Bulletin of the *Transilvania* University of Braşov • Vol. 5 (54) No. 1 - 2012
Series VII: Social Sciences • Law

THE INITIATIVE OF THE JUDGE IN MATTERS OF EVIDENCE. ASPECTS OF COMPARATIVE LAW

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Abstract: *This paper aims at exploring a controversial issue in doctrine, jurisprudence and legislation of European countries and Latin America: the role judges should play in the system of evidence in the civil trial. Certain legislations and some theorists argue for a judge to be an "expectant observer", other for an active judge, a guide of the trial. We will try to emphasize the practical advantages and disadvantages of the existing theories (especially the Romanian, French and Spanish ones), in order to decide which solution is the most effective to achieve the purpose of civil trial: social peace.*

Key words: *judge, evidence, duty, party.*

1. Introduction

The system of evidence is often compared - as a function of the civil trial - either with the nervous system or the respiratory system of an organism.

A key issue that impacts the pattern of the civil trial and the type of judge is that of the judge's initiatives that can be recognized in matters of evidence.

In the Spanish doctrine it was noticed that the issue of the judge's probatory role can be analyzed from at least two aspects: a) all legislations recognize the right and obligation of the judge to intervene in the management of evidence: he/she can order the presentation of a document by a third party at the request of any party, question the witnesses, request clarification from the expert, perform local research, etc. b) in addition, the question is if the judge – in order to learn more about reality and to ascertain the allegations of the sides – may require the management of some evidence that was omitted by one party. See: [7].

2. Aspects of comparative law on the judge's evidentiary initiative

In the last years there has been noticed, at a legislative level, the consolidation of the judge's initiatives in the matter of evidence. Even in England a "code" of Civil Procedure was created – "The Civil Procedure Rules" came into force in 1999 – which defines the expert as more of a technical auxiliary of the judge than an "advisor" for the party.

In France, as well as in Romania, the evidence system is based on the Roman adage: *idem est non esse et non probari* (not having the right or not being able to prove it are equivalent situations, an

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unproven right is as if it does not exist). See: [1-4]

The burden of proof is established in art.1315 of the French Civil Code - "(1) The party seeking the enforcement of an obligation must prove it. (2) Conversely, he who claims to be released must justify the payment or the fact that caused the cancelation of his obligation", and also in article 9 of the Code of Civil Procedure. "It is the responsibility of each party to prove under the law the facts necessary to the success of their claim".

In applying these legal texts, the judge, at the request of a party, may order the forced disclosure of some evidence, under a financial sanction, if the opponent does not agree because they might be disadvantaged by that evidence. For example, at the request of a party the judge may order the communication of a written document by the other party or by a third party. The whole activity of evidence administration is conducted under the control of the judge (Article 11 para.2, art.139, 145, 156, 159 of the French Civil Procedural Code).

In addition, Article 10 of the French Code of Civil Procedure highlights the right of the judge to decide ex officio the administration of evidence: "The judge has the power to automatically order all the investigation actions legally eligible." The judge has only one capacity, not being obliged to order such measures: he/she has the right to rule only on evidence produced by the parties, pursuant to Civil Code and Article 9 art.1315 Civil Procedural Code.

Article 10 encompasses many aspects and seems to recognize the judge's full or unlimited evidentiary initiative.

However, the power of the judge is imperatively restricted by the provisions of Article 146 of the same Code: "(1) A measure of inquiry cannot be ordered on a fact if the party does not have sufficient evidence to prove it. (2) In no case shall a measure of inquiry be ordered to compensate the deficiency of the party responsible for the administration of evidence". Therefore, Article 146 sets two restrictions for the administration of evidence ex officio: 1) the evidence may be ordered only if a party does not have sufficient evidence to prove the chosen fact; 2) the evidence may not be ordered to compensate for the party's negligence in the management of evidence.

Moreover, for reasons of procedural economy, in Article 147 there is provided that the judge must limit himself/herself in such situations, to evidence that is sufficient in order to give a solution of the case and to cases that are easier and less expensive.

In French law, it is emphasized that the power to order or to refuse the administration of a piece of evidence is a discretionary power of the judges. Judges are also sovereign in appreciating the "deficiency" (fault, negligence) of the party in administering the evidence. See: [1-2]

In Spain in particular, but also in Italy and Argentina, there is friction in the matter of evidence, in relation to the ideological or political dimension that can be attributed to a civil trial and to the type of judge.

Thus, in these countries, the "warranty" theory has many followers in the civil trial – it refers to the trial that should provide full guarantees, being centered on the citizen; it has an oral and public character, and the judge is dynamic, exerting a "function" or a judicial power. It is so-called "judicial activism" (in the Iberic-American doctrine).

In contrast, there is a new trial doctrine - with far fewer followers, called "revisionists" in Italy and Spain - of the ultra-liberal, individualist trial: the trial is a matter of the parties and the judge is neutral, passive, with no evidence

initiatives; the procedure is mostly written and is based predominantly on the aphorism: ”Iudex judicare debet secundum allegata et probata partium”. The supporters of this theory consider that the opposite model to the liberal one involves a civil authoritative trial, typical of totalitarian regimes. See: [7].

According to the "revisionists", the judge, by virtue of his/her impartiality, plays the role of a sports referee, using a little hammer instead of a whistle, and only intervenes to keep the game clean and to declare the winner at the end.

In contrast, many European and American lawyers argue that the modern judge cannot be an ordinary spectator. In order to fulfill his/her constitutional duty, the judge must know the reality of facts and create his/her own factual support that will motivate the sentence. *Quaestio facti* comes before *quaestio iuris*: the solution of the latter depends on the configuration of the former. In order to fulfill the duty and power he/she was invested with, the judge must be able to intervene in the management of evidence.

Thus, the Spanish professor J.L.Vázquez Sotelo does not believe that the judge will lose his/her impartiality if he/she uses with caution this power, without exceeding the procedural framework and respecting the principle of contradiction. When proposing evidence, the judge does not know in advance what its outcome will be: whether it will favour one side or the other. Impartiality should not be mistaken for neutrality or indifference. One should acknowledge the evidence responsibilities of the judge "in order to secure the triumph of the subjective right by uncovering the reality of facts." See: [7].

The "sore point" of the debate is – in the opinion of the above Spanish author – the point regarding which the revisionists may be right. Indeed, the trial could become inquisitorial if the judge goes beyond the removal of doubts on the state of facts or the supplement or replacement of the evidence offered by the parties, but substitutes himself/herself to parties and alters the burden of proof.

In the European doctrine – see, for example, the Italian author Cappelletti – it is estimated that the civil trial is an instrument of public law even when it is disputed on private rights. Thus, there are two distinct levels: one of the initiative of the trial and the delimitation of the purpose of this trial – it belongs to the parties, then, the targeting and management plan of the trial directly involving the judge because this is a tool of public right created by the State. The right of a judge to have probative initiative is included here.

Consequently, the "warranty” supporters claim that revisionists should place their objections within the limits in which the judge can show his probative initiative instead of defending to an extreme the passive, neutral and silent judge type, whose sole task is to decide on the winner of the trial.

Also, the Spanish authors propose as a starting point in this debate the principle of availability: the right of the concerned party to decide on how their rights will test the evidence and the means they will use in order to show the evidence. See: [6-7].

The Spanish and Italian doctrines distinguish between two senses of the principle of availability: 1) having one’s own rights and 2) availability of the evidence. (To be noted that in Spain, LEC - art.216, does not show explicitly the availability principle, but mentions *requested justice*, "justicia rogada" - see art.216, 306, 307).

Therefore, the first sense refers to the private rights that are available to the holder: he exclusively has, usually, the power to enforce them and to take legal action, demanding state protection against those who violate or ignore the individual

rights. This first sense is the expression of the aphorism: "nemo iudex sine actore".

In the second sense, it refers to the availability of evidence in the trial initiated by the holder of the infringed right. Traditionally, this meaning is included in the generic formula "justicia rogada", considering that having the means of evidence is a derivation of its right of disposal, in the sense that only he who decides to seek justice is the one who must and can dispose of the necessary evidence to prove the right and the incurred damage.

In this sense, the Spanish professor J. Nieva Fenoli encourages a semi-contractual vision on the burden of proof, according to which the evidence is an instrument that belongs only to parties who agree to submit the dispute to court, seeing the judge as an expectant observer. See: [6]

Still, the Spanish author L.Vázquez Sotelo refers to the fundamental distinction made by German processualists in the second half of the nineteenth century between "maxima dispositiva" of one's own right (Dispositionsmaxime) and the principle of management in the trial of one's own right (Verhandlungsmaxime), which in the Italian terminology corresponds to "principio della trattazione" and the Spanish doctrine of "aportación de parte". More specifically, the principle of provision of their procedural rights entails that the judge cannot act without the request of the proceedings, outside or beyond the subject or for a different cause than that one claimed by the plaintiff. The second principle, regarding the evidence, is actually a technique which governs and manages the evidence, a technique used on a distinct plan, the "aportacion de parte" (the principle of management by one party) which means that the law assigns to the plaintiff and defendant the right and obligation to produce evidence to prove the statements in the trial. It is a reflection of the aphorisms: "da mihi factum et dabo tibi ius" and "iudex judicare debet secundum allegata et probata partium" which means that the sentence of a judge is based on facts and evidence submitted by the parties. It is actually a technical rule, found in all systems of law (and in common law) and has a practical background in the sense that the parties know best how to prove the rights they claim, thus saving the resources of the justice system.

More specifically, the Spanish professor J.L.Vázquez Sotelo criticizes the dull and restrictive formulation of art. 435 of the current Ley de Enjuiciamiento Civil No.1/2000 (LEC 2000): "Final diligence: 1. Only at the party's request can the court decide the final endeavour, as final diligence, the management of evidence in accordance with the following rules:

a) One cannot manage as final dispositions the evidence that could have been presented in due time by parties, including those that could have been presented as proof of the court referred to in paragraph 1 of Article 429.

b) When, for reasons unrelated to the will of the party who presented it, acceptable evidence could not be administered.

c) Also, relevant and useful evidence may be admitted referring to new facts or information as provided in Article 2862.

2. Exceptionally, the court may require, ex officio or upon request, the management of new evidence for relevant facts mentioned in due time, if previous evidence has failed due to circumstances that have disappeared and were independent of the will and diligence of the parties, on condition that there are reasonable grounds to believe that new evidence allows us to obtain certainty about those facts. In this case, in the act in which such diligence is allowed, circumstances and reasons shall be expressed in detail."

LEC 2000 explains in the memorandum of reasons why it replaced "diligencias para mejor proveer" (from the old LEC from 1881) with "diligencias finales", the main argument being related to the consistency of the civil trial: "as a final measure, only evidence that could not be accepted for reasons unrelated to the will of the party concerned can be presented and accepted". The new 2000 law considers it non-procedural that these "final diligences", the consequences of the parties' negligence should be rectified; evidence is seen as an obligation of parties to defend their own rights and interests.

However, it is noticed that the new regulation does not remove the criticism made by authors who are against evidence initiatives of the judge and under this regulation, the judge may favour one side, becoming biased. Furthermore, the text being very restrictive, and not of much help to the judge who would like to know the status quo as accurately as possible. The text is also criticized because these final diligences can be taken only in the ordinary trial (not in summary or special proceedings) and only in the first instance. In these circumstances, in 2007 a decision of the Spanish Supreme Court stated that such measures can be admitted in the higher judicial instance in order to ensure effective access to justice – a fundamental right which should take precedence over a "slip" of the legislative.

It is therefore considered that the new LEC represents with view to the aforementioned aspect, a reversal of history: it removes the functionality of the old institution - "Diligencias para mejor proveer" (used for centuries and which had also been adopted on the Latin American continent) without removing the inconveniences related to the impartiality of judges (and sometimes to their interest in delaying the pronunciation of a solution) and without helping the judge who wants to know the facts as well as possible in order for his sentence to comply with the reality and the law.

Moreover, in the last decades of the Spanish law, there has been noticed that Spanish judges have not used too much the evidence prerogatives given by law, therefore there is no danger of judicial abuse.

In Romania, the New Code of Civil Procedure generically refers to the role of the judge in matters of evidence in Article 10, Article 22, and art. 248. In our legislation, the evidence management is also subject to legal restrictions pending trial: therefore, if one side is in possession of a piece of evidence, the judge may, at the request of other parties or ex officio, order its presentation under the penalty of payment of court fines [5]. Also, specific duties of a judge in the administration phase of evidence are provided in art.259-art.239, texts that refer explicitly to specific evidence.

But more than that, "The role of the judge in finding the truth" is raised to the rank of a principle of the civil trial and is regulated by Art. 22 of the New Civil Procedural Code. In order to find the truth, the judge is conferred by law a number of powers, including in the area of evidence: "The judge has a duty to insist by all legal means to prevent any mistake in finding out the truth in question, based on establishing the facts and correct law enforcement, in order to deliver a thorough and legal sentence. To this end, regarding the facts and legal arguments that the parties plead, the judge is entitled to ask them to explain themselves, verbally or in writing, to debate on any factual or legal circumstances, even if not specified in the request or in the sentence of defense, to order the administration of evidence which they consider necessary as well as other measures required by law, even if the parties are against it." See: [4].

We note that a similar provision is given in art.129 of the former Code of Civil Procedure (from 1865).

3. Conclusion

In theory, there is a clear opposition between the type of judge who sits with "crossed arms", "spectator" of the trial and that of a "chief judge, supervisor" of the trial, who is still limited by the contradictory attitude belonging to parties.

Revisionists entirely deny the power of the judge of materially conducting the trial, arguing that in this way, a judge may lose his/her impartiality, helping one of the litigants over another.

Making a comparative analysis of summarized doctrine laws and theories, we note that the Romanian judge has the broadest powers, less restrictive in the field of evidence. The active role of the judge is not only expressly provided as a duty, but it is raised to the rank of principle, being regulated in the Primary Title of the New Code of Civil Procedure – in the chapter on "fundamental principles of civil proceedings". To achieve this duty of "activism", the Romanian legislative makes available to the Judge, without many reserves and even if "the parties are against", various procedural powers (or tools), including that of the administration of any evidence necessary. All these aspects are needed in order to uncover the truth and to ensure the delivery of a legal and thorough sentence.

But we cannot deny that in the Romanian law there are also situations when the judge becomes biased in this way, becoming the advocate of a party or trying to delay the pronouncement of a sentence in complex litigation to manage evidence that is no longer useful in those cases.

However, we consider that these abusive attitudes of certain Romanian judges – whom the "revisionists" fear – are still isolated in our legal practice and do not represent a major problem for the Romanian justice. On the contrary, many times, judges being overloaded, they fail to successfully fulfill in every case that active role.

On the other hand, one of the fundamental objectives of justice – that of maintaining peace and social stability deserves special legal protection, through the most complex means available to the legal body of the state.

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