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ORIGINAL PAPER

Some clarifications regarding the protection of the natural person by judicial interdict and the protection of persons with mental disorders in the context of the legislative changes brought by by Law no. 140/2022 from the perspective of the right to respect for private and family life, provided by the European Convention on Human Rights

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Abstract:
The protection of the interdict is regulated in art. 164-177 of the Civil Code, as well as in the new Code of Civil Procedure in art. 935-942.
Substantial changes in the field were made by Law no. 140/2022, regarding some protection measures for people with intellectual and psychosocial disabilities and the amendment and completion of some normative acts.
Also, by Law no. 487/2002, amended, on mental health and the protection of people with mental disorders, a new framework of measures was given to promote and defend mental health and, at the same time, the prevention and treatment of mental disorders under voluntary or non-voluntary hospitalization in a psychiatric hospital. In the same register, of replacing the phrase "dangerous mentally ill people" with the generic notion of "people with mental disorders", the expression "alteration of mental faculties" instead of "dementia" or "insanity" is preferred. In criminal law, involuntary admission implies that the person has the status of "defendant or "suspect". Also, involuntary hospitalization can be performed only after all voluntary hospitalization attempts have been exhausted.

Keywords: *special guardianship law proceedings, European Court of Human Rights, circumstances of the case, judicial counselling.*

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Considering the legislative changes in the matter of interdict, from the point of view of Law no. 140/2022, we consider it particularly important that in this matter not to omit the fact that the dignity of the person must be respected. In the past there have been cases where political opponents were considered mentally ill and hospitalized in order to be subjected to the so-called "brainwashing" operation. Human dignity is not included in the list of human rights as a distinct right, but it supposes the "right to have rights", to be recognized as a person. Dignity can be understood only in relation to the other principles of bioethics: autonomy, responsibility, respect for the vulnerability of the human being, the integrity of the person, and respect for private life, which are an extension of human rights in the field of biomedicine(Călin, 2013: 191).

It is also useful to remember that for non-hazardous mental patients – the alienated and the mentally disabled – the measure of interdict is taken, which can only be instituted by the court, as it entails the lack of exercise capacity of the protected. According to the principle of formal symmetry, the judicial interdict may also be lifted by the court, according to the rules from the interdict, under the conditions of art. 177 paragraph (1) Civil Code: ` If the cases that caused the interdict have ceased, the court will decide to revoke it`.

For dangerous mental patients, medical care is taken in the form of medical treatment and medical hospitalization in a psychiatric unit, and the rule is that the prior consent of the patient must be obtained. The institution of treatment without the consent of the patient and his involuntary hospitalization can be made only under the limiting conditions provided by law and is ordered by administrative means, by the medical authority, the role of the court being to resolve any complaints made against the measures thus ordered[1], having no repercussions on the patient's exercise capacity. Having the same purpose, although they are two different protective measures, they can be cumulated (Chelaru, 2012: 114).

It is also necessary to clarify the notions of alienation and mental debility: in the case of the first discernment is missing, while in the case of debility it is diminished (Ungureanu, Munteanu, 2015: 390).

We mention the position of the European Court of Human Rights which, instead of an autonomous notion of "alienated", has developed three distinct conditions that must be met cumulatively by any detention of a person with mental disorders by national authorities, detention based on art. 5 para. 1 lett. e) of the European Convention (Rădulețu, 2023: 104) : i) alienation must be justifiably established, ii) the disturbance must have a character or extent justifying the hospitalization, iii) hospitalization cannot be prolonged if the disturbance does not persist. The European Court of Human Rights requires any deprivation of liberty to comply with national substantive and procedural rules, but at the same time national law must have a certain quality and be itself in accordance with conventional requirements. In the case-law on Romania, the Strasbourg court sanctioned not only the failure of the national authorities to comply with the relevant national law (represented by Law no. 487/2002, but also by the relevant provisions of the Criminal Code and the Code of Criminal Procedure), but also found certain shortcomings thereof (Rădulețu, 2023: 104).

However, from this perspective, in addition to the shortcomings of the law found regarding the lack of provision of the concrete way of communicating the non-voluntary admission decision (There is a real risk for the data subject not to be able to use the remedies provided by law against that decision), there remains a problem of art. of Law no. 487/2022 which provides: "Clinical trials and experimental treatments,

psychosurgery or other treatments likely to cause harm to the integrity of the patient, with irreversible consequences, do not apply to a person with mental disorders except with his/her informed consent and subject to the approval of the ethics committee of the psychiatric unit, which must declare itself convinced that the patient has truly given his/her informed consent and that it responds to the interest of the patient". Poor drafting of the phrase `irreversible consequences` which is clearly a contradiction in terms because such consequences can never be in the interest of the patient. But the question persists: how genuine can such consent be for a patient with serious mental disorders in a deprivation of liberty regime?

In general, in most cases concerning 'alienated persons' with which the Court has previously been seized, the internal procedure for the admission of the persons concerned has been examined from the perspective of art. 5 of the Convention. Consequently, in order to determine whether the admission procedure was in accordance with art. 8 of the Convention, for example, the Court will rely, *mutatis mutandis*, on its jurisprudence regarding art. 5 § 1 (e) of the Convention.

In the context of this issue, we must mention the Decision of the Constitutional Court of Romania no. 601 of July 16, 2020, published in the Official Gazette no. 88/27 January 2021, by which it was noted that the lack of establishment of guarantees to accompany the measure of protection of the placing under judicial interdict is prejudicial to the constitutional provisions of art. 1 para. (3), of art. 16 para. (1) and art. 50, as interpreted according to art. 20 para. (1), and in the light of art. 12 of the Convention on the Rights of Persons with Disabilities", and, led to the adoption of Law no. 140/2022.

Judicial interdict is that means of protecting the natural person who, being deprived of the necessary discernment due to alienation or mental debility, has the effect of depriving him of the capacity to exercise and establishing guardianship. In the decision of the Constitutional Court mentioned above, it was noted: "the measure of placing under judicial interdict regulated by art. 164 para. (1) The Civil Code is not accompanied by sufficient guarantees to ensure respect for human rights and fundamental freedoms. It does not take into account the fact that there may be varying degrees of incapacity, nor the diversity of a person's interests, it is not ordered for a fixed period of time and is not subject to periodic review. Any protection measure must be proportionate to the degree of capacity, be adapted to the life of the person, be applied for the shortest period of time, be periodically reviewed and take into account the will and preferences of persons with disabilities. Also, when regulating a protection measure, the legislator must take into account the fact that there may be different degrees of incapacity, and mental deficiency may vary over time. The lack of psychic capacity or discernment can take different forms, for example, total/partial or reversible/irreversible, a situation that requires the establishment of protection measures appropriate to reality and which, however, are not found in the regulation of the measure of judicial interdict. Adequate degrees of protection must therefore be attached to the different degrees of disability, and proportionate solutions must be found by the legislator in the regulation of legal measures. An incapacity must not lead to the loss of the exercise of all civil rights, but must be examined in each individual case.

According to art. 164 para.(1)Civil Code: `The person who does not have the necessary discernment to take care of his interests, due to alienation or mental debility,

will be placed under a judicial interdict`, and according to paragraph (2) of the same article it is noted that this measure can also be taken against minors with limited exercise capacity. Therefore, if in the case of minors under 14 years of age the lack of discernment is due to a legal presumption, in the case of the adult it is due to an objective cause: alienation or mental debility. The content of alienation and mental debility is determined by the psychiatrist (Ungureanu, Munteanu, 2015: 382). The provisions set forth by art. 164 must be interpreted in a restrictive way, otherwise it could lead to abuse in cases where a mentally healthy person or a person affected by a psychosis or a person temporarily lacking in discernment is placed under interdict. In this context, we recall that in the old regulation of the Civil Code there is the judicial *council ,* which referred to the designation by the judiciary of a person to assist and authorize the conclusion of certain acts for the individual whose weakening of mind or inclinations towards waste required protection and supervision. This measure could be taken when the person's mental state was not so weak as to institute the interdict (Hamangiu, Rosetti-Balanescu, Baicoianu, 1928: 476-487) . The one placed under judicial counsel and the married woman were only assisted by those in law to complete their capacity, unlike the minor or interdict who were represented by their guardian. We also recall that if a natural person, due to old age, illness or physical infirmity, although capable (with discernment), cannot personally defend his interests under normal conditions, he will be appointed a *curator*, according to the law.
Instead, the interdict creates the prerequisites for the establishment of *guardianship*.

According to the provisions of art. 168 of the Civil Code, the settlement of the request for placing under judicial interdict is made according to the provisions of the Code of Civil Procedure. According to art. 935 of the Code of Civil Procedure, the application for the interdict of a person is solved by the tutelage court in whose constituency he/she has his/her domicile. The interdict may be requested by any interested person, including the prosecutor, according to art. 111 of the Civil Code, and according to the jurisprudence, even by the sick person, in a moment of lucidity (Ungureanu, Munteanu, 2015: 382), as well as by the guardianship court, in the case of ex officio referral (Nicolae, Bicu, Ilie, Rizoiu, 2016: 240) . This moment of lucidity will not be confused with the absence of alienation or mental debility, which will be ascertained by a committee of specialist doctors at the time of the interdict, as we have already shown that no transient lack of discernment equates to the existence of alienation or debility.

In general, the protection of the minor is achieved by the parents, by establishing guardianship, by giving in placement or, as the case may be, by other special protection measures provided by law, and the protection of the **adult** takes place by establishing the measure of judicial counselling or special guardianship or of the curate or other measure provided by law.

Guardianship is an institution for the protection of both the minor, who is deprived of the care of his parents, and the adult, who is mentally disabled. The guardianship of the natural person is carried out by the guardian.
The essence of the matter is the decision of the European Court of Human Rights pronounced in the case N. against Romania, dated November 28, 2017, which shows that the Romanian state violated N. 's right to privacy, when he was placed under interdict, as well as when he was excluded entirely from the procedure of changing the legal guardian. In this case, the deprivation of liberty of the applicant affected by mental

disorders was justified, for a certain period, by the need to protect him. The authorities indicated, however, that only the maintenance of the admission could provide the applicant with the housing and social assistance he needed. But on this issue, the European Court indicated that "the objective need for housing and social assistance must not automatically lead to the imposition of custodial measures" (para. 146). Also, in case B v. Romania, pronounced on 19 February 2013, the Court ruled that the national authorities, especially the courts, have the obligation to interpret the provisions of the national law applicable in the field of psychiatric hospitalization and, more generally, in the matter of the integrity of the person in the spirit of the right to respect for private life, guaranteed by art. 8. In addition, art. 8 requires the authorities to maintain a fair balance between the interests of a person with mental illness and the other legitimate interests involved. As a rule, they must be given a wide margin of appreciation with regard to such a complex issue as the determination of a person's mental capacities. In fact, the national authorities benefit from direct links with the persons concerned and are therefore best placed to deal with these issues. For its part, the Court's task is to appraise, in the light of the Convention, decisions taken by those authorities in the exercise of their discretion. The discretion afforded to the competent national authorities varies according to the nature of the issues raised and the importance of the interests at stake. More stringent control must be exercised over particularly severe privacy restrictions (Chtoukatourov v. Russia, n. 44009/05, section 87-88, ECHR 2008).

In addition, the Court recalls that, although art. 8 does not provide for any explicit condition of the procedure, the decision-making process relating to the measures constituting an interference must be fair and properly respect the interests protected by this provision. Thus, the extent of the State's margin of appreciation depends on the quality of the decision-making process: whether the procedure was extremely deficient for one reason or another, the conclusions of the domestic authorities are further questioned.

Thus, even if amendments have been made to the legislation in question, the application of the substantive law rules must comply with the requirements of the conventional law, in the light of all the implications, namely the respect for the right to family life.

According to Law no.140/2022 : "An adult who is unable to take care of his/her own interests due to a deterioration of his/her mental faculties, temporary or permanent, partial or total, established as a result of medical and psycho-social evaluation, and who needs support in the formation or expression of his/her will, may benefit from special ***legal advice*** or ***guardianship***, if such action is necessary for the exercise of his/her civilian capacity, on an equal basis with other persons".

A person may benefit from ***special guardianship*** if the deterioration of his mental faculties is total (as opposed to ***judicial counselling*** when the person presents the deterioration of his mental faculties is partial and it is necessary to be continuously advised in the exercise of his rights and freedoms) and, as the case may be, permanent and it is necessary to be continuously represented in the exercise of his rights and freedoms.

Special guardianship can only be established if adequate protection of the protected person cannot be ensured by establishing assistance for the conclusion of legal acts or judicial counselling.

The establishment of special guardianship is ordered for a period not exceeding 5 years. However, if the deterioration of the mental faculties of the protected person is permanent, the court may order the extension of the special guardianship measure for a longer period, which may not exceed 15 years, unlike the general regulation which provides, in principle, for the establishment of guardianship of the prohibited for an indefinite period.

The institution of judicial counselling is ordered for a period not exceeding 3 years.

By the decision by which the protection measure was taken, the guardianship court appoints the person who will exercise the function of guardian from the date the decision remains final.

In the absence of a appointed guardian, the guardianship court shall appoint as a matter of priority, if they do not oppose with good reasons, the spouse, parent, relative or in-law, friend or person living with the protected one if the latter has close and stable links with the protector, able to carry out this task, taking into account, where appropriate, the ties of affection, personal relationships, material conditions, moral guarantees that the one called to be appointed guardian, as well as the proximity of domicile or residences.

If none of the aforementioned persons can assume guardianship, the guardianship court appoints a personal representative who has acquired this capacity under the terms of the special law.

When appointing the guardian, the court takes into account the preferences expressed by the protected person, his/her usual relationships, the interest shown in his/her person, as well as any recommendations made by persons close to him/her, as well as the lack of interests contrary to the protected person. Pursuant to art. 166 of the Civil Code must be retained the novelty brought in the sense that the person with full exercise capacity has the possibility to designate by unilateral act or mandate contract, concluded in authentic form, the person who would be appointed as guardian to take care of the person and his/her assets in case he/she would be placed under judicial interdict.

Therefore, aspects from a procedural point of view are cut in situations that are somewhat easy to manage, but when there are significantly sensitive issues, such as the existence of the children of the person to be protected, such as in case B against Romania, it is imperative to analyse the concrete circumstances and to decide in relation to the particularity of respecting the right to family life.

The European Court recalled the principles flowing from its settled case-law, according to which, for a parent and child, being together is an essential element of family life. In addition, the placement of the child in the care of public assistance does not put an end to natural family relationships. Decisions taken by the responsible authority leading to the placement of a child in a reception centre are considered as interference with the applicant's right to respect for family life and must be considered as such. According to the constant jurisprudence of the Court, such an interference violates art. 8, unless, as provided by law, it pursues one or more legitimate purposes within the meaning of paragraph 2 and is necessary, in a democratic society, to achieve them. The notion of necessity implies an interference based on an imperative social need and, in particular, proportionate to the legitimate aim pursued. Although art. 8 tends mainly to protect the individual against arbitrary interference by public authorities, it can also

generate positive obligations inherent in an effective respect for family life. In order to rule on the need for interference in a democratic society or on the existence of a breach of a positive obligation, the Court shall take into account the margin of appreciation afforded to the Contracting States. Thus, the procedures applicable to the regulation of matters concerning family life must prove compliance with it; in particular, parents normally have the right to be heard and fully informed on this subject, although, in certain circumstances, certain restrictions may be justified, pursuant to art. 8 § 2. The European court acknowledges that the responsible authorities have a difficult, even extremely difficult, task when they rule in such a sensitive area. Providing for a rigid procedure in each case would only create more problems. Therefore, a certain amount of discretion must be reserved to them in this regard. On the other hand, the examination of this aspect of the case must be based on fundamental information: there is a high risk that the decisions will prove irreversible. It is therefore an area that requires more than usual protection against arbitrary interference.

It should be determined, in the light of the circumstances of each case and in particular the seriousness of the measures to be taken, whether the parents were able to play a sufficiently important role in the decision-making process as a whole to afford them the protection required by their interests. In the event of a negative answer, it concerns the non-observance of their family life and the interference resulting from the decision cannot be considered "necessary" within the meaning of Article 8 (*Case B v. Romania*, ECHR: para. 108-110).

Finally, it should be noted that the authorities must pay particular attention to vulnerable persons and must provide them with increased protection because their ability or willingness to complain is often diminished.

In conclusion, Law no. 140/2022 seeks to bring a unitary solution to the need for legal representation of natural persons in situations characterized by lack or diminution of discernment, in accordance with the requirements of the European Court of Human Rights, providing more guarantees of procedure against arbitrariness and by introducing shorter terms of the protection measure, the possibility of periodic review and, last but not least, the application of the legal provisions in particular must respect human dignity.

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