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THE INCIDENCE OF COVID-19 ON THE RIGHT TO PROPERTY THROUGH THE LEASE AGREEMENT

Mónica Muñoz-Alonso López

PhD in Private Law. Professor of Civil Law
at: Universidad Francisco de Vitoria. Lawyer.
Mediator in environmental matters. Professor
of Health Legislation in the Master's Degree
in General Health Psychology taught by:
Universidad Francisco de Vitoria.

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Abstract: I. Introduction. II. Historical reference to Property Law. III. The urban rental relationship. 1. Housing lease. 2. Lease for use other than housing. IV. Covid-19 and government regulations. V. Incidence of the Covid 19 in the agreed rent and in the duration of the lease. 1. Housing lease. 2. Lease for use other than housing. SAW. conclusions. VII. Bibliographic references.

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INTRODUCTION

The subject of this study deals with the incidence of Covid-19 in Private Property Law.

In Spanish Law, the owner's power regarding the use and enjoyment of the thing is being altered through the lease.

Property Law enjoys the broadest faculties that the holder of a subjective right can have; In countries where there is constitutional recognition as a fundamental right of the right to property, as is the case of the Spanish Constitution, the powers that derive from this right can only be limited by Law and, even so, the Law cannot reduce these powers to the point of leaving them without content, since this would mean leaving without content the most important subjective right in a Rule of Law; would imply the abolition of private property and, consequently, of inheritance.

Although the Spanish Constitution allows the content of the property right to be delimited and delimited, this will always be by means of a Law.

With the excuse of Covid-19, several Royal Decree-Laws have been published that limit the right of the owners in their faculty to enjoy the thing.

HISTORICAL REFERENCE TO PROPERTY LAW

The right to property is one of the oldest known rights.

Following Fustel de Coulanges¹, in both Greek and Italian societies, land ownership was considered one of the three essentials, along with domestic religion and the family. There was a close relationship between the three of them. The family gods required a fixed abode and had to sit on the ground. The home was the altar and that stone where the family god dwelt could not be transported. The idea of property and religion go together; the domestic gods only protected the family to which they belonged, they were their property. The household takes possession of the land. The family is attached to the home, the home to the ground. The same was the case with the tomb, the place where all the members of that family had to rest. The soil was inalienable and imprescriptible. This direct relationship between domestic religion and private property meant that a family could not renounce one or the other, the owner was prohibited from selling his land².

Property belonged to the family, not the individual. In Roman Law it is from the XII Tables when the sale of the property was allowed.

In the Greek people, private property on the land was recognized, however, the owner of the land did not own the crops or their fruits, they had to be put in common, or, at least, most of it.

The Germanic peoples did not conceive of individual property on the land, there was no such Roman concept of private property on the ground; the tribe assigned each of its members a plot of land to cultivate that changed every year; but the German was the owner of his harvest; the same was the case

1 Fustel de Coulanges, (1931), pp. 77-93

2 Aristotle. Politics VI, 2, 5

Plato The Laws. Law XII, page: 842

with the herds, the land belonged to everyone, it was a property in common hands.

The Roman sense of private property on the ground and on everything that it produces or settles is the one that has come down to us.

The recognition of the right to private property does not imply that the power of the owner is infinite. The absolute character of the Roman property right³ it does not exist in any modern legislation. The owner must act within the limits that constitute its content. These limits differ in each country and, within them, these limits change depending on the corresponding historical moment. The right to property has, like all subjective rights, a social purpose to fulfill.

Although the Spanish Civil Code, following the Napoleonic Code, does not define the right to property, but limits itself to enumerating some of the faculties of the owner, most of the doctrine defines this right as the full legal power that can be had over a thing and that allows subjecting it directly and totally to our exclusive dominion⁴.

Now, that is defined as full legal power, or the broadest right of dominion that one can have over a thing⁵, it does not mean that the proper or normal content of the Property Right has no limits; The owner has a series of powers that he can exercise based on that full power, but within the limits allowed by law⁶.

The property right is a private subjective right and like any other subjective right, the satisfaction of the private interest of the owner has to be coordinated with the interest of the community, with the social interest; This connection or coordination is carried

out through the establishment of limits to the faculties of the owner and the imposition of duties in charge of him.

The Spanish Constitution, in its article 33, indicates the social function as a delimiting criterion of the content of the right to private property; this social function will serve the law to limit the content or the power of the owner, limits will be imposed both in a positive aspect, the owner must do something, that if that limit did not exist he could or could not do it; and, in its negative aspect, the owner will not be able to do something or will have to do it in a certain way, and if that limit did not exist, he could do it. The owner is limited in his powers, but in no case may he be deprived of them or diminished to an extent that could imply his suppression. The social function as a limit to the power of its owner will be predicable or not depending on the type of property, and will be those that having a social value are considered worthy of protection by the legal system⁷.

In any case, the social function cannot leave the property right without content.⁸ Criteria are required that unify the delimitation of the essential content of the property right to avoid the disappearance of a unitary concept of the same, the socialization of some of its faculties in certain goods is more than evident⁹.

Among the faculties that the owner has is the power of use and enjoyment, the exercise of this power will depend on the good on which it falls, the social function limits the exercise of the enjoyment of the good, in these lines we are going to expose if the social function supposes a decrease in the exercise

3 Land ownership extends up to heaven and down to hell.

4 ALBALADEJO, (2004), p. 232. OCALLAGHAN, (2012), p. 54; DIEZ-PICAZO, (2008), p.445

5 ENNECERUS, KIPP Y WOLF. (1971) p. 297

6 Article 348 of the Spanish Civil Code states "property is the right to enjoy and dispose of a thing without more limitations than those established in the laws"

7 ANGUITA, (2010), p. 39

8 STS89/1994, in his particular vote, with reference to the forced extension existing in the Urban Leasing Law of 1964 and the non-possibility of updating the rent.

9 ANGUITA, (2010) page: 50

of this power when it comes to real estate and, specifically, in homes.

Perhaps, the limits to the power of use and enjoyment that the owner of a home has, imposed by the social interest, or taking advantage of extraordinary circumstances such as the ones we are suffering today due to Covid 19, can serve to gradually reduce freedom of agreements in the urban lease and, consequently, disappearing one of the faculties of property law.

The restrictions on proprietary powers must be construed in a limited way, in such a way that the owner of the property can condition its property for the use she sees fit, as long as she does not violate any legal prohibition.

The owner has a series of powers that are traditionally classified into two large groups, of free use: alienate, encumber, limit, transform, destroy (with the limitations derived from criminal law); and the faculty of use: use, enjoy, consume.

Among the faculties of use, the owner can use the thing and enjoy it directly or he can assign its use and enjoyment to a third party (for a fee or free of charge); when that transfer is of a home we find ourselves with some limits in public interest; in the interest of housing: land regime, urban planning and renting.

The assignment of the owner of his power of use and enjoyment can be done in different ways; You can assign your timeshare to different people, you can assign its use for a short season, you can assign the enjoyment while you hold a certain position or job position; You can use the traditional form of

lease or the most current tourist or vacation use. It must be noted the real rights of usufruct, use or habitation, but since they are normally for life they do not pose social problems. At least for now.

Let's see the transfer of the power of use and enjoyment through the urban lease relationship.

THE URBAN RENTAL RELATIONSHIP

In our Law, the legal rental relationship is regulated in the Civil Code, but there are few precepts for the cases of urban or rustic property leasing, for which reason laws were published that have been modified over time.¹⁰

Regarding the Urban Leasing Law (LAU)¹¹, Two types of lease are distinguished according to the purpose of the lease:

- A) Housing lease; here the purpose of the lease is to satisfy the tenant's need for housing on a permanent basis¹²
- B) Lease for use other than housing; what is known, according to the previous law, lease of business premises; In this case, the primary purpose of the lease is not to serve as a permanent home -house/room- for the tenant; This permanent nature allows seasonal housing leases, housing for reasons of position or trade, luxury housing to be included in this assumption.

¹³ and other assumptions. The purpose of leasing this group or modality is to carry out an industrial, commercial, craft, professional,

¹⁰ Law 29/1994, November 24, on urban leasing; Law 49/2003, of November 26, on rustic leases.

¹¹ Article 1 "This law establishes the legal regime applicable to the leases of urban properties that are used for housing or uses other than housing".

¹² Article 2 "1. Housing lease is considered to be that lease that falls on a habitable building whose primary destination is to satisfy the tenant's permanent need for housing. 2. The regulations governing the rental of housing will also apply to furniture, storage rooms, garage spaces and any other dependencies, leased spaces or services transferred as accessories to the property by the same landlord".

¹³ These are homes whose surface area exceeds 300 m², or when the initial agreed rent exceeds 5.5 times the minimum interprofessional salary in annual calculation (approximately 6,000 euros per month).

welfare, recreational, cultural, educational activity, etc.

The lease for the use of housing has a regulation of an imperative nature in some of its rules and in what concerns the subject we are dealing with, it affects the rent and the duration of the contract.

In the case of leasing for use other than housing, the regulation is dispositive, the autonomy of the will prevails.

For greater clarity in the exposition, I am going to start with the lease for residential use.

HOUSING LEASE

One of the mandatory rules provided by the LAU is the one referring to the duration of the contract.

In principle, the duration will be freely agreed by the parties, but this declaration of autonomy turns out not to be such. There is a minimum duration and if the parties establish less time, the contract will have to be extended until that duration is reached.

The issue of the duration of the contract has been the battle horse of the different political parties. The rental of housing confronts the two contracting parties, the landlord who has a home that does not need it to live in it, but that can be his economic support or a complement to it or, simply, a way to make profitable his savings; and, on the other hand, the tenant who needs a home to live permanently.

This need for housing is what seems to determine a minimum duration that guarantees certain stability to the tenant.

The duration of the lease has undergone several modifications and in the last one it is

distinguished, for the first time, depending on whether it is a natural or legal person lessor¹⁴. If the lessor is a natural person, the minimum duration to which the lessee is entitled is five years; If the landlord is a legal person, the minimum duration required of the landlord is seven years.

The reason for this distinction has no other reason than to punish companies or investment funds.

The duration is important because the amount of the rent, in terms of updating it, carrying out works and its repercussions, updating the deposit and possible subrogations will depend on it.

Once the mandatory period of time has elapsed, if neither party denounces the contract, it will be extended for annual periods up to three years, whether the lessor is a natural person or a legal entity.

In short, the total duration of the lease is eight years if the landlord is an individual and ten years if he is a legal entity¹⁵.

LEASE FOR USE OTHER THAN HOUSING

In the case of a lease for use other than housing, the so-called business premises lease, the duration is freely agreed, the law does not establish a minimum duration nor does it require extensions once the minimum duration has expired.

As a minimum duration is not required in the contract, there is no mandatory clause that has to depend on it.

¹⁴ Law 4/2013, of June 4, on measures to make the housing rental market more flexible and promote, established a minimum duration of three years.

Royal Decree-Law 7/2019, of March 6, on housing and rental, introduces the distinction between natural person landlords and legal person landlords. It also distinguishes the minimum duration depending on the landlord, five and seven years.

¹⁵ As an exception to the extension, article 9 provides: "Once the first year of the contract has elapsed and as long as the lessor is a natural person, the mandatory extension of the contract will not proceed when, at the time of its conclusion, it has been recorded in it, expressly, the need for the landlord to occupy the leased property before the expiration of five years to use it as permanent housing for himself or his relatives in the first degree of consanguinity or by adoption or for his spouse in the event of final judgment of separation, divorce or marriage annulment".

COVID 19 AND GOVERNMENT REGULATIONS

Covid-19 has caused an emergency situation in Spain, both health and economic. The decreed state of alarm gave rise to a lockdown for several months that caused an economic crisis in all sectors; Except for those declared as essential activities, the rest of the activities had to close and cease their production.

The declaration of the state of alarm meant that many economic activities had to cease or be reduced to a minimum, causing a decrease in income. This decrease in yields produced major liquidity problems to meet the financial obligations contracted and, as far as is concerned here, to meet the rental income for the premises.

The difficulty in paying rents by tenants led to agreements between landlord and tenant to delay payments or reduce the amount of rents while the situation lasted.

If the joint and several agreement by the lessor was not given, the only way left to the lessee was the court requesting the application of the *rebus sic stantibus* clause; It is a clause of jurisprudential elaboration, there is no written norm. The purpose of this clause is to review the contractual obligations when due to extraordinary or unforeseeable circumstances the balance of the benefits of the parties is altered; On the principle of equity and good faith, this doctrine would be applicable whenever, given supervening and extraordinary circumstances, that is, unforeseeable circumstances, a revision of the contractual obligations occurs.

In those cases in which circumstances occur that break the economic balance of the contract in such a way that it is impossible or very burdensome for one of the parties to comply with its provision, the application of the clause may be the solution to the economic crisis that has of course the Covid-19

pandemic.

In any case, the judges are not very supportive of the application of this clause, since jurisprudential doctrine is reiterated that the possibility of reviewing a contract with application of the general principle of the *rebus sic stantibus* clause requires the requirements of alteration of circumstances between the moment of the perfection of the contract and that of consummation, exorbitant disproportion between the benefits of the parties, which must have been produced by an unforeseeable risk and subsidiarity because there was no other remedy.

Against this traditional conception, another criterion arises that considers necessary an adjustment or adaptation of the institutions to the social reality of the moment. The economic crisis and its effects on economic activity is a notorious fact that does not require expensive expert reports to justify it. The economic crisis not foreseen in the contract as a possible cause for termination cannot prevent its inclusion in the unpredictability requirement.

The Spanish government did not wait for the solution to this imbalance to come from the will of the contracting parties and, failing that, through the courts, but rather hastened to publish two Royal Decree-Laws imposing moratoriums or moratoriums on the owner-lessor. reductions without the possibility of negotiation with the lessee.

These Royal Decrees suppose a limitation to the right of the owner, in the faculty of use and enjoyment of it, limitation imposed by Royal Decree-Law and not by Law, as required by the Spanish Constitution.

The Royal Decree Laws are a formula provided for in the Constitution for urgent cases in which parliamentary processing cannot be waited for, there is an urgent need for an issue and the Government assumes the legislative capacity of parliament. These Royal Decree Laws are submitted after

their validation by Parliament, which may approve or reject them, in the latter case it will be without effect, but without retroactive character, which means that it will be in force during that period.

On the issue at hand, the Spanish Government issued two Royal Decree-Laws, responding to the urgent need derived from Covid-19, which have had a great impact.

Royal Decree-Law 11/2020, March 31, by which urgent complementary measures are adopted in the social and economic field to deal with COVID-19.

Royal Decree-Law 15/2020, April 21, on urgent complementary measures to support the economy and employment.

As a novelty, it must be noted that by Royal Decree-Law 30/2020, of September 29, on social measures in defense of employment, the provisions of the aforementioned Royal Decree-Laws are extended.

This way of legislating prevents opposition to the measures adopted, violating the rights of landlords by preventing them from establishing other agreements with less aggressive tenants.

INCIDENCE OF COVID 19 ON THE AGREED RENT AND THE DURATION OF THE LEASING CONTRACT

Of all the established measures, the ones that interest us here are the imposition of an extraordinary extension in the duration of the lease contracts and a moratorium on the payment of rent.

HOUSING LEASE

These two measures, duration and payment moratorium, apply to lease contracts that are regulated by the Law of November 24, 1994.

The landlord is obliged to extend the lease

for a period of six months when the contract ends during the duration of the alarm decree and two months later¹⁶. If the contract is extended, this extension will also apply.

The next measure that affects us is the one related to the debt moratorium; the landlord is obliged to grant the tenant a moratorium on the payment of rent. The moratorium is automatic, which means that there is no possibility of negotiation, which means a limitation on the right of ownership. The autonomy of the will in contractual matters and the requirement of a law that can limit the right of the owner is violated.

The duration of this moratorium is for the duration of the state of alarm and the following four months.

The amounts subject to moratorium may be recovered by the lessor in the manner established by the Royal Decree itself; The amount will be divided and may be required monthly during the three years following the end of the state of alarm and the following four months. If the contract is no longer in force, the term will be reduced.

In order for these measures to be applied, a series of requirements are established for the lessee.

The lessee must be considered economically vulnerable and not enjoy aid from the State.

With this term of vulnerable tenant, the Royal Decree refers to tenants in a situation of unemployment -ERTE- loss of income, if it does not reach 900 euros per month and does not have a home owned or usufruct in the territory in Spain. The tenant whose housing and supply expenses exceed 35% of his total net income is also considered vulnerable.

As an alternative measure to the moratorium on the payment of rent, the landlord is granted the possibility of choosing to reduce the amount of the rent to 50% during

¹⁶ March 21, 2020 is the date of declaration of the state of alarm and it was extended 6 times (March 25, April 9, May 6, May 20, June 3, ending on June 21, 2020). On November 9, a new alarm decree was issued that will end on May 9, 2021.

the state of alarm and four more months¹⁷.

Given the two possibilities that the Royal Decree grants to the landlord, the question that arises is to know which one may be of interest.

If the lessee obtains any aid from the State, the moratorium is incompatible and therefore the landlord would collect 100% of the rent from that moment on; but if he has opted for rent reduction then the tenant's help is not incompatible with it, therefore, the landlord would not recover 100% of the rent.

As a novelty, it must be noted that Royal Decree-Law 30/2020 of September 29, on social measures in defense of employment, extends until January 31, 2021 the term to request the landlord a moratorium or a partial remission of the rent if the landlord is a large holder or public entity; likewise, the term to benefit from an extraordinary extension of 6 months is extended until that date, provided that the landlord, a natural person, has not communicated the need for the home for himself.

LEASE FOR USE OTHER THAN HOUSING

With regard to business premises leases or as expressed in the Urban Lease Law, lease for use other than housing, Royal Decree Law 15/2020, of April 21, on complementary urgent measures to support the economy and employment, imposes a series of measures on the landlord for the duration of the state of alarm.

If the landlord does not reach an agreement with the tenant, the following measures are established: a moratorium on the payment of rental income during the state of alarm and four months after; or a reduction in the amount of rent. In the case of opting for the moratorium once the term has expired, the

¹⁷ If the lessee continues with the classification of "economically vulnerable".

¹⁸ These include: a 75% reduction in billing, taking the same quarter of the previous year as a reference; registration status in social security; total closure of activity due to pandemic.

amounts owed will be divided monthly for two years.

Unlike the housing lease, in this type of lease, the aforementioned measures are imposed on the landlord, mandatorily, when it is a company, public housing entity or large holder.

The Royal Decree considers the natural or legal person who is the owner of more than 10 urban properties, or a constructed area of more than 1,500 m², to be a great holder.

If the landlord is not a company, public housing entity, or large holder, the tenant may request from the landlord a temporary deferment in rent payment or a reduction. The parties may agree on the terms in which the agreement will be carried out.

These measures may be requested by tenants who meet the requirements set forth in the same Royal Decree-Law.¹⁸

The parties are authorized to have the required deposit in accordance with article 36 of Law 29/1994, of November 24, as total or partial payment of any of the monthly rent payments. The amount provided must be replenished within a maximum period of one year.

This possibility supposes a violation of the very purpose that is pursued with the deposit, which is to serve as a guarantee for the fulfillment of the obligations that the lessee has, other than the obligation to pay; the lease law itself prohibits it. In addition, the deposit must be deposited in the body that each CCAA has determined. Therefore, this possibility supposes a further violation of the right of the owner.

CONCLUSIONS

1. It is preferable to talk about Covid-19 and not about a pandemic, since the measures imposed could be generalized

to other cases of a pandemic.

2. The Government is obliged to adopt measures that reduce the negative impact that Covid 19 has on the economy, but I do not believe that the solution is to impose restrictions on landlords in their powers of property rights. The restrictions imposed do not entail a consideration for what makes them unfair. And, furthermore, this way of legislating is not adequate, especially when the right to enjoy the right to property is being limited, since, in accordance with the constitutional mandate, any alteration in the content of the right to property must be done by law. The state of alarm decreed prevents Parliament from validating the provisions of the Royal Decree-Laws, so if they are annulled at a later time the damage has already been done; although it always remains to demand patrimonial responsibility from the administration.
3. With these restrictions, the balance of the contractual benefits of the parties is further altered. In the contract it has been possible to agree that the non-individualized general housing expenses (community expenses) are included in the amount of rent to be paid. And in this case, the rent reduction measures or moratorium on payment harm the landlord who will not only not collect the rent, but will have to pay some expenses that the tenant must pay. In the same way, it is worth asking if the tenant is obliged to pay these expenses if it has been agreed in the contract and they are not included in the amount of the rent or he may request a reduction or moratorium. The same must be noted in the case of payment of taxes or rates.
4. The principle of equality in terms of the landlord is violated since different measures are established according to the type of person. In the same way, in the case of tenants, people who may be in a state of economic vulnerability are excluded, but do not meet the requirements. Perhaps it would have been better to offer help to all tenants and establish compensation for landlords, the Government cannot evade its obligation to protect citizens by imposing it on some of them, in the case at hand, landlords.
5. These forced situations provided for in the Royal Decree-Laws leave many issues unresolved, it is questioned whether the lessee could request the suspension of the contract instead of the *rebus sic stantibus* clause. The tax agency will stop entering the amounts corresponding to the Value Added Tax (VAT) of income and will have a reduction in income from Personal Income Tax (IRPF).
6. Another reasonable doubt is whether the constructed area of more than 1,500 square meters refers to a single property or the sum of several can also qualify as a large holder. And it is also worth questioning whether the reference to more than 10 properties is any property, commercial premises, home, rustic property, in full ownership or undivided; we must understand that it refers to more than 10 urban properties, in full ownership; Therefore, rustic farms and situations of undivided joint ownership are excluded.
7. Doubts also arise regarding seasonal housing leases; it is a home, but the LAU includes it in a lease for use other than housing and it is doubtful that

the tenant is self-employed or a small business, so they will not meet the necessary requirements to demonstrate the situation of social and economic vulnerability as a consequence of COVID-19. This type of lease is frequent in the case of students who, due to the suppression of face-to-face classes due to the effects of Covid 19, have had to leave, since this circumstance was not

foreseen, only the agreement with the landlord will allow a reduction in rent, a moratorium or possible withdrawal from the contract. On the contrary, there will be no problem in the case of leasing an office or office in a home to be eligible for the measures, as long as the requirements seen for leases for use other than housing are met.

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