THE MARGINAL WARNING NOTE, ITS NATURE AND LEGAL EFFECTS

Gisel Alejandra Olmedo*
Lawyer. University Professor
https://orcid.org/0000-0002-0064-5699
gissy-olmedo@hotmail.com

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RESUMEN

The Panamanian Registry System has provided peace and tranquility to our society for one hundred and eight (108) years and was established with the purpose of giving public faith to the registry, providing the registrations with publicity, substantivity and specialty of the rights recognized therein. If the registry institution did not exist, uncertainty and social confusion would soon follow. The existence of the Public Registry of Panama is based on Title II of Book Five of the Civil Code of the Republic of Panama, approved by Law No. 2 of August 22, 1916, which came into force on October 1, 1917, with a specific objective: *"According to the new registration system, disputes over the ownership of real estate in which the right of prescription must be asserted will be considerably reduced"*.[1] In summary, the registration has a constitutive character and legal certainty, due to the fact that the principles of rogation, successive tract, authentic title, legality, publicity, priority, specialty, legitimacy, public faith have a single purpose: control, order and clarity in the registrations providing legal certainty to citizens.

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* Master in Registry, Real Estate and Notarial Law from the Universidad Latina de Panamá, and Graduate of the Iberoamerican Course on Registry Law of the Association of Registrars of Spain - Autonomous University of Madrid.

1 EXPLANATORY MEMORANDUM. Civil Code, document published in the Official Gazette 2,418 of September 7, 1916.

INTRODUCTION

The reorganization of the Registry is an extremely important registry issue. The reorganization per se, is closely linked to the principle of publicity. By virtue of this principle the content of the Registry is understood to be accurate and operates for the benefit of the third party.

The subject of the registry publicity and the error, has been approached by the Spanish author Manzano Solano states in this respect:

"The essence of the registry publicity, as an instrument of legal certainty, lies in the protection of the appearance created by the registry pronouncement, by the exaltation of the rights to the registry status. The force of that status (constitutionally protected and under the safeguard of the Courts) is such that, in case of disagreement or discordance between the Registry and reality, the legitimizing presumption maintains the former over the latter." [2]

The registry systems aspire to maintain the least amount of discordances possible, however, they can occur as a result of extra-registry actions or as a result of registry actions such as: error and omission.

Let us talk about the error and how it is part of our legal systems, and it is analyzed from several points of view: error[3] as a vice of the will; error of fact and error of law, which is the inaccurate appreciation about the existence or qualities of a fact, or about the existence or interpretation of a rule of law; error in its broad sense as to its application in procedural law, which is related to any deviation from reality or from the applicable law in which a judge or court incurs when ruling in a case and simply error as mistake, error or mistake.

Omission[4] can be understood in ordinary language, and also in legal language, it can be distinguished between omission per se and commission by omission. The omission itself consists of a failure to act, a failure to act, a failure to abstain. In the field of criminal law, omission has legal connotations and, as a result of the crime of omission, it usually consists in the maintenance of a state of affairs, the rule violated being a prescriptive rule that orders a positive act or action.

2 MANZANO SOLANO, ANTONIO, Mortgage Studies, Association of Property and Mercantile Registrars of Spain, 2009, p. 690

3 www.enciclopediajuridica.com/d/error.htm

4 www.enciclopedia-juridica.com/d/omision/omision.htm

Following the order of ideas, Article 1790 of the Civil Code covers the terms error and omission. From the perspective of the referred code, the meaning of error is conceived as mistake, error or mistake and in the case of omission is a failure to do, failure to act and it is concluded that they are the product of human actions but in the case at hand are errors or omissions of a public servant called Registrar General (General Director) that cannot rectify or correct, and just those errors or omissions that cannot be rectified by the Registrar, which ultimately brings legal consequences.

The immediate consequence of an error that cannot be rectified by the Registrar is called Marginal Note of Warning and it is regulated in Article 1790 of the Civil Code that we cited:

> **Article 1790:** *"Whenever the Registrar notices an error that cannot be rectified by himself, he shall order a marginal note of warning to be placed on the entry and shall notify it through the official newspaper and shall notify the interested parties in the office's dockets, if he is unable to notify them in staff.*
> *This marginal note does not annul the registration; but it restricts the rights of the owner in such a way that until it is cancelled or the rectification is made, if necessary, no subsequent operation may be carried out in relation to the entry in question. If by mistake any subsequent operation is recorded, it shall be null and void".*[5]

Article 1790 of the lex cit describes the consequence of the error perceived by the Registrar and which cannot be corrected, but the rule does not describe what the Marginal Warning Note is. To understand what it is, we must go back to the beginning of the last century and the way registrations were made at the beginning of the last century.

The inscriptions were made by the system of handwritten transcription (hand and handwriting) and by extracts in booklets and these, like a school notebook, had margins on both sides of the page (folio). In these margins, annotations were made that required special attention and among these annotations were: the marginal notes of warning.

The marginal warning notes are a notice that, at the same time, contains the affidavit of a public servant called Registrar General (nowadays General Director), where he states that he made an error or an omission that he cannot correct by himself. On this subject, it is important to point out that the marginal notes of warnings only apply to entries and remain in force until the error or omission that generated them is corrected.

5 Subrogado por el Artículo 1 de la Ley N°43 de 13 de marzo de 1925, Gaceta Oficial 4,622 de 25 de abril de 1925.

As for the legal nature of the marginal warning note, it is clearly established by the civil law, so it is clearly an administrative action performed by the public servant called Registrar General (General Director), which he performs under his own responsibility.

The marginal note of warning is not a judicial order nor is it a precautionary measure, due to the fact that, in the first instance, the marginal note is not decreed by a Court, but on the contrary, it is a public servant subject to the Executive Branch. It is important to remember the definition of precautionary measures, either in criminal law or in civil law, and they are classified as personal precautionary measures or real precautionary measures depending on whether they affect the staff's personal freedom or the freedom of disposal of assets or administration of either the defendant or the accused. Depending on the measure that is decreed, the purpose will be to ensure the outcome of the process, ensuring the safety of society or the victim and/or to ensure the existence of sufficient assets for an eventual reparation or compensation to the victim in the criminal sphere or to determine a lawsuit involving real estate, movable property or rights exercised over a particular legal person.

The precautionary measures are inscriptions of provisional character and that have as purpose to guarantee the result of the process, and that applied, take the good out of the commerce of the men and limit the dominion to dispose freely of the same ones. The marginal note of warning, unlike a precautionary measure, restricts the rights of the owner in such a way, that until it is cancelled or practiced, the rectification may not be made any subsequent operation, related to the entry in question and if by mistake any subsequent operation is registered, it will be null and void.

The effects of the Marginal Warning Note are limited to the operations of a registry nature and therefore, it is not a judicial order subject to recursive measures, which means that it is not subject to the Appeal of Appeal[6] because, as we have already expressed, they are imposed under the responsibility of the General Registrar (Director General) and this has been established by ample jurisprudence of the Supreme Court of Justice[7]: Resolution of May 26, 1921, Resolution of November 15, 1921, Resolution of February 22, 1922, Resolution of February 22, 1961, Resolution of March 22, 1973, Resolution of August 22, 1973.

The limitation of a registry nature imposed by the marginal note of warning is to prevent new registrations from being made until the errors or omissions made by the General Registrar are corrected, therefore, its purpose is not to ensure the result of a process, to restrict or limit the domain over the property, nor does it annul or declare illegal a registered or pending registration[8] Hence our conclusion that the Marginal Note of Warning is not a court order.

6 Ruling of May 24, 2001, Civil Chamber, Supreme Court of Justice, Presiding Judge: Rogelio Fabrega.
7 VAN EPS, JUAN, Public Registry of Panama, Fourth Edition, 2013, pp.271-273.
8 Judgment of January 30, 2007, Civil Chamber, Supreme Court of Justice, Presiding Judge: Jose Troyano.

The annotation of the marginal note must not only be made on the respective entry (where the error or omission was made) but it must also be published in the official newspaper and notified at the offices of the Office if it could not be notified in staff according to Article 1790 lex cit.

Regarding the lifting of a Marginal Warning Note, it is important to remember that the Public Registry of Panama is governed by special provisions, therefore, the general provisions of the Judicial Code on appeals cannot be applied to such pronouncements.

Only the resolutions of the Public Registrar denying or suspending the registration of titles and those related to the rectification of entries may be appealed. Therefore, in general, resolutions that deal with marginal warning notes are excluded from appeal, because they are notes that the Registrar places under his own responsibility:

> *"In this case such appeal does not proceed, that is, in the case of resolutions of the Registrar in which he does not agree to place marginal warning notes, because such notes are placed by this official under his own responsibility, thus guaranteeing any damage caused by his actions".* (Cfr. Judgment of August 22, 1973, Civil Chamber, Supreme Court of Justice).

This means that the Registrar's refusal to agree to the lifting of a marginal note is not subject to appeal, and this is precisely because it is not a precautionary measure. The marginal warning note is lifted when the error or omission that produced it is corrected. The marginal note does not restrict the rights of the owner, but rather prevents subsequent registry operations and if they are made by error or omission they are null and void.

In this order of ideas it is important to clarify that the marginal notes of warning are not provisional registrations because they do not in themselves transmit, modify or limit the domain over real estate subject to cancellation by virtue of the fact that the right in question has been extinguished by the mere passage of time or because the court orders its lifting or issues a ruling related to a business under its scrutiny.

Now, it is important to clarify that the constitutional norm has supremacy over legal norms. This principle of legal hermeneutics has been called the *"constitutionally compliant interpretation of the entire legal system".*

Having determined the juridical nature and the effects of the Marginal Warning Note, we will proceed to make an analysis in the light of the Political Constitution of the Republic of Panama.

One line of thought considers that the marginal note is a limitation to the domain and therefore, it can only be imposed on an entry for a maximum of twenty (20) years, regardless of whether or not the error or omission that generated it has been corrected.

Article 292 of the Political Constitution of Panama establishes a maximum term of twenty (20) years for the temporary limitations to the right of alienation and the conditions or modalities that suspend or delay the redemption of the obligations, let us see:

*"***Article 292.** *There shall be no property that is not freely alienable nor irredeemable obligations, except as provided in Articles 62 and 127. However, the temporary limitations to the right of alienation and the conditions or modalities that suspend or delay the redemption of obligations shall be valid for a maximum term of twenty years".*[9]

Now, it is pertinent to make a little history because it is evident how the legislator made the legislative adjustments to article 1790 of the Civil Code precisely in order not to violate the Magna Carta, let's see:

Civil Code adopted by Law No. 2 of 1916 [10]	**Civil Code subrogated by Law No. 43 of 1925** [11]
Article 1790: *"Whenever the Registrar notices an error that cannot be rectified by himself, he shall order a marginal note of warning to be placed on the respective entry and shall notify the interested parties by means of the official newspaper.* *As long as such note is not cancelled or the rectification is made, if necessary, no subsequent operation may be made in relation to the entry in question".*	***Article 1790:*** *"Whenever the Registrar notices an error of the kind that cannot be rectified by himself, he shall order a marginal note of warning to be placed on the entry and shall notify it through the official newspaper and shall notify the interested parties at the offices of the office, if he is unable to notify them in staff.* *This marginal note shall not annul the registration; but it shall restrict the rights of the owner in such a way that, until it is cancelled or rectified, as the case may be, no subsequent operation may be carried out in relation to the entry in question. If by mistake any subsequent operation is recorded, it shall be null and void".*

9 Political Constitution of the Republic of Panama, published in Official Gazette 25,176 of November 15, 2004.
10 Law N°2 of August 22, 1916 "Whereby the Criminal, Commercial, Mining, Fiscal, Civil and Judicial Codes, prepared by the Codification Commission, are approved" published in Official Gazette N°2,418 of September 7, 1916.
11 Law N°43 of March 13, 1925 "On Civil Reforms" published in Official Gazette N°4,622 of April 25, 1925.

Having made this historical comparison of the norm and how it was subrogated, we can support the reason why we do not agree with the lifting of the Marginal Warning Notes by erroneously using Article 292 of the Political Constitution as support. In previous lines, we defined the legal nature and effects of the marginal warning note, therefore we do not agree with this criterion for the following reasons:

1. The Marginal Note of Warning is not a limitation to the domain on movable or immovable property, but on the contrary, the same only limits the operations of registry character until the error or omission that generated it is corrected.
2. The Marginal Note of Warning is not a judicial order that could limit the domain of a good taking it out of the commerce of men to guarantee the result of a process.
3. The Marginal Warning Note is not a contract guaranteeing obligations.
4. The Marginal Warning Note is not a burden to be borne by a real estate.
5. The Marginal Warning Note is not a provisional registration according to the provisions of Article 1778 of the Civil Code.

Considering the above, a Marginal Warning Note cannot be lifted using the "Cancellation by the mere lapse of time" based on Article 292 of the Political Constitution of the Republic of Panama, but it must be lifted in accordance with the provisions of the second paragraph of Article 1790 of the Civil Code.

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