The burden of proof in contested procedure

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Abstract

It is undisputed that proving in trials is one of the most fundamental and most important processes in the contested procedure. The court is responsible for reconstructing certain situations in a procedure that are based on facts that exist or existed at a given moment, with the purpose of using them in support of its final decision and other secondary decisions. In paragraph 2 of Article 206 of the Law on Contested Procedure, it is foreseen that the court decides to determine the object of proof, analyze and prove facts that are relevant to the particular case and which lead to the verification of the claims of the parties. Otherwise, the work of the court would be destined to failure. In order to avoid this problematic in the procedure, the maxima of "*probation qui dicit, non eiquit negat"* and *"in exepiendoreus fit actor"* applied in today's litigation are still current but in facilitating the practice of judges to avoid enormous claims of the parties, these procedural rules have been corrected by categorizing facts in several groups. In this context, on the one hand, we will treat each party's obligation to present facts and to propose evidence to support its request or to reject the allegations and facts of the opposing party in proceedings, the so-called subjective probative burden, and on the other hand, we will treat the parties' inability to prove the truth of the allegations in the procedure, the so-called objective probative burden.
the burden of proof, the object of proof, the parties in the procedure, the evidence.

Keywords: the burden of proof, the object of proof, the parties in the procedure, the evidence.

1. Introduction

It is the duty of the court to decide on the rights and obligations of the parties to the proceedings in various disputes if they are family relations, property, labor relations, property relations or other relations to which court is competent. In this regard, it is important to say that the court decides based on the requests submitted by the parties.
The procedural actions of the parties in the procedure are regulated by law, as it is regulated the court's "decision making space" to the limits of the requests that are put in the proceedings. In this context, on the one hand is the court that decides on the specific case regarding the claims of the parties, claims that necessarily must be pronounced, otherwise the court is not authorized to decide (Article 5, paragraph 2 LCP).
On the other hand, there are parties which freely dispose their demands which they present to the court, in this context, we say that each party is obliged to present facts and propose evidence on which it bases its request or which rejects the allegations and evidence of the opponent (Article 205 par. 1) - the so-called subjective burden of proof.
According to an author there is no real "subjective" burden of producing evidence *(Michele Taruffo, Mohr Siebeck, Tubingen Martinus Nijhoff Publishers, Dordrecht, Boston, Lancaster, 2009 p. 74-75).*In reality, each party has a clear interest in satisfying its burden of proof in order

to get the case, so considering the final decision on facts, but it is not necessarily interested in satisfying any "subjective" or "procedural" burden. When a sufficient number of evidence was not presented, the party on which the burden of proving was laying will lose, because it did not fulfill its burden of producing evidence. If, on the contrary, the fact was proven by the other party or through the evidence whose presentation was ordered by the judge, the party on which the burden of proving that fact was victorious, although she did not present any evidence regarding that fact.
Beside subjective sense of "burden of proof" in procedural theory used term burden of proof in the objective sense. Its importance lies in the final stage of the probation procedure. Assessment of evidence, where the court based on evidence examined proofs cannot form the veracity or falseness of the claims of the parties concerning the relevant facts. The consequences of the inability to prove the authenticity of factual claims of non-probate parties - the facts that have not been proven are considered to be non-existent (*Janevski & T. Z. Kamilovska, 2009, page 273).* If the evaluation of the evidence does not produce results, the rules on the burden of proof give an answer to the question of which party carries the risk of inability to prove allegations of relevant facts. With these rules, the burden of proving between the parties to the dispute is dispersed, so that the consequences of the impossibility of proving the facts legally relevant is carried by that party on which the burden of proving lies.
Based on LPK Article 7, paragraph 2, for establishing facts for which the parties have not filed the court to find evidence, but from the results of the review and the evidence it results that the parties intend to dispose of the requests with which they cannot dispose. In addition, during the procedure if the court considers necessary to present facts and proposals for the right dispute settlement, it can warn the parties that this moment would be crucial to resolving the case and to warn the obligations of the first paragraph of Article 205 from which arises the obligation of each party individually to take care to protect their claims in the proceeding.
It is of a great importance to point out on which side the presumption lies, and to which belongs the *"onus probandi"* burden of proof? According to the most correct use of the term, a ' presumption' in favor of any supposition means in short that the burden of proof lies on the side of him who would dispute it. The first moment in the procedure actually deals with the rule *"of the incumbent probatio qui dicit, not the quit negat"*, under which it is plaintiff's duty to prove something he claims to arrive in the proceedings from the moment of filing the lawsuit up to the opening of the main trial.
The abovementioned rule stems from the assumption that the legal order has not been broken and functions normally, if a dispute arises or if a person sue another person for a violation of the law, the person who sues it is against himself, more precisely against the claims on which supports the lawsuit, the assumption according to which the legal order is not violated if he disagrees with the need to prove the contrary (TZ Janevski & Kamilovska, 2009, page 273). If the plaintiff has allegations of a burden on him to prove the situation for which he seeks legal protection, in this case the respondent's position is passive because he can only silence or deny the claims of the other party unless he chooses be put into active mode. This is the situation where the transformed rule *"in exepiendoreus fit actor"* comes into play - if the defendant takes the plaintiff's position.
Although it looks simple to have two positions in a dispute, but with the right Professor Janevski emphasizes that in legal practice there are not always simple cases, given the burden of proving only in having a positive role of the party, but legal practice also reveals various complications. In a Law review of Harvard University, the author James B. Thayer says "I am of opinion that it is equally so when a fact found, or undisputed at the trial, has shifted that onus. The cases in which the principle that the onus may shift from time to time has been most frequently applied, are those

of bills of exchange. At the beginning of a trial under the old system of pleading . . . the onus was on the plaintiff to prove that he was holder, and that the defendant signed the bill. If he proved that, the onus was on the defendant; for the bill imports consideration. If the defendant proved that the bill was stolen, or that there was fraud, the onus was shifted, and the plaintiff had to prove that he gave value for it. This depends not on the allegation, under the new system, on the record, that there was fraud, but on the proof of it at the trial". In further explanation as second he explains: "Expressing the duty of the actor to establish the grounds upon which he rests his demand the court shall move in his behalf, - that is the sense to which the burden of proof and the weight of evidence are two very different things:

- The former remains on the party affirming a fact in support of his case, and does not change in any aspect of the cause;
- The latter shifts from side to side in the progress of a trial, according to the nature and strength of the proofs offered in support or denial of the main fact to be established;
- In the case at bar, the averment which the plaintiff was bound to maintain was that the defendant was legally liable for the payment of tolls;
- In answer to this the defendant did not aver any new and distinct fact, such as payment, accord and satisfaction, or release, but offered evidence to rebut this alleged legal liability, so he did not assume the burden of proof, which still rested on the plaintiff; but only sought to rebut the prima facie case which the plaintiff had proved" (James B. Thayer Source, May 15, 1890).

2. Legal regulation of the burden of proof in different systems

Some legal systems, the burden of proof is allocated according to the general provisions governing any type of special situation and specific provisions regarding special cases. For example, in Italy, the general rule is set out in Article 2697of the Civil Code, under which the burden of proof lies with the party who claims to be, and she is obliged to prove the facts that support her claim, and if the other party makes a complain that those facts are legally irrelevant or that the claimed right has been altered (modified) or it fades, the burden of proving the facts that underpin its claim lies on it. A similar regulation exists in France: Article 9 of the Code of Civil Procedure says that each party should prove the facts necessary to prove that its claims are well grounded. Article 1315 of the Civil Code refers only to cash bonds, but is considered a general rule that the plaintiff should prove the basis for his claim, and the defendant should prove the basis of his defense. (Michele Taruffo, Mohr Siebeck, 2009, p.75). Similar principle is provided for in Article 217 of the Spanish Code of Civil Procedure.

Serbia procedural rules, Article 3 stated that civil procedure decides within limits of claims submitted in the proceedings, the parties are free to possess applications submitted during the procedure, and they may even give up their claims, recognize the claim the opposing party and reconciled. Article 7 obliges the parties to present all the facts upon which they base their claims and to propose facts that prove those facts. The court will consider and determine only facts that are presented by the parties and will only present the evidence proposed by the parties ("Official Gazette of RS", no. 72/2011, 49/2013). The court is authorized to establish facts that the parties have not presented and enables the court to present evidence that the parties have not proposed if the results of the discussion and proof emerges that the parties possess requirements which they cannot possess. This is same approach with our current Law on Civil contested procedure.

According to article 7 of the Law on contested procedure parties shall present all the facts on which they base their claim and propose evidence which establishes such facts, the court is authorized to verify also the facts not submitted by the parties as well as evidence which was not proposed by the parties, only if it results from the examination that parties are making a claim which are not available to them. The court shall not base its decision on the fact and evidence for which parties could not make statements for. Again we have the same situation but on article 8 is added that the court shall decide on eligibility of the evidence truthfully and cautiously as well as based on the results of the entire proceeding and the court shall examine each evidence individually and collectively (Law on contested procedure no. 03/L-006).

In the Civil Code of the Republic of Albania, in the fifth chapter, the issue of proving in the procedure is regulated just a little bit differently according to the neighboring preliminary systems. In the regulation of Albania pursuant to Article 12 of this Code, the court by decision allows the parties to prove the facts on which they base their requests and claims:

- submitting to the court only those evidence that are necessary and relevant to the question of trial;
-the court that judges the disagreement, must express itself above all that is required and only for what is required;
-the parties have the obligation to present the facts upon which they support their claims;
-the court invites the parties to provide explanations on the facts that it deems necessary for the settlement of the dispute;
-the court supports its decision only on the facts that have been filed during the trial;
-proof are data taken in the form prescribed by the Code and to prove or invalidate claims or objections of the participants in the process;
-the Parties claiming a right, there is an obligation, in accordance with the law, to prove;
-the worldly or officially known facts do not need to be tested. The facts for which there is a legal presumption should not be proved by the party in whose favor the presumption is;
-the court has a duty to conduct a full and comprehensive judicial investigation in accordance with the law;
-the parties are obliged to provide their support for the normal conduct of the judicial investigation. The court charges them responsible in case of failure to inactivity or obstruction by their fault (Law No. 8111, dated 29.3.1996, Code of Civil Procedure of the Republic of Albania).

In common law systems, the distinction between the burden of proof and the burden of producing evidence is indicated by the Thayer in 1898. The burden of producing evidence "is not a logical necessity of the procedure" and "it is a product of a jury trial". His basic functions are related to the need to initiate proceedings to determine whether there are sufficient conditions to bring the case before the jury: the basic requirement is that the parties present sufficient evidence in support of their claims. If the party on which the burden of producing evidence fails to fulfill that burden, it immediately loses its case and will not come to trial with a jury. This burden corresponds to the approach that is mainly present in American literature, which takes in to consideration of the dynamics of the parties' evidence of tactics. In this context, the burden of producing evidence helps to understand the evidence of one party step by step compared to the evidence of the other party (Michele Taruffo Mohr Siebeck, 2009, p.73). However, the distinction between the burden of production and the burden of persuasion may not be so harsh if one takes into account that the burden of production is the function of the persuasive.

3. Rules on the burden of proof

In general, the procedural law does not contain concrete rules on how the burden of proof between the parties should be divided. In some of the material nature of the provision is given the answer to the question for some contentious situations, ex. who causes harm to another person, should reimburse it, if you cannot prove that the damage was caused without his fault; custodian school or institution under the supervision of whom is a minor, responsible for the damage which the minor it causes to another person, except when it can be proved that supervision has been done according by the law and that the damage would also be caused even if supervision was done with extra care; owner of the property, which is under the ownership sues for his return, should this prove to his right and the fact that the object is located at the defender (Faik B. 2004 p. 237).
From the first point of view, it is easy to set the burden of proof on subjects, but above mentioned, it is not so easy in practice. To achieve the situation unequivocally associated with the burden of proof proposed division of facts into several groups. The facts, by which the right is created, the facts by which right is extinguished, are changed or that impede the creation of the right (Arsen J. & T. Z. Kamilovska 2009, p. 274).

- The facts which establish the right is obliged to prove the party who alleges the existence of those facts, as a rule, this is the plaintiff, ex. to prove that the defendant has accepted his offer for the contract;
- The facts that change the right, which the defendant submits to the rule, for which he argues a different claim by the plaintiff, which may be, for example the deadline for the performance of the contract;
- fact that extinguished the right, the same as in the previous case is the defendant task and it is actually required to prove that the debt is due, that obligation is prescribed, etc.;
- Facts that prevent the creation of the right, situations such as to prove that the contract was settled under mistake, violence, fraud or other forms which must prove the accused party itself.
- This division of the facts helps to relieve the judicial practice, which becomes an important step in determining the burden of proving, if there is no expression provision that show where stands the test burden then come into consideration these facts which clarify the roles of the parties in the legal relationship, as well as the roles of subjects in contested procedure.

4. Conclusions

In our system and in the countries in the region recognize the legal systems theory, the so-called normative theory. Each party in the proceedings is responsible for taking or failing to take procedural actions. Exactly from this rule came the idea of burden of proof. The principle of availability as one of the most important principles in the procedure plays an important role both in the initiation, during the procedure and in determining the subject of the dispute. The court does not initiate the procedure without the parties' request, it decides on what is required. The parties decide on the positions they take, active or passive, in this context considering this element that the burden of proof is a category that is not bounded to a party, but this rule changes. Always we

have to consider the basis of the rule: Who claims it, have to argue the allegations, otherwise the party itself carries responsibility for the lack of proven opportunity.
The general standard is that each party should bear the negative consequences resulting from it where proven facts on which has based its allegation or complaint. When there is no general standard, there are various special provisions to share the burden of proof in specific situations and detailed rules should be applied to the facts and procedural rules on presumptions.
The rules concerning the burden of proof to diffuse the negative consequences that come from the lack of evidence on material facts. The standards on the burden of proof discussed above are extracted from material law and there is an extremely important moment for uncertainty in interpreting situations on the burden of proof. Therefore, we say that this is a substantial rule that regulate roles of the plaintiff and the defendant concerning the interpretation of rules on the burden of proof.

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