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THE SUBJECT, OBJECT AND THE DUTY TO PROVIDE EVIDENCE

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Abstract: *In our usual language, the word "evidence" represents the mental and logical operation by which we attempt to prove something, to demonstrate, to emphasize a statement which provides credibility to a certain situation. The institution of evidence in the system of objective law was regulated in certain legal texts, with different regulations, from material law to procedural law, depending on the different factors which configure private law, but also in direct connection with the lawmaker's interest. As a consequence, in the past, the matter of evidence was studied within the general theory of civil law, whereas, in present times, evidence is studied within Civil Procedural Law. The matter of evidence would be known differently and treated differently both by law and by doctrine, thus having a different space "and a different setting between the institutions of civil material and procedural law".*

Key words: *evidence, legal regulation, facts, probation.*

1. The subject and object of evidence

Evidence is meant to prove the existence or inexistence of a specific civil relation which is subject to litigation, thus evidence is administered within a trial as a general rule, resulting in the persuasion of the person called upon to administer the act of justice, namely the judge, who becomes the subject of evidence. In essence, evidence "works on the perception and reason of the judge". Based on legal syllogisms, by using the methods of interpreting the legal regulations which govern those certain relations which are subject to litigation and based on his legal and practical culture, the judge will aim to establish the facts which occurred, both on a mental level and a cognitive level. Sometimes, the facts are subject to more or less conclusive evidence, but the judge will be able to rule based on his own beliefs, formed in accordance with his intellectual level when "he will prove the facts which he *a priori* considers as pertinent, based on his intuitive legal qualification".

Mentally, the judge will represent the facts, and then, based on legal syllogism, he will apply and enforce the law in his ruling.

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A ruling will always be legal and credible if the judge has a clear and correct representation, in agreement with reality; he must also rely on true and complete information, which is capable to reveal the essential aspects of the case and provide firm beliefs regarding the factual reality of the case.

The parties will play a decisive role through the evidence they present before the court, thus referencing the well known quote according to which „dehis qui non sunt et que non aparent idem est judicium" – all that is not proven in court is presumed to not exist.

The mental and logical endeavor by which the judge passes from hypothesis to belief is subjective, as it pertains to his legal culture and his experience in life, thus, as a result of the legal battle which occurs in court, the role of legal assistance ensured through lawyers, can play a decisive role in influencing the solution of the judge. As suggestively stated by professor V.M.Ciobanu "the major uncertainty of justice will occur in this matter, as it is a matter of human error and if any irrational element occurs, whether conscious or not, the reasoning will suffer".

The object of evidence – in a synthetic phrasing, the object of evidence is what must and can be proven, demonstrated. As a result, the object of proof is the legal fact, in its wide meaning including the stricto-sensu legal facts as well as judicial acts. Thus, the lato-sensu legal facts are "the sources of rights and obligations in regard to the litigating parties".

If legal regulations are not the object of evidence, thus invoking the principle „jura novi curia„ the legal facts are always subject to probation, namely those facts which have "created, modified or terminated the legal relation which is subject to litigation, or the facts which determined the ineffectiveness of the act and provided the right to demand an annulment of the act". So the latter are facts subject to statute of limitation. Another criteria of classification - the facts which are about to be proven are material facts or psychological facts.

The material ones are externalized when committed, for example the destruction of a plantation. The psychological ones are externalized by their result, as is bad faith or deception.

Definite or determined facts, both positive and negative, can be proven. If, some time ago, doctrine showed that negative facts can't be proven, nowadays, the unanimous opinion of specialty literature is that these too can be proven, the latter proving the contrary positive fact. For example, in order to inherit, heirs must prove that superior heirs have unanimously renounced the inheritance.

Undefined facts, whether positive or negative, can't be the object of proof. It would be hard to prove that, during the course of a day, a person was permanently in a certain room. However, the facts which are personally known to the judge, from other circumstances except the administering of evidence, are subject of evidence.

If a judge is personally aware of a series of facts which prove to be indispensable to the case subject of obligation, he will lose the quality to be judge of that particular case, as he will become a witness; he will be incompatible with the solution provided in the case.

We must distinctively point out those facts which are notorious, uncontested and the facts which are legally contested, also known as presumptions.

In case of notorious facts, the parties will not be required to prove them, as they are known to several people.

For example, the fact that a great fire occurred in a certain place, at a certain date, must not be proven; such an event is known to several people.

What must be proven is not the event in itself but the notoriety of the event. It is unanimously pointed out by doctrine that "once notoriety is established, the party who invoked notoriety must no longer prove it".

Uncontested facts are those facts upon which the parties agree, thus both parties acknowledge these facts. However, if the judge is suspicious in regard to the circumstance that the uncontested facts do not correspond with reality, then the parties can be held to prove the facts or the court will demand proof. Such situations are those, in which the evidence might be withheld by the other party. Thus, the person who causes damage to another person by his actions must agree with the other party in regard to the extent of the damages.

Legally contested facts are those facts presumed to have existed by law, the judge must only acknowledge it, as proving them would be useless. See legal presumptions "in which the existence of the generating fact is induced by the lawmaker by certain neighboring events and presumed as certain by the judge, until proven otherwise".

In regard to introductory matters, we must acknowledge the opinion according to which the facts established in the material state within criminal court can no longer serve as evidence in civil court, as their confirmation and denial would be useless, inadmissible, as it is unanimously acknowledged that the "fact that a criminal decision is of authority in civil court in regard to the existence of the fact, the person who committed it and its guilt".

When foreign law is enforced, a certain situation is created, according to which the legal regulation is the object of probation. Civil law refers to conflicting regulations by expressly showing that foreign law can't be enforced by Romanian courts, as its regulations are considered Romanian based on the conflicting laws which refer to the law that applies in case of legal relations with foreign elements. Thus, in accordance with article 2562 of the Civil Code "the content of foreign law is established by the court by approval of the state which elaborated the law, by notice from an expert or in another adequate manner, and the party who invokes foreign law can be held to prove its content„.

Thus, the above mentioned article states that the parties must work together with the court in order to find out and interpret the content of the foreign law which applies.

The enforcement of foreign law in civil matters entails other aspects. Thus, Law no 189/2003 regarding international judicial assistance in civil and commercial matters states that the central authority in regard to information pertaining to the regulations of internal law required by ministerial offices of other states, as well as the exchange of information as required by Romanian courts, in order to solve these matters based on foreign law, the litigating parties can demand such information but they must be accompanied by approval from the court.

The following provisions are the object of evidence - texts which are not published in the Official Bulletin of Romania or any other means stated by law; conventions, treaties and international agreements which apply in Romania but are not stated in a text of law; regular international law; the provisions which are listed in classified documents which can only be proven under the conditions stated by law; deontological rules and practices agreed upon by the parties must also be proven under the conditions stated by law; the legal rules and regulations, if there is an express request of the court.

As an example, we mention comparative law in which case French doctrine and jurisprudence states that "the proof of foreign law is a matter of fact and the content and interpretation of foreign law must be proven by the party who invokes it".

As a consequence, foreign law does not fall under the incidence of the principle „jura novit curia„.

As a result, it can be proven by any means of proof, usually by a regular certificate. In regard to the practice of French law, it states that proof is gathered by qualified personnel who orally testify to this purpose. In regard to jurisprudence, given that it is not considered a source of law in Romania, any party who invokes a jurisprudence rule, must prove its existence.

Thus, we must keep in mind that the jurisprudence of the Constitutional Court, namely its decisions, is mandatory for judges.

The fundamental law states, in article 147 fourth alignment that the decisions of the Constitutional Court which are published in the Official Bulletin of Romania, are mandatory from the time they are published and can only regulate for the future.

For similar reasons, the same effect is attributed to the decisions of the High Court of Justice in cases of lawful appeal, as these decisions are also mandatory for the courts (see article 516 Civil Procedure Code).

2. The duty to provide evidence

Article 249 of the Civil Procedure Code expressly states the following "the person who makes a claim during trial must prove it, except for the cases specifically stated by law". A stricto sensu interpretation of the above mentioned article shows the fact that the task to provide evidence answers a natural question, namely who is the person who must prove the existence of a fact or interest during trial.

In the old regulation of evidence, article 1169 and 1865 of the Civil Code stated that "The person who states a claim before the court is held to prove it". By interpreting this text of law, we must note that the person who claims a right by trial, is called upon to indicate the proof which grants him the right to claim such a right; in case he fails to provide such proof, his right remains a mere claim, with no legal support.

As a consequence, in agreement with elementary logic, the claimant is the first who is held to provide proof according to the principle „Actori incumbit probatio„ or „Onus probandi incumbit actori„. Once the claimant proves the claim he makes, the defendant will no longer remain passive and, by his defense, will contest the evidence provided by the claimant, thus demanding the court to reject the claim as unfounded or unjust. At this point, the task to provide evidence is transferred to the defendant, thus respecting

the principle according to which the person who makes a claim before the court must prove his claim „probatio incumbit ei qui dicet non ei qui negat„.

The defendant's state must not be interpreted as passive, because he is informed of the claim and denies it, as „the truth is not obtained by successive elimination, the truth is the product of common search of the interested parties„.

This judiciary duel helps evaluate and interpret the evidence suggested by the parties, thus reaching the final solution, the judge's belief in regard to who is stating the truth.

In case the defendant presents to the court certain exceptions which do not contest the claims made by the plaintiff, but result in paralyzing his claims, the one who is held to provide evidence is the defendant, in accordance with the principle „in excipiendo reus fit actor„.

The order of presenting the means of evidence derives from the legal provisions as well as from the reasons which pertain to "logic and equity".

By following an elementary logic in finding out the judicial truth, it was shown by doctrine that between "the claimant who aims to change an existing situation and the defendant who benefits from it, until proven otherwise, the defendant should be protected by law as the situation is in his favor - and generally in agreement with the state of fact - whereas the claimant merely states a demand".

The claimant's attempt to change the existing order must be proven with legal means so as the judge to be persuaded that the current situation is not the same as the rightful situation. If, at first, the defendant was in a privileged position, in case the means of evidence provided by the claimant aim to prove a different state of fact, at this point the defendant must no longer be passive and must show that the newly occurred situation is not real, thus resulting in a true judicial duel between the claimant and the defendant. Whenever one party invokes a new fact, thus generating a trial, he must also prove his claim. The above mentioned rule does not apply only to the two actors mentioned but it pertains to any person who claims a right before the court or any person who claims that one of his rights was violated.

The order, in regard to providing proof, is that the claimant presents his evidence first and then the defendant; however, there are certain situations in which both parties have a simultaneous obligation to provide proof. This is the case of the so-called „judicium duplex„ in which case each party is both a claimant and a defendant, for example in case of a divorce settlement.

In such cases, "the defendant can be considered a claimant as he can obtain the conviction of the initial claimant, even without requesting such a measure against the claimant".

Doctrine has shown that although the judge, in his endeavor to find out the truth, may order evidence which he considers necessary, even outside the will of the parties, such a behavior is considered to be outside the obligation of the party to provide evidence.

In case the defendant becomes the claimant as a result of a claim filed before the court, he must prove his demands with priority.

There are certain situations in which, even if the defendant does not change his legal quality, he is held to provide evidence first (as is the case of the "relative legal presumptions when the law assumes the factual reality has a lawful correspondent, and

the beneficiary of the presumption must overturn this situation by presenting the contrary evidence").

The existence of a tacit mandate between spouses is presumed in regard to conservation acts concluded with a third party until proven otherwise by the party who challenges this presumption, thus the party must prove lack of consent from the other spouse.

The case of absolute legal presumptions is similar, as they can be overturned by confession; the beneficiary of the presumption will prove the neighboring and connecting fact which supports the presumption and the opposing party will attempt to obtain the admission of the neighboring fact by questioning. Another exception from the rule stated in article 1169 of the Civil Code and article 249 of the Civil Procedure Code is the one stated in article 287 of the Labor Code which states that "in case of labor conflicts, the employer must prove his demands, as he is held to provide evidence to his defense until the first day of trial, regardless of his position".

The problem regarding who is held to provide evidence is significant, as, in lack of evidence, or if the evidence is not sufficient to prove a certain fact, the person who was obliged to provide evidence and failed to do so, will have their claim dismissed.

In an attempt to reinstate the truth, even if a party is justified in their claim, in lack of any evidence, they will find themselves in the inevitable situation of having their claim dismissed by the court.

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