THE OPTICAL ILLUSION OF THE RIGHT OF DEFENSE

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Abstract

The modern judicial system has as its unwavering axiom the right of defense in close and cohesive bond with the principle of free access to justice as well as the right to a fair trial. The famous French Revolution, which put the fundamental rights and freedoms at the center of philosophical thinking, just as Renaissance had placed man at the center of the universe, wanted to end a system tributary to false judgment and to the priority of rank. The contemporary Romanian era promoted, through the entire judicial reform, an axiomatically improved judicial system, linked, at least declaratively, to free access to justice, to celerity and to the elimination of various types of abuse in the exercise of the right of action, on the one hand, and, on the other hand, in tributary judgment. Justice has, since ancient times, been symbolized by the lady with the blindfold, holding the scales. From an axiomatic point of view, this symbol meets the human desire to see in justice a divine act of triumphing truth, or is perceived in a derogatory manner as in the nowadays remark that justice is blind and the judicial act tributary to a judicial mechanism regarding the administration of evidence and the relativity of legal truth.

Keywords: right of defense, free accesss to justice, right to a fair trail

The right of defense is consecrated in the Romanian legislation by means of Article 24 of the Constitution, Article 15 of Law no. 304/2004 on judicial organization, republished in the Official Journal no. 827 of 13.09.2005, Article 10, Article 89 and the following of the Criminal Procedure Code (Law no. 135/2010), published in the Official Journal no. 486 of 15.07.2010, Government Emergency Ordinance no. 51/2008 on public legal aid in civil matters and Government Emergency Ordinance no. 80/2013 on judicial stamp duties, Article 13 of the Civil Procedure Code (Law no. 134/2010). The provisions in the national law are a reflection of those in Article 6, paragraph 3 of the European Convention on Human Rights to which Romania is part, and whose provisions have priority in the event of divergence between the national and the international law, except for the case of the more favorable national law, as set forth in Article 20, paragraph 2 of the Constitution.

MATHERIAL AND METHOD

This study is a reflection of judicial practice approached from the perspective of the effective way of guaranteeing the right of defense, correlated with a number of judicial errors. Furthermore the authors of the study equally refer to the legal doctrine dedicated to the right of defense, consecrated by constitutional law professors such as Genoveva Vrabie, Marius Bălan, Marieta Safta, Ştefan Diaconu etc.

RESULTS AND DISCUSSION

From the viewpoint of the authors of the study, the largest number of articles in this matter and thus most ECHR judgments focused on criminal law and less on civil law. This state of play is normal if considered through the perspective of historical evolution of the regulation on the right of defense which effectively aimed at guaranteeing individual freedom and a just criminal trial, in which a possible conviction would fully reflect the constitutional principle: "no one is above law". Nevertheless, this article intends to reveal a series of malfunctions of the judicial system in civil matters. Thus, we would like to highlight a number of violations of the right of defense by the way the practical application of Article 194 (regulating the content of the action in court) was made. We believe that current judicial practice reflected the provisions of Article 194 in conjunction with those of Art. 200 of the Civil Procedure Code, in a negative manner and contrary to the purpose intended by the legislator. Thus, in relation to the provisions of Art. 194, by excess of formalism, the court came to require elements that are either not mandatory, or reflect a prejudgment of the court and even a violation of free access to justice, which is

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also a form of guarantee of the right of defense. The case law we present is closely connected to property law, on a wide array of actions in court, ranging from the simple action for recovery of real property and reaching the legal solutions that reflect a legitimacy of continuous, public and unequivocal possession, based on a property title. In these situations brought before a court, the plaintiff is bound to present evidence in support of his claims. We refer in this respect to the provisions of Art. 194 letter c) which is applied in a very formal manner. For example, in the matter of acquisitive prescription, it is true that the plaintiff has the obligation to make the cadastral identification of the land he wants to acquire by adverse possession, by relying on the provisions of the former Civil Code (Articles 1846 to 1862, by relying either on the 30 years adverse possession with reference to Art. 1890, or on the 10-20 years adverse possession provided by Art. 1895 of the former Civil Code). Then again, in our opinion, the formalism in applying Article 194, letter c) of the Civil Procedure Code is excessive, given that the plaintiff proves the dimension of his property right, and implicitly the corresponding cadastral indicators, by a technical report (allowed by Art. 1050 of the Civil Procedure Code) prepared by a legal expert, that already obtained the approval of the National Agency for Cadastre and Land Registration, approval involving the verification of the existence of the property right, the absence of overlap with other property titles and the status of unencumbered property. In the context of the plaintiff submitting such a report to the court, the latter's request for a certificate issued by the National Agency for Cadastre and Land Registration, attesting either the registration with the Land Register or the status of unencumbered property, is unjustified.

From our point of view, also in the case of legal action for the recovery of real property, where also based on Art. 194 letter c) of the Civil Procedure Code, an up-to-date extract from the Land Register is required, despite the submission by the plaintiff of a copy of the registration of the property right made with the Land Register but having the date of the registration, is an excessive request that equates to a prejudgment. The court forgets that as long as the plaintiff brings an action in court with clear claims, with appropriate in fact and in law grounds and, therefore, with a designation of the defendant, he assumes the risk of not proving certain mentioned circumstances, given the principle of law which states that the burden of proof rests with the person making various allegations. Therefore, from the point of view of the court, the plaintiff's failure to indicate proper evidence, namely his use only of documentary evidence and not also of witness testimony or of authorized topographical surveys, cannot result in the annulment of the action in court in light of the provisions of Art. 194 in conjunction with Art. 200 of the Civil Procedure Code.

We believe it is also a violation of the right of defense, the court's conduct to annul the action in court on grounds that the plaintiff did not provide the personal identification number or the fiscal code of the defendant, a natural or legal person. Moreover, in relation to Art. 194, these indications are optional. Per a contrario, we wonder in what situations a possible plaintiff would be put, if he is the victim of civil wrong resulting in his injury on a pedestrian crossing without the number of days of medical care justifying a possible criminal record for the offence of battery and other violence (Art. 193 of the new Criminal Code).

We regard also as a violation of the right of defense, the decisions of first courts to decline their jurisdiction on applications for rectification of property titles in relation to Law 165/2013, which resulted in the introduction of Art. 59^1 in Law 18/1991, which, in turn, allowed for such applications to be resolved by the Local Commissions for Land Fund. From our point of view, the determination of the material jurisdiction for the applications for rectification of property titles, initiated before the entry into force of Law 165/2013 and considering that the procedural stage was already very advanced (topographical surveys for the verification of corresponding cadastral indicators for the surfaces whose rectification was demanded and consequently for the verification of no overlap with other property titles had already been performed), signified a breach of the principle of non-retroactivity of civil law and hence, of the right of defense. The harsh and sad judicial reality is that these decisions infringed on the jurisdiction of the Local Commissions for Land Fund, which were unable to benefit from the topographical surveys made in those cases. This situation generated new expenses for the applicants who had to submit new electronic topographical reports in order to obtain a new approval from the National Agency for Cadastre and Land Registration. The number of such examples in case law proves the need for a less formal analysis of the law in the sense of the judge viewing and understanding both the positive effect of the legal rules and the economic consequences at micro- and macro-level of his decisions.

CONCLUSIONS

In conclusion, we believe that it is necessary an amendment of the Regulation of the Superior Council of Magistracy towards the establishment of mandatory meetings between the governing bodies of the court and a series of liberal branches, such as the Bars, the County Chamber of Bailiffs, the County Chamber of Notaries, as well as representatives of the Local Commissions for Land Fund, in order to harmonize legal decisions and to make the application of law uniform. It is forgotten that the promotion of appeals on points of law, even in case of their admission, does not produce positive effects for judicial decisions having *res judicata* power, which often reflect judicial errors that took place previous to the admission of the appeal on points of law.

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