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ORIGINAL PAPER

Two main guardian principles of the civil lawsuit reflected in the case-law of the national Courts: the principle of availability and the principle of adversariality

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Abstract:
The principles of the civil lawsuit were initially developed by the doctrine of law, but they were expressly stated by the New Civil Procedure Code. These are important because they are a barometer for both the judge and the parties, stating the guidelines for the civil lawsuit for all its actors. All law professionals should keep in mind the guiding principles and the paper aims to identify how these principles give the judge the instruments to identify simple solutions to difficult problems.

Keywords: *civil procedure, principle of availability, principle of adversariality.*

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1. The fundamental principles of the civil process

One of the novelties of the current Civil Procedure Code was the express regulation of the fundamental principles of the civil process. The legislator dedicated a special regulation to them in a separate chapter from the preliminary Title.

The vector that guarantees compliance with these principles is the judge, a fundamental actor in the civil process, with a vital role in ordering the measures required to guarantee the rights of the parties.

Moreover, as well noted in the specialized doctrine (G. Boroi, 2017: 10-11), compliance with the fundamental principles is not an option or a right of the judge, but a its essential obligation. Thus, from the interpretation of the provisions of art. 20 of the Civil Procedure Code, it undeniably follows that the judge is obliged to ensure compliance with the fundamental principles of the civil process, and a decision that does not reflect this fact is liable to be annulled in the exercise of appeals.

The paper proposes a practical approach to some decisions of judicial review courts in which the manner in which the trial court ensured compliance with the principle of availability and adversariality was discussed.

2. The headquarters of the matter

The doctrine stated that "the civil process can be considered the property of the parties" (Piperea, 2019: 21). Regarding the principle of availability, it is expressly provided by the provisions of art. 9 of the Civil Procedure Code, but it also appears from the interpretation of other provisions such as art. 22 para. (6) Civil Procedure Code. This principle is specific to the civil process (Velescu, 1971: 15-27), but it does not have an absolute character, the legislator bringing a series of limitations to it, in cases expressly and limitedly provided by law.

The principle of availability is closely related to the principle of good faith in the process, enshrined in art. 12 C. Fr. civ.1 and art. 57 of the Romanian Constitution2, according to which citizens "must exercise their constitutional rights and freedoms in good faith", without violating those of other individuals.

The principle of availability is a complex principle which, as well noted in the specialized doctrine (Boroi, 2001:191), involves the following: the fact that the parties can determine the existence of the process, but also its content. Thus, as a rule, the court cannot be referred ex officio (as the legislator provides a series of exceptions when passive procedural status is recognized to other persons or entities or bodies, even though they are not the holder of the subjective civil right in the litigation), reason for which party initiates the litigation brought to trial, establishing both its object, but also the parties and the cause of the litigation. In achieving these attributes, the parties are also the ones who determine the means of evidence used in order to settle the disputed situation. Moreover, the parties are also the ones who decide on the exercise of legal remedies and, therefore, on the phases that the civil process could go through.

Thus, in terms of procedural manifestations, in accordance with the doctrine in the matter (Ciobanu, Briciu & Dinu, 2018: 98-99), the principle of availability appears in several forms: the right of the interested person to start the civil process or not, the right to determine the limits of the summons request or the defense, the right to waive the judgment or the claimed subjective right, the right to recognize or acquiesce to the claimant's claims or the decision of the first court, as well as the right to end the litigation through a transaction, the right to exercise or not the right of appeal against a

decision or to persist or not in the way of appeal exercised,as well as the right to request or not the execution of court decisions (in the same sense, Tăbârca, 2013: 71-81).

Also as a manifestation of the availability principle, the transaction concluded pursuant to the provisions of art. 267 Civil Procedure Code, although it is a way for the parties to dispose of their material, not procedural, rights (Boroi & others, Bucharest, 2013: 39).

The principle of availability is reflected in the conduct of the parties in arguing and proving the existence or non-existence of the rights they claim during the course of the litigation brought to the judgment, but also until the effective execution of the provisions of the enforceable title represented by the court decision (Leș, Durac, Ghiță, Hurubă, Speriusi-Vlad, Stoica & Tabacu, 2021:41).

It should be emphasized that the principle of availability does not give unlimited power to the parties, but on the contrary, they exercise this procedural right under the control of the court. This control is sheltered under the umbrella of the principle of the active role of the judge, which, among other things, imposes on the court an obligation to verify whether the procedural acts of disposal carried out by the parties were carried out in order to achieve illicit purposes, if the parties had the capacity to provision or if the consent was given in compliance with the legal provisions (in this sense, see LEȘ, 2010: 62).

However, it does not constitute a limitation of the right of the party to establish the basis of the claim brought to the judgment the right of the court to give the request for summons to the court (or even the remedy bearing the wrong name) a correct qualification, when the parties have established a wrong name, because the court does not change the object or the cause of the action, but only determines the name it must bear in relation to the legal provisions. However, this intervention by the judge is limited in time, because it should take place before the administration of the evidence, because only in this way the puzzle that makes up the case brought to trial can be reconstructed, under all its essential aspects, in order to lead to finding out the truth in question.

Moreover, in procedural law there is the preeminence of the principle of availability over the principle of finding out the truth in the case, so the judge is prevented from ruling on certain matters or on certain aspects with which the parties have not informed the court through the introductory request or through the defenses formulated in the case .

In the doctrine, it was opined that the principle of availability and the principle of the active role that the judge manifests to find out the truth are in a relationship of interpenetration, limiting each other. In such conditions, the parties can do any act permitted by law, but they are bound by the provisions of the court, which has the obligation to look after the truth. Through this mechanism of interdependence, the legislator ensured the limitation of the rights granted to the party by virtue of the principle of availability (Tabacu & Drăghici, 2010: 89).

As for the principle of adversariality, it is regulated by the provisions of art. 14 Code of Civil Procedure, but being a fundamental principle of the civil process, it can be deduced from the interpretation of several provisions contained in the Code of Civil Procedure, being a principle that manifests itself in all stages of the civil process.

The principle of adversariality is a component of the right to defense, one of the means by which the litigant's right to a fair trial is guaranteed.

In essence, the principle of adversariality is the one that allows each party to question and fight any aspect of the dispute, under the conditions provided by law

(European Court of Human Rights, Case Clinique des Acacias, para. 37). Also, by virtue of this principle, the parties have the opportunity to present a point of view regarding all aspects and legal issues discussed by the court (Ciobanu, Briciu & Dinu, 2018: 93).

The principle of adversariality also functions as a supporting principle for the other principles of law. For example, it can help to achieve the principle of finding out the truth in the case, but also to guarantee the right to defense and the principle of equality of arms (Leş, 2010: 58-59) .

In accordance with this principle, the judge has, on the one hand, the obligation to discuss with the parties any element of fact and law necessary to find out the truth in the case, but also the duty not to base his judgment on facts that do not have been previously discussed by the parties (Ciobanu, Briciu & Dinu, 2018: 98), with the aim of issuing a legal and thorough court decision (G.Boroi et al, 2013: 45).

The same reasoning is also derived from the jurisprudence of the European Court of Human Rights, which reaffirmed the importance of ensuring an adversarial procedure in cases where the observations of an independent judge in a civil case were not communicated in advance to the parties and they did not have the opportunity to formulate a response (European Court of Human Rights, Case of Lobo Machado v. Portugal, para. 131, Case of Van Orshoven v. Belgium, para. 141).

In the jurisprudence of the European Court of Human Rights, the principle of adversariality is closely related to the provisions of art. 6 of the European Convention on Human Rights, because the notion of a fair trial implies an adversarial procedure before the court. Moreover, the principle of adversariality is closely related to the principle of equality of arms (European Court of Human Rights, Case Werner v. Austria). In the development of these principles, the Strasbourg Court ruled that the right to an adversarial procedure means that the parties (both those in the civil and criminal proceedings) have the effective opportunity to take cognizance of any document or any observation made in before the judge, in order to discuss it (European Court of Human Rights, Case of Ruiz-Mateos v. Spain, para. 63, McMichael v. the United Kingdom, para. 80, Vermeulen v. Belgium, para. 3, Case of Lobo Machado v. Portugal, para. 131)

Pronouncing a court decision in violation of the adversarial principle entails its nullity (see, in this sense, the annotated civil jurisprudence of the High Court of Cassation and Justice and other courts, CHBeck Publishing House, Bucharest, 2007, p. 234).

In such conditions, the decision of the court of first instance must contain in detail and explicitly all the debates held before the court, made with the aim of proving compliance with the principle of adversariality and in order to issue a legal and thorough decision. Moreover, in the situation where, during the deliberation, after remaining in the judgment, the court finds that elements of fact and law have been identified which were not discussed by the parties and which are likely to lead to the discovery of the truth in the case , in order to issue a legal and thorough decision, has the obligation to put the case back on the docket.

Regarding this aspect, the legislator established limitations and we are referring here to the situation in which one of the parties would submit written conclusions, after the completion of the judicial investigation and the moment of the conclusions on the merits of the case, and would invoke through them aspects or documents that were not previously debated in adversarial proceedings (see, in this sense Ciobanu & Nicolae, 2013: 40).

3. Jurisprudential landmarks

3.1. The court's obligation to order the summoning of all the defendants indicated in the summons application (Craiova Court of Appeal, Administrative and Fiscal Litigation Section, Decision no. 352/2023)

Through the summons, plaintiff X, through the Union, requested, in opposition to the Minister of Finance, the Ministry of Finance through the Regional General Directorate of Public Finances Craiova and the National Agency for Fiscal Administration and the President of the National Agency for Fiscal Administration, in essence, the obligation to the defendants in the elaboration of the procedure for the establishment and use of their own income from the activity provided for in art. 1 paragraph (1) from GEO no. 116/2017, as well as the payment of rights related to the same legal provisions.

The trial court settled the case, admitting the exception of the prescription for the period January 2018-20.04.2019 as prescribed and, otherwise, as unfounded, contrary to the defendants the Minister of Finance, the National Agency for Fiscal Administration and the President of the National Agency for Fiscal Administration.

Against this sentence, the Ministry of Finance through the General Regional Directorate of Public Finances Craiova and the plaintiff declared an appeal.

In essence, the appellants invoked the grounds of appeal provided by the provisions of art. 488 para. (1) points 6 and 8 of the Code of Civil Procedure, but the court of judicial review invoked ex officio the reason for annulment provided by point 5 of the same article.

Under the aspect of this reason for annulment, it intervenes when the court of first instance, by the judgment rendered, violated the rules of procedure that attract the application of the sanction of nullity of the judgment.

The court of judicial review found, analyzing the summons, that the plaintiff understood to judge himself adversarially withMinistry of Finance, Minister of Finance, National Agency for Fiscal Administration, President of the National Agency for Fiscal Administration.

The trial court, disregarding the principle of availability, ignoring the procedural framework set by the plaintiff through the summons, cited only the Minister of Finance, the National Agency for Fiscal Administration, the President of the National Agency for Fiscal Administration, not the Ministry of Finance.

The court of judicial review emphasized that, in accordance with the provisions of art. 9 para. (2) Code of Civil Procedure "*The object and limits of the trial are established by the pleadings and defenses of the parties."*and considering the provisions of art. 14 of the same regulation, which governs the principle of the active role of the judge, the court has the obligation, in any trial, to submit to the discussion of the parties all requests, exceptions and factual or legal circumstances invoked.

Moreover, in accordance with art. 153 Civil Procedure Code, "(1) The court can decide on a request only if the parties have been summoned or appeared, personally or through a representative, except in cases where the law provides otherwise. (2) The court will adjourn the trial and will order that the summons be issued whenever it finds that the missing party was not summoned in compliance with the requirements provided by law, under the penalty of nullity."

As a consequence, from the corroborated interpretation of the aforementioned legal provisions, the court had the obligation to order the summons of all the defendants indicated in the content of the summons.

The court of judicial review also noted that "by the principle of availability is also understood the fact that the plaintiff initially outlines the procedural framework, which must indicate, among other things, the parties in the process, the claim brought to the judgment, the reasoning in fact and in law".

The settlement of the case with non-compliance with the procedural framework established by the parties, by violating the principle of availability and without summoning one of the parties to the case, as established by the summons, leads to the nullity of the appealed court decision, becoming incidental to the grounds for annulment provided for by the provisions of art. . 488 para. (1) point 5 Civil Procedure Code.

3.2 The court's obligation to discuss with the parties the request to bring another person into the case and to rule on it (Craiova Court of Appeal, Administrative and Fiscal Litigation Section, Decision no. 2491/2022)

Through the summons,the plaintiff X sued the defendants MINISTRY OF TRANSPORTATION, INFRASTRUCTURE AND COMMUNICATIONS, THE NATIONAL ROAD INFRASTRUCTURE ADMINISTRATION COMPANY SA and the MINISTRY OF PUBLIC FINANCE, requesting that, by the judgment that will be handed down, they be obliged to return the user fee to him of the national road network in Romania (Rovinieta) paid for the two privately owned cars, for the last 3 years - the amounts due will be updated in relation to the inflation rate, until the actual restitution. The plaintiff also requested that the defendants be obliged to exempt him from the payment of the previously mentioned tax, hereinafter, for the cars in the property - as a consequence of non-compliance with the European rules.

The trial court rejected the request filed in opposition toMinistry of Transport and Infrastructure and Ministry of Public Finance,as being introduced against persons lacking passive procedural quality. The exception of the inadmissibility of the summons request, invoked by the defendant National Road Infrastructure Administration Company, was rejected as unfounded. The action filed by the plaintiff X against the defendant National Road Infrastructure Administration Company, with claims as its object, was dismissed as unfounded. The request for intervention in the interest of the plaintiff, formulated by the Legal Drive Association, was rejected.

Against this solution, plaintiff X filed an appeal, citing, among other things, the reason for annulment provided by the air provisions. 488 para. (1) point 5 Civil Procedure Code.

In essence, the claims of the appellant-plaintiff concerned the fact that he submitted to the case file of the court of first instance a request to bring SC CNIR SA into the case.

The court of judicial review found that the trial court settled the case illegally, not putting in the adversarial discussion of the parties the respective request that sought to widen the procedural framework. Proceeding in such a manner, without ruling on the request, the court of first instance violated both the principle of availability and the principle of adversariality, causing damage to the parties which is sanctioned by the nullity of the procedural acts concluded under such conditions.

3.3 Harmonization of the principle of availability with the principle of the active role of the judge (Decision no. 2049 of May 23, 2013 pronounced on appeal by the Second Civil Section of the High Court of Cassation and Justice*)*

During the resolution of a case, the supreme court found that in accordance with the provisions of art. 129 of the Old Code of Civil Procedure (corresponding to Art. 22 of the New Code of Civil Procedure), the judge has the obligation to request the parties to present written or oral explanations, but also to put into their debate any legal or factual circumstances, even if they are not expressly specified in the subpoena or counterclaim.

Under this aspect, the active role of the judge must not affect the principle of availability, which is a prerogative of the parties, but must harmonize with the initiative of the parties, with the aim of leading to the establishment of the truth in question.

The High Court held that, in reality, the judge did not exercise an active role, going over the arguments that the plaintiff brought in support of his request, based on which he had the obligation to correctly qualify the summons request, being necessary for the court to analyze the entire content of the action and to give the legal name to the request that had a wrong name, but correctly substantiated, in relation to the factual situation.

3.4. The obligation to resolve the objection of illegality of the administrative act contrary to all its issuers (Decision no. 2610 of June 4, 2014 pronounced in appeal by the Administrative and Fiscal Litigation Section of the High Court of Cassation and Justice)

According to the High Court of Cassation and Justice, the principle of availability implies that all factual and legal elements of the process must be subject to debate, with the aim of ensuring that each party has the effective opportunity to express themselves regarding any element that could be related to the inferred right to judgment. Thus, adversariality is manifested both in the realm of relations between the parties, and from the perspective of the relationship between the parties and the court.

Thus, the judge can rule on a request only after the parties have been summoned or appeared, and when he finds that the missing party has not been legally summoned, he orders the postponement of the judgment and the resumption of the summoning procedure.

In the case brought to trial, the court resolved the objection of illegality in the absence of one of the issuers of the administrative act in question, which led to the pronouncement of an unfounded and illegal decision that was overturned, with the consequence of sending the case for retrial to the same court.

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