiary of the place in the dormitory and the landlord. In the case of accommodation of students in dormitories subordinated to state educational institutions - a copy of the decision of the educational institution in whose management the dormitory is and the order regarding the distribution of the living space [17];

- the lease or sublease contract, concluded under the conditions of chapter VIII of Law no. 75 of April 30, 2015 on housing [17, pt. 33];

- the final court decision on the recognition of the right to use the dwelling;

- the extract from the Register of records of the households of the population from the respective locality attesting the registration of the dwelling and the record of the members of the household [14];

- the request of the administration of the social assistance institution, the specialized medical-sanitary institution, the foster family or residential placement service, the penitentiary institution, the military unit, the educational institution, including the one subordinated to the Ministry of Internal Affairs or the Ministry of Defense, placement centers, as well as other specialized institutions that dispose of habitable rooms, if for the accommodation of persons it is not mandatory to conclude the lease contract [19, pt. 106].

Until the modification of the legal framework regarding the issuance of identity documents and the records of the inhabitants of the Republic of Moldova, the previous provisions limited the right of citizens to free movement by imposing restrictive norms. Thus, the Constitutional Court, in Decision no. 16 of 19.05.1997, found the unconstitutionality of the provisions of point 10 paragraph 2 of the Regulation on the manner of completion and issuance of identity documents of the National Passport System, so that the phrase „Citizens are required to obtain the registration of establishing the domicile within 3 days upon the moment of arrival” contravenes the right to free movement, enshrined in art. 27 of the Constitution. The Court noted that the existence of the institution „residence visa” in the legislation of the Republic of Moldova and its use in social relations contradicts the norms and constitutional principles, constituting an obstacle in exercising the right of the citizens of the Republic of Moldova to free movement [15].

The principle of registration of the citizens residing in the Republic by granting the residence visa by the internal affairs bodies from the locality of residence, determined in pt. 10 par. (1) of the Regulation, is unconstitutional and contradicts the stated right. The Court mentioned that, identity documents in the national passport system, based on art. 1 of Law no. 273-XIII of November 9, 1994 on identity documents in the national passport system, are all types of passports, identity cards and residence permits. Identity documents, according to Law no. 273-XIII (for passports - art. 2 para. (5), identity cards, residence permit - art. 3 para. (4) and (10), do not contain data on „residence visa” or „domicile visa”. The phrase „the number and date of issuing the residence permit” (art. 3 par. (4) letter r) is provided exclusively for identity cards and residence permits. The Constitutional Court does not dispute the need for registration and evidence of the population in the state, and

at the same time, it mentions that their forms and methods must not contradict Article 27 paragraph (2) of the Constitution, which stipulates: „Every citizen of the Republic of Moldova is guaranteed the right to establish the domicile or residence in any locality in the country, to leave, emigrate and return to the country” [15].

The term „domicile” is contained in the text of several normative acts, so that the Family Code [10] also mentions domicile when it refers to the situations of establishing the domicile of the spouses (art. 16 - Spouses determine their domicile freely and independently), dissolution of marriage (art. 36 determines which body is competent to resolve the request for dissolution of marriage - the civil status body in whose territorial area is the domicile of one of the spouses, art. 37 in conjunction with art. 39 of the Civil Procedure Code [8] - establish the competent court to which the parties may apply for the dissolution of the marriage), the child’s right to communicate with the parents and other relatives (art. 52 - especially regarding situations in which the parents have separate/different domiciles) [8], the domicile of the minor child (art. 63) [8], etc.

When establishing the domicile of the minor child, in case the parents live separately, we witness some scenarios regulated by the Family Code, and namely:

a) in the case of agreement between the parents, the domicile of the child, who has not reached the age of 14, is determined by them;

b) if the minor has reached the age of 14, he/she has the right to choose which of the parents he / she wants to live with. If he/she refuses to choose which parent he wants to live with, the child’s domicile is established by the parents’ consent;

c) the court will decide on the domicile of the minor, in case the parents’ agreement regarding the establishment of the child’s domicile is missing, and the child who has reached the age of 14 refuses to choose which parent he wants to live with [10, art.63].

The domicile is also regulated from the point of view of the Code of Criminal Procedure (hereinafter - CCP of the Republic of Moldova), and in accordance with pt. 11) art. 6 of the CCP of the Republic of Moldova [28] „domicile means the dwelling or construction intended for permanent or temporary accommodation of one or more persons (house, apartment, villa, hotel room, cabin on a sea or river vessel), as well as the spaces directly attached to them, constituting an indivisible part (veranda, terrace, loft, balcony, cellar, another place of common use); it also means any private land, car, private sea and river vessel, office”[9].

The authors Chernomorets S. and Faigher A. mention that the rooms of boarding schools or dormitories for pupils or students are considered domicile within the meaning of criminal law due to the fact that these persons are accommodated there on the basis of their consent and have the right to undisturbed living or to prohibit the access of other persons [6, p.195].

The residence, unlike the domicile, has a temporary character. Otherwise, in terms of functional destination, the residence is no different from the domicile.

As we mentioned before, the term „domicile” does not only imply just the quality of real estate that a good can own, if we refer to the classification that we find in art. 459 of the Civil Code of the Republic of Moldova (hereinafter - CC of the Republic of Moldova) [7], but the idea that the domicile is the place where a person conducts his personal life should be taken into account. At the same time, it is not the action on the goods or even on the victim’s person that harms the legal object protected by the criminal law, but the very unwanted presence of the perpetrator in the place that constitutes the victim’s domicile.

The interpretation of the term of domicile, especially in the classification of crimes, determined in 2019, the notification of the Constitutional Court of the Republic of Moldova regarding the lifting of the exception of unconstitutionality of some of the provisions of article 179 par. (1) of the Criminal Code and Article 6 pt. 11) of the Code of Criminal Procedure [9], namely, the identification of the domicile as „any private land”. The request was declared inadmissible for the following reasons: the Constitutional Court found that, being defined in Article 6 pt. 11) of the Code of Criminal Procedure, the notion of „domicile” is sufficiently accessible, clear and predictable. The Court notes that this notion has an autonomous criminal meaning and does not depend on the definition of the notion of „domicile” in other branches of law. The definition of „domicile” in the autonomous criminal sense has no defects of unconstitutionality [13].

We consider that «domicile» refers to the place where a person lives permanently, i.e. the place where the person usually lives exclusively.

The interpretation of the term „domicile” in the sense of the European Convention on Human Rights (hereinafter - ECHR) differs from the meanings it has in the domestic law systems of the signatory states. Thus, the authors Cârnaț T. and Cobășenco I, mention that, with the aim of granting maximum protection to the beneficiaries of this right, the European Court of Human Rights (hereinafter - the Court) attributes to the notion of „domicile” an autonomous connotation within the meaning of the Convention, so that the „domicile” refers not only to the legally occupied or acquired space, but also to any other living space, if there are sufficient and continuous connections [5, p. 16].

The content of the concept of „domicile” within the meaning of Article 8 of the ECHR has been clarified in *Gillow vs. The United Kingdom* case [4]. In this case, the applicants had not occupied the house they had built in Guernsey for almost nineteen years, but they kept in touch with it. The Strasbourg judges noted that the applicants - who had come to settle at home - had never chosen a „house” elsewhere and had apparently always intended to return. Therefore, they had kept enough connections with the house, for this house to be understood within the meaning of art. 8 of the Convention [12]. Since that judgment, the Strasbourg Judges have given the word ‘domicile’ a broad interpretation in case-law.

With the signing of the Association Agreement between the Republic of Moldova and the European Union [1], the right to free movement is guaranteed, the visa regime being liberalized by the European Union for the citizens of the Republic of Moldova. The agreement initially provided that „The Parties shall endeavor to increase the mobility of citizens and shall take progressive steps towards achieving, in due course, the common objective of a visa-free travel regime, provided that the necessary conditions are met to ensure well-managed and well-conducted mobility in the conditions of security provided for in the Visa Liberalization Action Plan”.

According to Regulation no. 539/2001CE on the abolition of the visa requirement for short trips for Moldovan citizens holding a biometric passport in the Schengen area, the concept of free movement takes on a wider applicability [18].

In the opinion of the author Șchiopu C., the freedom of the citizen to move within the state does not require approval, authorization or submission of a declaration. If the person does not have an identity document (identity card), he/she does not break the law. At the same time, the author considers that the possession of an identity document would facilitate the performance of mandatory identification procedures of the person, such as: criminal

investigation; committing a contravention; concluding a contract; committing other disciplinary offenses; employment, etc. [21, p.90].

It is important to mention that the analyzed right is not an absolute one, which means that it can be limited in the presence of certain conditions. According to Article 2 paragraph (3) of Protocol No. 4 to the ECHR „the exercise of the right to free movement may not be subject to restrictions other than those provided by law; it institutes necessary measures in a democratic society for national security, public safety, maintaining public order, preventing criminal acts, protecting health or morals, or protecting the rights and freedoms of others” [12]. According to art. 54 of the Constitution, „the exercise of certain rights or freedoms may be restricted only by law and if necessary, as the case may be, for: the defense of national security, order, public health or morality, the rights and freedoms of citizens; the conduct of a criminal investigation; prevention of the consequences of a natural disaster or damage” [11]. Typical examples of restrictions that may be imposed are: military service, ban on access to or settlement in military and security areas, serving a sentence of imprisonment, etc.

We agree with the authors Chernomorets S. and Faigher A., who claim that the domicile is one of the few places, where the person has the opportunity to enjoy privacy, to rest after a day of work, to keep their personal belongings and, not lastly, to feel safe. The above-mentioned authors point out that a considerable part of a person’s intimate, family and private life takes place precisely in his/her home and any undesirable intrusion into the home space encounters a vehement reaction [6, p. 195].

According to the different circumstances of an individual’s life, the common law distinguishes and recognizes three types of domicile: the one of origin, the propositus one chosen freely and, finally, the domicile on which certain persons „depend” (minors, persons under protection) [20 , p.82].

Conclusions. Following the analysis, we can state with certainty that the domicile or temporary residence makes it possible:

- to set the place where the civil rights of the person are exercised;
- to locate a person geographically, which makes it possible to know the competent administrative or judicial authorities.

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Presented: 14.05.2021

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