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THE CIVIL PROCEDURE GUARANTEES OF THE PARTIES WHEN EXAMINING THE CASE IN THE ABSENCE OF THE DEFENDANT

SUMMARY

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The doctoral thesis and the summary can be consulted at the library of the State University of Moldova, at the website of the Doctoral School of Legal Sciences and at the website of ANACEC.

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CONTENT:

CONCEPTUAL MILESTONES OF THE RESEARCH

The actuality of the subject

One of the most urgent problems faced by the Republic of Moldova during its modern history is the demographic problem, our country being massively affected by the phenomenon of migration.

The legal risks associated with people staying for long periods outside the country's borders are mainly procedural rather than material. Thus, the physical positioning of a person does not affect the range of material rights he benefits from. On the other hand, from a procedural point of view, the permanent residence and the actual location of a person are the defining elements in the fate of the process started against such person.

When summoning the defendant fails, the specifics of the civil procedure, conditioned by the principles of availability, adversariality and equality of the participants in the trial, lead to the trial of the case in the absence of the defendant, while his absence is compensated by a set of guarantees and procedural instruments.

As a result, attention must be concentrated on the issue of guaranteeing the rights of the absent defendant during the entire process. However, considering that the purpose of the civil process involves both, the defense of the rights of the plaintiff, as well as of the other participants in the process, the procedure of trying the case in the absence of the defendant must be balanced, so that the interests of good justice and the legitimate interests of the involved parties in the trial are combined. Thus, we must not forget that consideration of a case in the absence of the defendant has effects on both parties to the trial, of course primarily suffering the defendant, but the procedural condition of the plaintiff cannot be ignored either.

Examining the case in the absence of the defendant raises many questions, both theoretical and practical, which the national courts collide every day, but as a result of these unresolved questions suffer over a million people, citizens of our country, who are away from home.

Description of the situation in the field of the research

Even though the subjects regarding the guarantees, on the one hand, and the procedure *in absentia*, on the other hand, have been previously researched at the national level, consideration of this subject under the aspect of procedural guarantees is unprecedented for legal science of the Republic of Moldova, moreover, it is an innovative approach for the international doctrine as well.

We find that the subject of procedural guarantees applicable when trying a case in the absence of the defendant lacks research and the issue under discussion has not been previously addressed in the civil procedure' theory. However, starting from the component elements of this

research we must note that both, the guarantees and *in absentia* procedure are not absolutely new concepts, there are some studies and some research in these field, even though just at an introductory level.

Identification of the research problem

In our research, we start from the imperative according to which, only when both parties know and participate at the examination of the case, we can ascertain the equal guarantee for both parties of the right to a fair trial carried out under conditions of adversariality and equality.

However, achievement of this imperative cannot be ensured all the time, given that in the context of the social crisis determined by an continuous wave of migration, to which are added errors in the summoning process, the problem of procedural absenteeism becomes more and more acute, so that not in every case the defendant can be properly summoned and as a result his presence at the trial cannot be ensured. Nevertheless, in order to avoid the procedural deadlock and to ensure the plaintiff's right to free access to justice, the court is forced to examine the case in the absence of the defendant.

Understanding that when examining a case in the absence of the defendant, both the rights and interests of the plaintiff and those of the defendant may be affected, the legislator is forced to introduce a series of mechanisms and guarantees, intended to defend the parties to the trial, in order to ensure the smooth running of the trial, even in the absence of the defendant.

Introduction of compensatory mechanisms or guarantees must satisfy the condition of efficiency, while ensuring the preservation of the procedural balance between the parties, which is not possible in all cases, hence theoretical solutions, sometimes, proving to be ineffective when the time comes for their practical application.

As a result, the major scientific problem, faced both, by science and practice, consists in *identifying and ensuring a fair balance between the rights and guarantees offered to the parties when examining a case in the absence of the defendant, so that neither the plaintiff is affected in his right to free access to justice, nor the defendant is affected in his right to equality of arms and adversarial process.*

The purpose of the research:

Taking into account the complexity of the scientific problem, the purpose of this paper is equally complex, consisting of:

1. Identifying the guarantees offered by the civil procedure legislation of the Republic of Moldova to the defendant, on the one hand, and to the plaintiff, on the other hand, in case of a trial in the absence of the defendant, as well as establishing the role these guarantees play in fortification of the procedural status of the parties to the trial.

2. Determining the extent to which the civil procedure legislation of the Republic of Moldova maintains a fair balance and equilibrium between the rights and guarantees of the plaintiff, on the one hand, and of the defendant, on the other hand, under the special conditions of examining a case in the absence of the defendant.
3. Comming up with conclusions and practical recommendations for improving the mechanism of judging a case in the absence of the defendant.

Research objectives and tasks:

In order to accomplish the intended goals, we propose to achieve the following objectives and tasks of:

1. Conceptualization of „guarantee", „general guarantee", „legal guarantee", „civil procedure guarantee" and „anti-guarantees" by identifying their structure, operation and applicability;
2. Defining and separating the concepts of „guarantee", „general guarantee", „legal guarantee", „civil procedure guarantee" and updating these concepts by removing them from the influence of the dogmatism of the Soviet ideology;
3. Conceptualization of „anti-guarantees" and their differenciation from „guarantees";
4. Determining the reasons and consequences of the absence of the plaintiff and/or of the defendant from the trial;
5. Providing and arguing an unequivocal answer to the question: Participation at the examination of a civil case is a right or an obligation for the parties to the trial?
6. Identification of the plaintiff's procedural rights affected as the result of the examination of the case in the absence of the defendant;
7. Identification of the spectrum of guarantees placed in the interest and benefit of the plaintiff, under the special conditions of trying a case in the absence of the defendant;
8. Identification of the procedural rights of the defendant affected as the result of the examination of the case in his absence;
9. Identification of the range of guarantees placed in the interest and benefit of the defendant, under the special conditions of examining the case in his absence;
10. Assessment of the efficiency and usefulness of the procedural tool „public summoning" for guaranteeing the procedural rights and interests of the parties to the trial;
11. Assessment of the efficiency and usefulness of the procedural tool „search of the defendant" for guaranteeing the procedural rights and interests of the parties to the trial;

12. Assessment of the efficiency and usefulness of the procedural tool „appointment of the lawyer ex officio" to guarantee the procedural rights and interests of the defendant, when trying a case in his absence;
13. Assessment of the degree of protection of the plaintiff's rights and interests, as well as the availability and sufficiency of the guarantees offered to the plaintiff, when trying a case in the absence of the defendant;
14. Assessment of the degree of protection of the rights and interests of the defendant, as well as the availability and sufficiency of the guarantees offered to the defendant, when trying a case in his absence;
15. Testing the balance between the rights and guarantees of the plaintiff, on the one hand, and of the defendant, on the other hand, under the special conditions of trying a case in the absence of the defendant;
16. Assessment of the effectiveness of the remedies offered to the defendant to contest the judgment pronounced in his absence.

Scientific research methodology

In order to carry out a complex investigation of the procedure for examining the case in the absence of the defendant, to ensure the identification of the procedural guarantees of the parties to the trial, as well as to establish the level of guarantee of the rights of the parties when trying a case in the absence of the defendant, various methods of research were used such as: *the logical method, the method of analysis and synthesis, the historical method, the comparative method, the empirical method.*

In order to achieve the proposed objectives, was closely examined the jurisprudence under art.6 of the European Court of Human Rights. In the same context were analyzed the cases examined by national courts of all levels of jurisdiction, including the explanatory Decisions of the Supreme Court of Justice Plenary, the opinions and advisory opinions of the SCJ, the Judgements of the Constitutional Court of the Republic of Moldova.

Scientific novelty and originality

As T. Kuhn notes: "What is important is not so much the novelty in solving the problem, but the point of view from which the problem is solved. (...) In this process, the reason for searching for information does not consist so much in the accumulation of new data, but in the different ways of interpreting them."[1]

[1] KUHN, T. *Structura revoluțiilor științifice*. Disponibil: https://monoskop.org/images/f/f9/Kuhn_Thomas_S_Structura_revolutiilor_stiintifice.pdf

In the same manner, in the conducted research were proposed for analysis problems that have been in the sights of researchers for a long time, but the novelty and scientific originality introduced by the author consists in the novel approach to the issue of examining cases *in absentia*, through the lens of legal guarantees.

Thus, the novelty and scientific originality of this work consists, first of all, in the innovative approach to the problem, under a novel angle for procedural science, namely through the lens of legal guarantees, which allow us to look under a completely different ungle to the issue of trying cases *in absentia*, providing the necessary solution to decompose the procedural status of the plaintiff and that of the defendant down to its structural elements, in order to understand how functional and sufficient these elements are to guarantee the respect of the rights and interests of both parties.

This thesis constitutes the first national study of the phenomenon of civil procedure guarantees of the parties when examining the case in the absence of the defendant, carrying out such a deep and comprehensive analysis of the national doctrine, legislation and practice.

As a result of the carried-out research, it became possible to propose solutions for the scientific problems that have been in the sights and discussions of scientists for a long time, new questions and problems were also rised, for whose solution, extensive research was conducted, and proper mechanisms were proposed.

The theoretical significance of the work

The theoretical importance of this work lies in the multi-aspect approach to a whole series of theoretical problems, primarily in the field of civil process, but also in the field of general theory of law.

As a result of this study, it became possible to identify and group procedural guarantees by subject categories, making it possible to understand the role of guarantees in ensuring the legal status of the parties to the process. At the same time, it became possible to formulate an unequivocal answer to the question of whether there is or is not ensured in the civil procedure legislation of the Republic of Moldova a fair balance between the procedural rights and guarantees of the parties to the trial under *in absentia* proceedings.

Thus, we consider that this study has an indisputable scientific value, primarily due to the novel subject for legal science, to the approach to the problems proposed for research, as well as to the obtained scientific results.

The applicative value of the work

Based on the results of the research, it became possible to reveal the gaps and contradictions in the civil procedure legislation, being identified and motivated practical solutions for the

problems faced by the courts, in the contex of trying a case in the absence of the defendant. At the same time *lege ferenda* proposals are formulated, aimed at improving the legal framework, thus aiming at strengthening the legal status of the parties to the process, streamlining procedures, reducing procedural costs and deadlines.

This work can be a useful tool in the application activity, providing necessary solutions and interpretations regarding many important aspects of *in absentia* procedure, which can be successfully used by practitioners.

Main scientific results submitted for defending

1. Taking into account a strong influence of Soviet dogmatism in the treatment of the concept of „guarantees", a review and a reconceptualization of „guarantees" has been carried out, modernizing this concept, in line with the new realities.
2. Was restructured the organization of general (material) guarantees based on the Soviet doctrine (dividing them in economical, political and ideological guarantees), proposing a new organization of these guarantees.
3. Was developed and argued the mechanism based on which the various types of guarantees can be delimited and highlighted, as well as the way in which rights and freedoms can be distinguished from guarantees.
4. Was scientifically argued the concept of „anti-guarantees", identifying the structure and characteristic signs of anti-guarantees.
5. Analyzing the phenomenon of procedural absenteeism, was presented and argued the answer to the question: Is participation in a civil case a right or an obligation?
6. Were identified the specific rights of the plaintiff, on the one hand, and of the defendant, on the other, affected when trying a case in the absence of the defendant, at the same time was identified a list of procedural guarantees that ensure the realization of these rights.
7. Was proposed and argued the need to devide summoning into perfect and imperfect, ordinary and extraordinary.
8. After conceptualizing guarantees, understanding how they perform their functions, identifying and highlighting the guarantees applicable on the one hand to the plaintiff, and on the other hand to the defendant, it finally became possible to offer an evaluation of the extent to which the legislation of the Republic Moldova ensures a fair balance between the procedural rights and interests of the plaintiff and of the defendant, when examining a case in the absence of the defendant.

9. A series of *lege ferenda* proposals were made to ensure the most efficient consideration of cases in the absence of the defendant and to improve the condition of the defendant and to minimize the impact on his rights and freedoms as a result of the absence of the defendant from a trial.

Implementation of scientific results

The results of the research, along with proposals of *lege ferenda* were communicated to the Parliament of the Republic of Moldova, the Ministry of Justice and the Supreme Court of Justice, to be examined and used in the subsequent process of legislation and standardization of judicial practice.

In the letter of 06.05.2022, the Ministry of Justice communicated: „Considering the importance of the topic of the thesis, the conclusions formulated will serve as support in the processes of amending the legislative framework in the sector, as well as being a source of research in the training process in the higher education institutions of the Republic of Moldova."[2]

In the letter of 03.10.2022, the Legal Committee on Appointments and Immunities of the Parliament of the Republic of Moldova appreciated the research results as „an outstanding contribution to legal doctrine and practice in the field of civil procedure law." At the same time, it was highlighted that „the *lege ferenda* proposals, developed as a result of the carried out research, were the basis of a draft law, which will be promoted in the context of the operation by the Parliament of amendments to the relevant normative framework."[3]

Approval of results

The doctoral thesis was developed under the auspices of the Doctoral School of Legal Sciences of the State University of Moldova, being presented, argued, analyzed and debated within the Guidance Committee and before the Department of Procedural Law of the State University of Moldova.

Publications on the topic of the thesis

The research results were presented to the academic environment and the general public in a number of 5 publications, made in scientific journals and 3 communications, made in national and international conferences.

The volume and structure of the thesis

The conducted research is divided into 5 chapters, conclusions and recommendations, bibliography with references to 312 sources, having a total volume of 222 pages.

[2] Letter from the Ministry of Justice of the Republic of Moldova nr.02/1241 of 06.05.2022.
[3] Letter from the Legal Committee on Appointments and Immunities of the Parliament of the Republic of Moldova CJ-05 nr.228 of 03.10.2022.

Keywords: civil process, guarantees, anti-guarantees, absence of the defendant, search for the defendant, public summoning, legal summoning, appointment of the lawyer, reasonable term, free access to justice, adversariality and equality, procedure *in absentia.*

THESIS CONTENT

Chapter 1. Analysis of the situation in the field of civil procedure guarantees of the parties when examining the case in the absence of the defendant

This chapter is dedicated to the analysis of the situation in the field of investigation of civil procedure guarantees of the parties when examining the case in the absence of the defendant. Thus, taking into account that this investigation is carried out through the lense of civil procedure guarantees, this being an innovative approach, both for domestic and international science and doctrine, we faced a vacuum of works and research that would address directly the given subject, using the research technique proposed by the author.

The analysis of the situation in the research field is carried out from the perspective of the component elements of the research problem, being structured in 3 levels of research:

- The first level hovers over the general subject of guarantees, separating legal guarantees from the general set of guarantees and delimiting civil procedure guarantees in a separate compartment;
- The second level focuses on the issue of the presence and participation of the parties at the examination of the case, reserving a separate place for the summoning procedure;
- The third level is a cumulative one, including the problems solved at the first two levels.

Section 1.1. entitled *Analysis of the situation in the field of guarantees* starts with an introduction to the subject of guarantees, making a historical foray into the emergence and development of this phenomenon as a research subject for legal science, taking its origins in the `40s of the XX century, having its research epicenter in the Soviet Union.

In this historical context we see how coming to life, evolution and development of the guarantees was conditioned by the Soviet ideology and the geo-political conjuncture of those times. However, guarantees, as an idea and a concept, are not totally anachronistic and broken from the current reality, still having great scientific importance, being researched, developed and widely applied both theoretically and practically even today. This conclusion is demonstrated by the increased interest of researchers in the topic of guarantees, found in a large number of monographs, scientific articles and doctoral theses.

Section 1.2. named *Analysis of the situation in the field of examining cases in absentia* continues the analysis of the situation in the second structural level of the research subject, focusing on the specific field of trying cases *in absentia.*

The doctrinal coverage of this subject, especially in the field of civil procedure, is rather superficial, being briefly reflected in manuals and courses dedicated to civil procedure, this subject being touched only tangentially in some researches and scientific articles. However, the phenomenon and issue of the procedure *in absentia* is becoming an increasingly attractive topic for proceduralists, confirmed by the recent doctor's thesis with the generic *Peculiarities of judging criminal cases in the absence of the defendant*, signed by Ilanji Arina.[4]

Chapter 2. Analysis of the concept, structure and types of guarantees

Chapter 2 is entirely dedicated to guarantees, being a preparatory chapter, intended to introduce the reader to the subject of guarantees, as well as to familiarize him with the issues and doctrinal discussions.

Within this chapter, the delimitation between the concepts of „general guarantees", „legal guarantees" and „civil procedure guarantees" is made, and an algorithm for identifying and delimiting the various types of guarantees is also developed.

Section 2.1. entitled *Introduction to the concept of guarantee* traces the historical evolution of the understanding and emergence of the very necessity of guarantees, passing the transformation from the Roman legislation that did not see the need in guaranteeing rights, to the contemporary period in which guarantees were recognized for their undeniable role in the defense of rights and citizen's interests.

As indicated by Н.А. Боброва with reference to the concept of guarantee: "Legal science does not know another such category that is used so often and at the same time has such a broad semantic form, in which the most diverse content is included. This category constitutes guarantees."[5] Thus, the definition and identification of the component elements of this category constituted the priority subject of research within Section 2.1.

Examining the opinions and definitions offered by researchers, we find a great interest on their part, materialized in a great diversity of views and appreciations given to guarantees, which are being perceived as: tools or mechanisms; objective and real conditions; conditions and means; preconditions; conditions; economical, political, moral, legal and organizational means and

[4] ILANJI, A. *Particularitățile judecării cauzei în lipsa inculpatului*: Teza de doctor în drept. Chișinău, 2019.
[5] БОБРОВА, Н.А. *Гарантии реализации государственно-правовых норм:* Монография. Воронеж: Изд. Воронежского Университета, 1984, p.8.

procedures; general conditions and special means, some of the authors even deny the existence of guarantees.

We must admit that guarantees constitute a controversial legal phenomenon, masking and disguising itself in the most diverse forms and representations, making the attempts of researchers to demonstrate the existence of this legal matter extremely difficult.

Finding an algorithm to identify guarantees involves decomposing this concept, by dividing it into structural elements and methodically studying each element separately.

Thus, the Russian professor А.И. Денисов proposed dividing the multiple guarantees of the rights of the citizens of the USSR into two basic groups: *general guarantees for all the rights and special guarantees, characteristic for each individual right*.[6]

Starting from the division of guarantees in general and special, the next stage in understanding guarantees consists in the thorough research, on the one hand, of general guarantees and on the other hand of special guarantees, which allows us to understand both the common elements of these two categories, which bring them together under the umbrella of the generic concept of guarantees, as well as highlighting the differences between them, which leads to individualization of each category.

Within Section 2.2. entitled *General guarantees*, the focus is on the research of general guarantees (called *material guarantees* in the Soviet doctrine), in its status of a structural element of the supercategory of *guarantees*.

For a better understanding of this scientific concept we started by researching the historical framework in which it came into being and developed. Thus, the general guarantees were created and served as a scientific-political tool, widely exploited by the Soviet doctrine, demonstrating by means of the general guarantees the superiority of the socialist system compared to the capitalist one, and the main argument in this propagandistic struggle constituting the material guarantees.

In this historical context, the theory of material guarantees was founded, which traditionally assigns economic, political and ideological guarantees to this category.[7]

Carrying out a detailed study of material guarantees, was reached the conclusion that they do not guarantee and do not ensure the defense, protection or realization of concrete rights or interests, they actually form an environment, they are preconditions, a sphere of existence and development of society, of rights and freedoms, of legal guarantees, as well as of all other social phenomena. As a result, we believe that the appreciation given to these conditions, to this

[6] ДЕНИСОВ, А.И. *Советское государственное право*. Москва, 1947, p.322.
[7] ВИТРУК, Н.В. *Общая теория правового положения личности.* Москва: Норма, 2008, p.144.

environment of existence of society and the individual - as guarantees of subjective rights and freedoms, being a mistake. The time has come to dethrone material guarantees from the guarantee system and to review their role and their functions.

However, if we deny the role of material guarantees in the realization of subjective rights and freedoms, then we inevitably collide with another question: What then sets the law in motion and makes it functional?

In our view, this source of the spark, which ignites the flame of law and keeps it burning and this guardian of law in society and supervisor of the administrative system and the state machinery, is society itself, or rather the most active part of society, which we now call „civil society", and the most important tool for achieving this mission is the „struggle" - the internal struggle that the law is waging, the ongoing struggle between the interests of the oppressors and the oppressed, the dominant classes and the dominated, those in power and those in opposition, the struggle waged by individuals to defend their subjective rights, the struggle waged by society for its general rights and interests, all this struggle and all the resistance opposed by the individual and society constitute the most important general guarantee, which ensures, besides the permanent and continuous evolution of the law, the guarantee of those rights and freedoms declared and reinforced by normative acts.

We can associate this guarantee neither with ideological guarantees, nor with social guarantees, nor with organizational guarantees, nor with the concept of „civil society", each of these categories contributing its structural elements to build a distinct guarantee that we call „Vox Populi" (Voice of the People). It is not by chance that the expression „Vox pópuli vox Déi" (Voice of the people - Voice of God) became a maxim.

As a result, we consider Vox Populi to be the most important general guarantee, ensuring a strong internal control over the state machinery and ultimately making the law truly functional.

In addition to an internal control, we can also identify an indirect form of control, originating from the outside, accumulating in itself the features of a general guarantee. Thus, in our view, the phenomenon of globalization, the world hegemony of the USA, in line with the strengthening of the European Union and the neighborhood policy led by the EU, is taking shape in a general external guarantee, accumulating in itself the specific characteristics of a guarantee that we call „Vox Mundi" (Voice of the World).

Vox Mundi is the external voice, which joins the internal voice of civil society, contributing to the guarantee and respect of general and even individual rights and freedoms.

As a result, the general guarantees, from the modern period, are composed of at least two indispensable elements, on the one hand „Vox Populi" - materialized in the civil society, acting

from the inside, and on the other hand „Vox Mundi" - materialized in the form of an external instrument, which contributes to guaranteeing the respect for human rights and general interests, as well as democratic values.

Thus, the time has come to leave the outdated concept of „material guarantees" in history, and let its place be taken by the pure concept of „general guarantees", which includes two fundamental guarantees: „Vox Populi" et „Vox Mundi".

Section 2.3. called *Special (legal) guarantees* continues with the research of the second component element of the supercategory of guarantees, focusing on the research of special guarantees, also called by doctrinaires *legal guarantees*.

Although most authors agree on the role and importance of legal guarantees, the authors' views on the structure and definition of this legal phenomenon are extremely polarized. Thus, the first group of researchers understands by legal guarantees exclusively certain legal means or instruments, the second group of researchers assigns to the category of legal guarantees not only legal means and instruments, but also „the activity of state bodies and institutions and NGOs ", the third group of researchers in general took a radical position, denying the very existence and necessity of legal guarantees.

If for doctrinaires defining the concept of legal guarantees is a challenge, then identifying the elements of which legal guarantees are composed of, as well as determining the legal nature of these guarantees is a real problem in the legal world.

In the works of researchers, we can find such structural elements attributed to the category of legal guarantees as: legal norms, subjective rights and freedoms, legal obligations, principles, presumptions, fictions, judicial practice, individual legal acts, means of supervision and control, means of legal liability, means of counteracting and sanctioning violations, procedural forms of rights' defense, means of prophylaxis and prevention of violations, etc.

We believe that the attempt to identify all the legal instruments and phenomena that are part of the system of legal guarantees can take forever, and any new element that will be included or excluded from the system of guarantees will arouse a wave of discussion among scholars, arguments being made both for and against the inclusion or exclusion of that element.

However, given that legal guarantees cannot be determined by a certain form or legal structure, and the most diverse legal phenomena can be attributed to this category, we asked the question: How to individualize legal guarantees in the guarantee system and how to distinguish them from other legal structures and phenomena?

In order to solve this problem, we proposed the establishment of a system of benchmarks or defining features that would individualize them.

In our view, every single legal guarantee is identified by three criteria that distinguish legal guarantees from other legal phenomena, as well as differentiate them from other types of guarantees, namely: **function**, **form** and **object**.

Thus, based on these three criteria - function, form and object we obtain the possibility, first of all, to separate guarantees from other legal or social phenomena, as well as to establish a mechanism for distinguishing the various types of guarantees and to identify legal guarantees in the vast system of guarantees and legal structures.

Finally, we found that legal guarantees do not represent a distinct legal phenomenon, do not constitute a certain legal formation (such as rights and freedoms, principles, presumptions, fictions, etc.), but represent a state of legal matter.

Section 2.4. named *Civil Procedure guarantees* continues with the study of guarantees, narrowing the subject of research to the category of legal guarantees applicable to the civil process.

It is generally recognized in legal science and does not require additional proof the assignment of civil procedure guarantees to the category of legal guarantees.[8]

However, the close connection between legal guarantees and civil procedure guarantees imposed the need to identify the criteria to distinguish civil procedure guarantees from the other legal guarantees.

To solve this task we refer to А.Б Иванюженко, who highlights the following as the main distinctive element of civil procedure guarantees – the realization of procedural guarantees exclusively within a procedural legal frame.[9]

Thus, outside of a civil process and, as a result, outside of a civil procedure frame, civil procedural guarantees cannot exist. As a consequence, the civil procedure frame is a guarantee in itself of the implementation of the rights, obligations and guarantees established in the rules of civil procedure law, and the proper functioning of the guarantees is possible only with the respect of the civil procedure frame.

Chapter 3. Procedural absenteeism and its consequences for the parties

Within this chapter, the phenomenon of procedural absenteeism is subject to research, as well as the procedural consequences that arise as a result of the absence of the plaintiff, of the defendant or of both parties to the trial, representing an important chapter in understanding how cases end up being examined *in absentia*.

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[8] **MOSCALCIUC, V. Poziționarea și identificarea garanțiilor procesual-civile în sistemul general al garanțiilor. În: *Rezumatul comunicărilor la Conferința științifică internațională „Perspectivele și Problemele Integrării în Spațiul European al Cercetării și Educației”,* p.73, Cahul, 2018.**

[9] ИВАНЮЖЕНКО, А.Б. *Процессуальные гарантии участников производства по делам об административных правонарушениях:* Дис...канд. юрид. наук. Санкт-Петербург, 1999, p.87.

While the absence of the parties as a procedural phenomenon is quite widespread, the reasons for the absence are quite diverse, so are the consequences for the non-appearance of the parties before the court, taking the form of procedural sanctions aimed to disciplining and stimulating procedural „presenteeism" .

Researching the autochthonous doctrine, as well as the Romanian and Russian doctrines, we found that the term „procedural absenteeism" is not in use, although this term would perfectly reflect the phenomenon of non-appearance before court, voluntary or involuntary, of the participants to the trial. As a result, we considered it necessary to introduce in scientific circulation the term „procedural absenteeism", in order to bring together under a single concept all the cases of non-appearance of the parties before court.

Section 3.1. *The reasons and consequences of the procedural absenteeism of the parties to the trial* emphasizes the identification and study of the reasons that condition the non-participation of the plaintiff or of the defendant in the examination of the case. Thus, both the absence of the plaintiff and the absence of the defendant can be determined by several reasons, which can be conventionally divided into categories of purely subjective, purely objective and mixed reasons.

It should be borne in mind that the absence of the defendant cannot condition the same consequences as the absence of the plaintiff, because if the defendant's absence would lead to the impossibility of trying the case, even in the form of stryking out the application, the judicial act would be compromised and the plaintiff would be totally deprived of the free access to justice.[10]

The absenteeism of the parties to the trial can be determined by the most diverse reasons, both subjective and objective, but regardless of the reasons that were the grounds of the parties' absence, the court is the only one responsible for verifying compliance with all the procedures for communicating the summons, adopting finally the only correct procedural solution, designed to guarantee the rights of the present party, but most importantly the rights and interests of the absent party.

Section 3.2. *Participation in the trial - right or obligation?*

Trying to provide an unequivocal answer to this question, we decided to do it through the principles of adversariality and availability, or, rather, through the collision of these two principles.

Thus, we started from the idea that the principle of adversariality is that component element of the civil process for whose realization the presence and participation of the parties in the examination of the case is required. At the same time, the absence of the plaintiff or the defendant

[10] МУСИН, В.А. *et al*. *Гражданский процесс*. Москва: Проспект, 1998, p.193.

constitutes some unavoidable procedural incident, which, however, cannot lead to the blocking of the process and, as a result, cannot compromise the act of justice.

Continuity of the process, even in the absence of one of the parties to the process becomes possible due to the counterbalance in the form of the principle of availability.

The freedom of will of the participants to the trial, as well as the autonomy in deciding the fate of the material and procedural rights, are the only ones capable to shake the imperative of adversariality.

As a result, adversariality dictates the mandatory presence of the parties at the examination of the case, and only availability can oppose it, through the freedom of expression of the will of the trial participant not to show up. We must not forget that sometimes the absence of a participant in the examination of a case may in itself be his procedural position, and the suspension of the examination of the case or endless summoning of the absent party would lead to the prejudice of the present party.

Thus, returning to the question of the participation of the parties as a subjective right or a subjective obligation, we came to the conclusion that both the plaintiff and the defendant are to decide freely and individually whether or not to participatein a civil case, this being the exclusive subjective right of the party, and any derogation, even if it pursues the supreme interest of the state, society or the opposite party, will have no result and will not bring any added value to the ongoing process by simply bringing by force the missing party, or sanctioning it for no show.

Chapter 4 Civil procedure guarantees of the plaintiff when examining the case in the absence of the defendant

In this chapter, as well as in the following chapter, the research results from the previous chapters are brought together and applied to the specific situation of the parties, when examining a case in the absence of the defendant. At the same time, within this chapter, the foundations of the guarantee identification mechanism are laid, which will be applied both to the identification of the plaintiff's and of the defendant's procedural guarantees.

Thus, we have found that in order to proceed to the research of specific guarantees, it is necessary to clearly define the mechanism of recognizing guarantees, which is why the research must begin by identifying the subjective rights.

As a result, the clear identification of subjective procedural rights and finding the answer to the question – what do we want to guarantee? - allows us to find out what is the circle of procedural guarantees put in the service of these rights, providing therefore the answer to the question - how do we guarantee?!

The guarantees that the plaintiff benefits from bear the imprint of the special condition of examining the case (in the absence of the defendant), aiming to ensure and put into operation the components of the right to a fair trial, affected as a result of the trial being conducted without the opposing party.

Thus, we found the components of the generic right to a fair trial, affected as a result of the absence of the defendant:

- the plaintiff's right to free and unimpeded access to justice;

- the plaintiff's right for the case to be examined within a reasonable time.

As a result, all the guarantees offered to the plaintiff, when trying a case in the absence of the defendant, are mainly aimed at ensuring the continuity of the process, even in the absence of the defendant, with the objective to ensure that the court examines the case in a fair and a reasonable term.

Section 4.1. *The guarantees of the plaintiff's right to free access to justice, when trying a case in the absence of the defendant*, emphasizes the explanation of the content of the right to free access to justice, both from the perspective of national legislation and from the perspective of the Convention and the practice of the European Court. Understanding the guaranteed right in itself allows the identification of the entire spectrum of procedural guarantees placed at the service of this right.

Only under the conditions when the plaintiff has the certainty of defending his rights, regardless of the presence or absence of the defendant, the plaintiff can be confident in the protection of his procedural rights, as well as in the defense of his material rights.

Thus, we found that the plaintiff's right to free access to justice is supported by an important number of guarantees that ensure the examination of the case even in the absence of the defendant.

Section 4.2. *Guarantees of the plaintiff's right to justice within a reasonable time, when trying a case in the absence of the defendant*, continues with the investigation of the plaintiff's guarantees related to the plaintiff's right to justice within a reasonable time.

Thus, we concluded that the term in which justice is carried out is essential to guarantee its effectiveness, its violation being likely to attract the responsibility of the state, but only in the case of delays attributable to the judicial authorities, and in order to prevent such violations the legislator implemented a wide range of guarantees for the proper realization of this right.

Chapter 5 Civil procedure guarantees of the defendant when examining the case in his absence

If in the previous chapter we found that considering the plaintiff's advantageous position in the trial, due to the absence of the defendant, the guarantees granted to the plaintiff are primarily

focused on ensuring the plaintiff's right to free access to justice, while also ensuring the conduct of judicial proceedings within a reasonable time, so that the absence of the defendant does not cause the process to be blocked, then in the case of the absent defendant, the guarantees placed in his defense have an omnipresent role, being found at all procedural phases and stages and in a wide representation. Thus, the guarantees dedicated to the absent defendant are more technical, localized and punctuated on specific procedural aspects. As a result, the guarantees placed in favor of the defendant intervene from the moment the action is lodged, progressing as the proceedings move on, culminating at the stage of summoning the defendant and when examining the merits of the case.

In accordance with the adopted research mechanism we started by identifying defendant's rights affected as a result of examining the case in his absence.

Again, as in the case of the plaintiff, when trying a case in the absence of the defendant the main right affected is the right to a fair trial. However, in the case of the absent defendant, the most affected components of the right to a fair trial are: the adversarial nature of judicial proceedings and the equality of procedural rights of the trial participants.

At the same time, if in the previous chapter we identified groups of guarantees specific to each category of rights, then in this chapter we do not separately identify the guarantees specific to each affected right, but first we start by explaining the essence of the affected rights, after which we identify the procedural guarantees put in the service and in defense of the subjective rights and interests of the absent defendant. However, in order to ensure a logical order and continuity of the research, the identification and grouping of the procedural guarantees placed at the service of the absent defendant is done depending on the specific phase of the civil process.

Within Section 5.1. *Guarantees of the defendant's rights at the stage of filing the civil action* we identified the guarantees that the defendant benefits from at this procedural stage.

We observe a specific feature of all the procedural guarantees applicable at the stage of filing the civil action - „anticipated action" of the guarantees. Thus, the given category of guarantees become active even before the process is started, obliging and forcing the plaintiff to take measures to identify, search but also preventively inform the defendant.

Section 5.2. *The guarantees of the defendant's rights at the stage of preparing the case for judicial debates* continues with the identification of the guarantees that become operative and applicable at the stage of preparing the case for judicial debates. Thus, we found that at this stage the defendant can benefit from three levels of guarantees:

- *The first level of guarantees* has a general character and is offered to any defendant, materializing at the stage of the ordinary summons.

- If the ordinary summons of the defendant fails, leading to the impossibility to inform the defendant about the trial, *the second level of guarantees* intervenes and is activated, aimed at ensuring the identification and information of the defendant through the mechanisms of extraordinary summoning, such as: public summoning and search of the defendant.
- *The third level of guarantees* has an interphase character, being activated at the stage of preparing the case for judicial debates, when the court, noting the impossibility of summoning the defendant, requests the appointment of an ex officio lawyer, but this guarantee proliferates at the stage of judicial debates, when the lawyer appointed ex officio has the most active role.

The first level of guarantees is researched in sub-section 5.2.1. *Guarantees of the defendant's rights within the ordinary summoning*. Thus, the ordinary summoning mechanism is the primary instrument, which establishes the manner and general conditions for summoning the participants to the trial before the court.

At this stage, we found the need to divide the ordinary mechanism of summoning into „perfect summoning" and „imperfect summoning", so that the perfect summoning involves the existence of an indubitable and incontrovertible certainty about the communication of the summons to the participant in the trial targeted in it, while the imperfect summoning is based entirely on the presumption of communication to the participant in the trial of the summons, but offering no direct evidence to prove this fact.

The proper implementation of the ordinary summoning mechanism is ensured by the guarantees included in art.102 parag. (3), (4^1), (6), art.103 parag. (1), art.105 parag. (6), art.107 para. (1) and (2) CPC RM which have the purpose and task to provide the appropriate communication and information of the defendant about the on-going trial, thus ensuring the presence and participation of the defendant in the process.

The second level of guarantees is researched in sub-section 5.2.2. *Guarantees of the defendant's rights under the extraordinary summoning*. At this stage of the research we note that the extraordinary summoning is part of the unique summoning system, providing tools to summon procedural participants by public summoning and by search of the defendant, which intervene and apply only in case of failure of the ordinary summoning mechanism.

The unique character of the summoning system is highlighted primarily by the obligation to go through the ordinary summoning stage, and only in the event and under the condition that this procedural exercise failes, the tools of the extraordinary summoning become applicable. Thus, the qualification of the extraordinary summoning as an alternative procedure to the ordinary

summoning is wrong, since the very term „alternative" implies the existence of a freedom of choice, while specific to the extraordinary summoning is the successive character, which manadtory and in all the cases implies the exhaustion of the ordinary summoning before resorting to the tools of extraordinary summoning.

a. Public summoning of the defendant, by its very nature, undoubtedly constitutes a procedural guarantee, but this guarantee has a double applicability, on the one hand, having the role of an additional instrument to inform the defendant about the trial of the case, because in the end we cannot exclude the fact that following the public summoning the defendant will learn about the examination of the case, and, on the other hand, this instrument has the role of unblocking the procedural deadlock determined by the failure of the ordinary summoning, thus guaranteeing the plaintiff's right to the continuity of the proceedings and free access to justice.

At the same time, unlike the ordinary summoning, which has an *immediate, direct and personal* character, the public summoning, taking into account the procedure for its execution, has a *mediated, indirect and public* character.

Studying the legal nature of the instrument of public summoning and trying to answer the question of whether the instrument of public summoning is a *presumption* or a *legal fiction*, we came to the conclusion that public summoning is a legal fiction, being an expression of the legislator's will, who links the publishing of the summons with its communication to the defendant, even if this fact is not known and cannot be proven, thus having the effect of a legal summoning.

b. Search of the defendant is an atypical institution of the civil process. Thus, this mechanism constitutes a procedural guarantee, but if in its historical form search of the defendant had a clearly defined orientation, protecting the interests of the state and of the plaintiff, currently, as the result of exclusion of bring the defendant by force before court by the police bodies, this guarantee has migrated from guaranteeing the rights and interests of the plaintiff, to guaranteeing and protecting the rights and interests of the absent defendant.

However, the biggest paradox of this procedural institution is the fact that even if the search of the defendant, from a guarantee dedicated to the plaintiff, has become a procedural guarantee dedicated to the defendant, the categories of cases for which the search of the defendant is ordered have remained unchanged and continue to serve the interests of the plaintiff and not of the defendant. „Thus, the search of the defendant, in order to be a real and effective procedural guarantee, aiming to strengthen the legal status of the holder and in no way to favor abuses, must

be established for those categories of cases in which the defendant would have an interest „to be found" and to really get involved in the examination of the case, for which the court sought him."[11]

Currently, the institution of searching for the defendant is an anachronistic one, becoming a procedural atavism, requiring a fundamental rethinking and revision. However, abandoning the tool of searching the defendant is not a correct solution, it being a procedural mechanism that can bring unexpected procedural benefits, if provided its „general reconstruction".

Within Section *5.3. The guarantees of the rights of the absent defendant at the stage of judicial debates* is researched the third level of guarantees from the phase of preparing the case for the judicial debates, but which, as we previously mentioned, produce its most important effects at the stage of judicial debates. Thus, within this compartment, we investigate the main and only guarantee, applicable at the stage of judicial debates, that the absent defendant benefits from - the appointment of an ex officio lawyer, made according to art. 77 CPC RM.

Examining the procedural guarantees placed by the legislator for the use of the defendant during the phase of judicial debates, we found that the absent defendant does not benefit from many guarantees, and the only procedural guarantee which is addressed directly to the absent defendant is not very helpful either. First of all, we need to note that appointment of an ex officio lawyer is provided by the law only to the category of absent defendants whose domicile is not known, and secondly, we cannot miss out of sight that the presence of an ex officio appointed lawyer contributes only to the observance of the procedural order and has no chance to effectively contribute to the substance of defense of the absent defendant. Moreover, the lack of clarity regarding the powers of the appointed lawyer to appeal the rendered judgment, as well as the 30-day period to exercise an appeal, which runs from the date of pronouncement of the judgement, compromise any form of defense of the absent defendant, even under the conditions of defendat's subsequent appearance. Thus, weighing the legal status of the present plaintiff and that of the absent defendant, we found an obvious imbalance between these two procedural subjects.

The structural consistency of research of the guarantees within the various procedural phases is interrupted by Section *5.4. The concept of anti-guarantees*. Such a deviation was determined by the author's desire to prepare the reader by first giving him a detailed exposition of the theory of guarantees, followed by the practical presentation, in action, of the guarantees and only after detailing the plaintiff's guarantees, on on the one hand, and of the defendant, on the other hand, the author considered that the reader is sufficiently prepared, and the subject is mature enough for arguing the concept of anti-guarantees.

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[11] **CREȚU,V. MOSCALCIUC,V. Probleme teoretico-practice la căutarea pârâtului în cadrul procesului civil. În: *Revista Institutului Național al Justiției*, 2016, nr.2(37), p.35.**

Thus, in this section are provided the answers to the questions: What are anti-guarantees and how to distinguish them from other legal phenomena?

The term anti-guarantee is circulated in the doctrine, being found in the works of several researchers. However, the use of the term anti-guarantee is rather customary than scientific; thus, none of the researchers developed this concept and demonstrated its legal nature and applicability.

In order to provide an assessment of anti-guarantees, we started from the initial finding that they represent a mirror or rather a shadow (the dark side) of the guarantees.

We believe that the distinguishing element between a guarantee and an anti-guarantee is the effect, influence, impact or consequence of the application of a guarantee. It is the influence that the guarantee produces on the subject it is meant to protect, as well as on other legal subjects, that makes a guarantee turn into an anti-guarantee.

Anti-guarantees are the *„werewolves"* of the legal world, being at first glance ordinary guarantees placed in the service and defense of the subject of the law in question, while in reality they have a destructive effect either on the bearer of this guarantee or on the surrounding subjects. Therefore, it became necessary to destinguish and classify anti-guarantees into *direct* and *indirect*, starting from the subject over which the anti-guarantee negatively influences: the (anti)guarantee holder or other subjects.

Section *5.5. The civil procedure guarantees of the parties at the optional phases of the trial* is the culminating part of Chapter 5, unmasking the real condition and the fate of the absent defendant, when examining a case in his absence.

In the framework of this study, going shoulder to shoulder with the absent defendant, through all the judicial phases and stages, we found that the judgement adopted by the court in the absence of the defendant is predictably unfavorable for him, at the same time under the conditions when the legislator provides for lodging appeal only 30 days from the date of the pronouncement of the judgement we must state that there are few chances that the defendant will learn about the judgement given in his absence and will lodge his appeal within the time-limit. At the same time, any appeal submitted after the time-limit will inevitably be declared out of time by the court of appeal. Subsequently, trying to challenge the decision of the court of appeal the defendant will collide with the inflexibility of the Supreme Court of Justice, thus exhausting any ordinary remedies against a judgement given in his absence.

Trying to make use of extraordinary remedies, the defendant will find that there is no procedural ground, in the list of grounds for review, provided under art. 449 CPC RM to request the review of the judgment pronounced in his absence.

Section 5.6. *In absentia procedure* examines the problem of examining cases *in absentia* in the legislation of other states, highlighting similar shortcomings, but also the good practices which can be implemented in our procedural system.

Correspondingly, we came up with several alternative proposals to improve the procedural condition of the defendant, submitting legislative amendments to guarantee the legal status of the defendant, which urgently need to be implemented in order to minimize the risk of trying a cases in the absence of the defendant – a procedural state in which anyone can find himself.

6. GENERAL CONCLUSIONS AND RECOMMENDATIONS

Examining a case in the absence of the defendant is a particularly topical subject for the reality of the Republic of Moldova, given that every 4th citizen is either abroad or is about to take such a decision.

This state of affairs is known and addressed both by the state and by the international community, but the phenomenon of migration is viewed and examined from a social, demographic, political and economic point of view, while the legal aspect of this problem is not taken into account.

Through this researche we tried to highlight the legal component, equally affected as a result of the massive exodus of the population, alerting society and the legislator to the consequences and the impact that migration can have on the legal status of the citizens, demonstrating how unprotected the citizen is when facing legal proceedings induced and conducted in his absence.

Even if the problem regarding the conduct of proceedings *in absentia* is accute as never before for our country, we must note with regret that neither the legislator nor society is aware of the extent of this problem and the eminent legal risks, which is why from the very beginning of this work we proposed, as one of the main purposes, to highlight the problems related to trying cases in the absence of the defendant and to arouse the interest of the legislator and society towards these problems.

In an attempt to establish the role that guarantees play in strengthening the procedural status of the parties to the trial and to determine the level of guarantee of the rights of the parties to the trial, under special conditions of trying a civil case in the absence of the defendant, through a dialectical exercise of investigation and at the same time of counterposing the procedural rights and guarantees of the plaintiff, on the one hand, and of the defendant, on the other, we reached the following **conclusions**:

1. The guarantees, especially the civil procedure guarantees, applicable at the examination of the case in the absence of the defendant, as a research subject, has never been the object of any fundamental studies within the domestic doctrine, but also for the international doctrine, the approach to the issue of examining the case in the absence of the defendant, from the point of view of civil procedure guarantees is innovative.
2. The subject of guarantees is still treated by researchers under a strong influence of Soviet dogmatism, elaborated and substantiated almost a century ago, without, however, undergoing essential changes in approach and thinking, requiring a revision and a reconceptualization that would go in step with the new realities.
3. Studying the material (general) guarantees in the form of political, organizational, socio-economical, and ideological, we found that, in fact, they do not guarantee the realization of subjective rights and freedoms, but only constitute an environment in which these rights and freedoms exist. A form of political organization of a society, an economic or social basis are inevitable and exist independently of individual will, being factors as objective as air or water. Thus, we find it necessary to abandon the legacy of the Soviet ideology in the treatment of material guarantees by placing them on the pedestal of the theory of guarantees, and as a result, to abandon the attribution of socio-political, economical and ideological conditions to the category of general guarantees.
4. However, we consider that research of general guarantees is not out of place and still requires special attention from researchers, as never before it is necessary to identify those phenomena that form the category of general guarantees.
5. In our view, the general internal guarantee, which fulfills the role of guardian of the law in society and supervisor of the administrative system and the state machinery, is the society itself or, rather, the most active part of society, which we currently call „civil society", and the most important tool for the achievement of this mission is „struggle" - the internal struggle that law is fighting, the continuous struggle between the interests of the oppressors and the oppressed, the dominant and the dominated classes, those in power and those in opposition, the struggle of individuals to defend their subjective rights, the struggle of society for its general rights and interests. All this struggle and all the resistance opposed by the individual and society to the state constitute the most important general guarantee, which we named „Vox Populi" (Voice of the People).
6. Along with the internal general guarantee, we also identified the special role played by the international community, resulting from the phenomenon of globalization, the world hegemony of the USA, along with the strengthening of the European Union and the EU's

neighborhood policy, all leading to the shaping of an external general guarantee, which we named „Vox Mundi" (Voice of the World).

7. Thus, as a result of the dethronement of the Soviet concept of „material guarantees" we identified two general guarantees: „Vox Populi" and „Vox Mundi", which together represent that driving force and that guardian of law and justice, transforming law from a conglomeration of declarative norms into a living and functional organism.
8. Redefining *general guarantees*, we consider that they *represent a system of activities and actions of civil society (vox populi) and of the international community (vox mundi), focused on the defense and protection of rights and freedoms, both individual and collective, aimed at ensuring supervision of the state's activity and at responding to any attempts to abuse rights and freedoms, thus creating equal conditions for any subject to realize his rights and legitimate interests.*
9. Researching special guarantees, also named legal guarantees, we found that in an attempt to determine their legal nature, as well as to define them, researchers often go the way of identifying and enumerating the structural elements that make up legal guarantees, including in this concept the most diverse legal phenomena. We cannot support this trend. We believe that legal guarantees do not represent a distinct legal phenomenon, do not constitute a certain legal formation (such as rights and freedoms, principles, presumptions, fictions, etc.), but represent a state of the legal matter. This means that in vain we try to find a certain form of materialization of legal norms, which we can call legal guarantees, but we must talk about a state of existing legal forms, only that these forms are in a condition deviated from their normal state, being oriented in a different direction than the ordinary one and performing other tasks than those they usually perform.
10. In order to be able to separate legal guarantees from any other legal phenomena, we have come to the conclusion that it is necessary to establish a system of benchmarks or defining features that individualize them. Thus, in our view, absolutely any legal guarantee is identified by three criteria that distinguish legal guarantees from other legal phenomena, as well as differentiate them from other types of guarantees, namely: *function, form* and *object*. The *function* is the universal criterion, having the defining role in delimiting guarantees from other categories of legal and social phenomena. Thus, whenever a legal or social phenomenon fulfills the function of protection or defense of subjective rights and freedoms, we will know that we are facing a guarantee.

The *form* of expression of the guarantees is the criterion that allows distinguishing the guarantees expressed in a normative form, i.e. having the form of a legal rule, and non-normative.

The *object* of legal guarantees constitutes that criterion that facilitates the delimitation of legal guarantees from any other types of normative guarantees, subsequently allowing to draw a clear line of demarcation between guarantees, on the one hand, and subjective rights and freedoms, on the other. The object of rights and freedoms is the subject, while the object of guarantees are the rights and freedoms. Thus, rights and freedoms are always oriented externally, towards the subject, prescribing him a certain conduct, while legal guarantees have an internal orientation, towards that right or towards that subjective freedom, ensuring their realization.

11. Based on the carried out research, we propose a new definition of legal guarantees. Thus, in our view, *legal guarantees represent legal norms having defense and protection functions that ensure the realization of the rights, freedoms, as well as of other legal interests of the legal subjects.*
12. Researching civil procedure guarantees, we found that they, indisputably, are part of the more general category of legal guarantees, having a particular importance in the full and effective realization of the subjective rights and freedoms of the participants to a civil process. A distinctive elemnt of this cathegory of guarantees is their existence strictly within a procedural frame. Thus, *the civil procedure guarantees represent civil procedure rules with defense and protection functions that ensure the realization of the rights, freedoms, as well as of other legal interests of the participants to a civil trial, strictly within a procedural frame.*
13. Taking into account the impact that guarantees can have when being applied, we came to the conclusion that guarantees do not always have the role of an „absolute good", sometimes migrating from the „beneficial" area to the „evil" area of the law, thus outlining the idea and concept of **anti-guarantees**.
14. Even if anti-guarantees are circulated at the customary level, from a scientific point of view this concept has not been introduced and researched until now.
15. Anti-guarantees, just like guarantees, are essentially legal norms, which have the role and function of ensuring the defense and protection of rights and freedoms, as well as other legal interests of legal subjects, but anti-guarantees are a mirror reflection or, rather, the dark side of guarantees. The distinguishing element between a guarantee and an anti-guarantee is the effect, influence, impact or consequence of the application of a guarantee. The negative

impact that a guarantee has over a subject, which it is intended to protect, as well as over other legal subjects, makes a guarantee turn into an anti-guarantee.

16. Considering the subject on which the anti-guarantee influences, we consider it necessary to divide the anti-guarantees into *direct* and *indirect*. As a result, direct anti-guarantees form the category of anti-guarantees that have a destructive effect over the guarantor, thus leading to a diametrically opposite impact on the guarantor, than the expected one, when the guaranty was initially programmed. On the other hand, indirect anti-guarantees have the opposite effect on the bearer, providing him an excessive and exaggerated protection, but exerting a destructive impact on other subjects around him.

17. Thus, we propose for defense the concept of **anti-guarantees**, representing *guarantees intended to fulfill the function of defense and protection of the rights, freedoms, as well as of other legal interests of the legal subjects, but upon application and implementation exerting a negative impact either on the bearer, or on other legal subjects, affecting their legal status or destabilizing the balance between the rights and legitimate interests of the subjects, excessively favoring one of the subjects at the expense of others.*

18. It is impossible to researche the civil procedure guarantees of the parties, which intervene in case of trying a case in the absence of the defendant without establishing the reasons and consequences of „procedural absenteeism". Taking into account the criterion of the subjective interest of the participant in the process, we established the exceptional nature of the plaintiff's absence from the trial, as a rule, the plaintiff being a subject interested in the outcome of the process. On the other hand, the defendant often takes on the role of an opposer of the judicial proceedings, especially under the conditions where the outcome of the trial is predictably negative, which is why the absence of the defendant from the trial cannot prevail over the interests of the plaintiff, but also over the interests of the state, in carrying out the task of jurisdiction.

19. Is participation in a trial a right or an obligation? Trying to find an answer to this question, we came to the conclusion that considering non-existence of a direct sanction in the structure of the procedural norms that regulate the participation of the parties in a trial, as well as given the subjective aspect of the impossibility to force a party to the trial to be actively involved and to contribute to the examination of the case, even if brought by force, prooves the freedom of will of the parties, in particular the freedom of will of the defendant, to decide either to participate, or not to participate in the trial.

20. By colliding the principle of adversariality, on the one hand, and the principle of availability, on the other hand, we reached the conclusion that the realization of the principle of

adversariality does not necessarily depend on the presence of the parties at the examination of the case. Thus, it is relevant to ensure the possibility of the missing party to realize its procedural rights in a contradictory way, by its appropriate summoning, while the decision to participate or not in the trial is taken only by the concerned party, sometimes the refusal to participate in the trial being a procedural position in itself of the missing party. Thus, participation in the examination of a case is undoubtedly a subjective right of the plaintiff and of the defendant.

21. Researching the civil procedure guarantees that benefit, on the one hand, the plaintiff, and on the other hand, the defendant, when examining a case in the absence of the latter, we concluded that the entire chain of guarantees cannot be identified exhaustively, under the conditions that the guarantees themselves are supported by other guarantees, forming an endless chain, so that any legal phenomenon can take the form of a legal guarantee under special circumstances. However, the identification of guarantees can be made only after the initial determination of the rights, freedoms and subjective interests of the party, affected as a result of examining a case in the absence of the defendant.

22. The guarantees that the plaintiff benefits from are aimed primarily at preventing the blocking of the proceedings, thus ensuring trial of the case even in the absence of the defendant. The other procedural rights enjoyed by the plaintiff during the examination of the case, in the absence of the defendant, are sufficient by themselves, without the need for additional guarantees, given that the plaintiff benefits from the privilege of presence and „procedural solitude" and the court is constrained by law to maintain impartiality. Thus, the plaintiff's rights at risk of violation, as a result of the defendant's absence are *the right to free access to justice* and the right to *a reasonable time for judicial proceedings*.

23. The plaintiff's right to free access to justice is ensured by an important number of guarantees that ensure trial of the case even in the absence of the defendant, such as:

- guarantees aimed at ensuring the examination of the case even in conditions of *non-existence of legislation, of imperfection, collision or obscurity of the legislation in force*, intervening the compensatory mechanism of the analogy of the law and the analogy of the right, thus covering any possible normative vacuum;
- the guarantee set forth by the legislator in art.5 parag.(3) CPC RM, which excludes the possibility of any of the parties waiving their right to adress to court, by concluding such an agreement in advance, with the exception of an arbitration agreement;
- the imperative nature of the jurisdiction of the courts when examining cases, even more so, the random distribution of cases among judges, constituting the crucial instrument in

ensuring the rights of both the plaintiff and the defendant, but also the general interest of justice;

- guarantees contained in art.85 and art.86 CPC RM, which establish the cases and grounds for *Tax exemptions* and *Tax deferment and staggered payment*, ensuring access to justice for every litigant, regardless of his material condition;
- guarantees included in art.206 parag.(3) CPC RM, which establish the possibility of examining the case in the absence of the defendant who was legally summoned, but who did not appear on the date set for the trial of the case;
- guarantees provided for in art.108 CPC RM, materialized in the public summoning mechanism that allows unblocking the procedural impasse determined by the impossibility of summoning the defendant through ordinary ways.

24. The proper realization of the plaintiff's right to the conduct of judicial proceedings within a reasonable time is ensured by:

- the guarantee provided for in art.113 CPC RM, establishing the effect of the limitary-statute of the right to perform the procedural act, in case of non-compliance with the procedural time-limits. At the same time, the correct and fair applicability of this procedural mechanism is ensured by the instrument of postponement, transposed by the legislator in art.116 parag. (1) CPC RM;
- the guarantee included in art.192 CPC RM, which establishes the task and the objective of examining civil cases within a reasonable time, also establishing the criteria for determining the reasonable time for judging cases;
- the guarantee set out in art.192 CPC RM parag. (1^1) and (2^1), offering litigants a tool to speed up judicial proceedings, in the form of an accelerating remedy;
- the instrument of the compensatory remedy, set forth by the legislator in Law no.87/2011 on the reparation by the state of the damage caused by the violation of the right to examining the case within a reasonable time or the right to the execution of the court decision within a reasonable time.

25. Comparing the affected rights of the plaintiff, on the one hand, and of the defendant, on the other hand, in the conditions of examining the case in the absence of the latter, we came to the conclusion that in the case of the defendant, the most affected is the right to a fair trial conducted under conditions of adversariality and equality. At the same time, taking into account the specifics of the affected defendant's rights, we considered it most effective to identify and report the guarantees that he benefits from at each procedural phase, in order to facilitate research and understanding of how the guarantees intervene and act.

26. At the *stage of initiating a civil action*, the defendant benefits, in particular, from the following guarantees:

- procedural guarantees in the form of preliminary tasks placed under the responsibility of the plaintiff, such as identification and inclusion in the application of data regarding the name or title of the defendant, his domicile or headquarters;
- the guarantees provided for in art.166 parag. (2) let. h) CPC RM, under which the plaintiff is required to indicate in the application data about compliance with the preliminary attempt of settlement of the dispute;
- the guarantees included in art.167 parag. (1) letter d) CPC RM, which obliges the plaintiff to attach to the application, documents that confirm compliance with the procedure for the prior attempt of settlement of the dispute;
- if the plaintiff did not comply with the procedure for the preliminary attempt of settlement of the dispute, the court, based on art.170 parag. (1) CPC RM, will return the application to the plaintiff.

27. At **the stage of preparing the case for the judicial debates**, the defendant can benefit from three levels of guarantees:

- ***The first level of guarantees*** is of a general nature and is offered to any defendant, comming into force at the stage of ordinary summoning;
- If the ordinary summoning of the defendant fails, leading to the impossibility of informing the defendant about the examination of the case with his participation, ***the second level of guarantees*** intervenes and is activated, aimed at ensuring identification and information of the defendant through the mechanisms of extraordinary summoning, such as public summoning and the search of the defendant;
- ***The third level of guarantees*** has an interphase character, being activated at the stage of preparing the case for judicial debates, when the court, noting the impossibility of summoning the defendant, requests the appointment of an ex officio lawyer, but this guarantee proliferates at the stage of judicial debates, when the lawyer appointed ex officio has the most active role.

28. After re-evaluating the institution of summoning in the civil process, from the perspective of legal guarantees, we came to the conclusion that this procedural institution has a complex structure, being made up of two components: *ordinary summoning* and *extraordinary summoning*. Thus, the mechanism of the ordinary summoning constitutes the primary instrument, which establishes the manner and general conditions for summoning the participants to the trial to appear before court. On the other side, the extraordinary

summoning is a mechanism that in all cases succeeds the ordinary summoning and intervenes in case of its failure, offering successive means and tools for summoning the participants in the trial, in the form of a public summoning and search for the defendant.

29. At the same time, we propose for defending the idea of dividing the summoning mechanisms into *perfect summoning* and *imperfect summoning*. Thus, taking into account the fact that not in all cases the summons can be handed directly to the addressee, we consider it necessary to sepparate the perfect summoning from the imperfect summoning. We are in the presence of a perfect summoning when there is an indubitable and incontestable certainty about the communication of the summons to the participant in the trial referred to in it, and if we do not have the proof of the direct and personal communication of the summons to the addressee, we are facing an imperfect summoning. Imperfect summoning is totally based on the presumption of communication of the summons to the trial participant, without having any direct evidence to prove this fact, thus this presumption can be overturned.

30. By researching the mechanism of public summoning, we came to the conclusion that public summoning is not a guarantee provided for the defendant but is rather an additional guarantee for the plaintiff. The public summoning, in its capacity of an extraordinary mechanism of summoning does not aim to notify the defendant about the trial of the case, but is intended to simulate the legal summoning of the defendant, thus removing any fault of the ordinary summoning, allowing moving on with the trial of the case in the absence of the defendant.

31. Trying to establish the legal nature of public summoning, we reached the conclusion that public summoning is a legal fiction and not a presumption, being an expression of the legislator's will, which links publishing the summons to the communication of the text of the summons to the defendant, even if this fact is not known and cannot be proved, thus having the effect of legal summoning.

32. Studying the procedural mechanism of the search of the defendant, we reached the conclusion that the search of the defendant was initially a guarantee provided for the plaintiff, but after excluding the possibility of bringing the defendant to the trial by force, it became an additional guarantee for informing the defendant about the examination of the case. However, considering the cases in which the search of the defendant is ordered, as well as the procedure for carrying out this procedural mechanism, we find that in the current form of regulation the search of the defendant is practically useless. However, we believe that the mechanism of the search of the defendant is of a major interest. It would become possible to use effectively the search of the defendant, provided that the cases for which it is ordered, as well as the actual procedure of the search of the defendant are rethought and restructured.

33. At the procedural **stage of judicial debates**, we found that the main and only guarantee that the absent defendant benefits from is the appointment of an ex officio lawyer, made according to art.77 CPC RM. The main role of this guarantee is to simulate the presence of the defendant, substituting him with an ex officio appointed lawyer. However, this guarantee has several shortcomings that significantly reduce its importance and functionality. Thus, the legislator provided the possibility of appointing an ex officio lawyer only for the absent defendant whose domicile is unknown, which is practically impossible under the provisions of the Civil Code of the Republic of Moldova. At the same time, filing an appeal, by the appointed lawyer, against the decision adopted in the absence of the defendant deprives the defendant of the right to subsequently challenge the decision adopted in his absence in the court of appeal.

34. Moving on to the investigation of the defendant's procedural guarantees within the **optional phases of the trial**, was examined the possibility of the absent defendant to contest the judgment pronounced in his absence, being reached the following conclusions:

- The defendant, in whose absence the examination of the case took place in the first court, is practically deprived of any possibility to contest the judgement of the first instance, given that art.362 parag. (1) CPC RM sets the deadline for lodging an appeal to 30 days from the date of the pronouncement of the judgement. As a result, there are little chances that the defendant, who did not know about the trial of the case in the first instance, will learn about the pronounced judgment and within *30 days from the date of the pronouncement of the dispositive part of the judgment* will formulate and lodge an appeal request.
- Even if art.362 parag. (3) CPC RM establishes the possibility of reinstatement within the appeal time-limit, this is not applicable for the cases where the trial in the first instance court took place following the public summoning.
- After the rejection of the request for reinstatement within the appeal time-limit, the Supreme Court of Justice, as a rule, upholds the position of the Court of Appeal, thus exhausting any ordinary remedies against a judgement pronounced in the absence of the defendant.
- The defendant cannot make use of the extraordinary remedy of review of the judgement, given that art.449 CPC RM does not provide any grounds for review in the case of errors in the summoning procedure or in the case of the impossibility of summoning the defendant.

At the beginning of this study, the major scientific problem facing both science and practice was determined, consisting of: *identifying and ensuring the balance between the rights and guarantees offered to the parties when examining a case in the absence of the defendant, so that*

neither the plaintiff is affected in his right to free access to justice, nor the defendant is affected in his right to equality of arms and adversarial process.

Conceptualizing the guarantees, understanding how they perform their functions, identifying and highlighting the applicable guarantees, on the one hand, to the plaintiff, and, on the other hand, to the defendant, we are finally able to give an appreciation of the way in which the legislation of the Republic Moldova ensures a fare balance between the procedural rights and interests of the plaintiff and of the defendant, when the case is examined in the absence of the defendant.

With regret, we have to note that the civil procedure legislation of our country mostly ignores the situation of the absent defendant, when the case is examined in the absence of the defendant. Therefore, the absent defendant becomes the procedural „hostage", since the plaintiff reaps all the benefits of the absence of his procedural opponent. Subsequently, the guarantees elaborated and implemented by the legislator, in an attempt to compensate disadvantage of the defendant, are chaotic and ineffective, and the legal formula contained in art.108 parag. (1) CPC RM, according to which „publishing summons in press is considered legal summoning", makes any error in the instrument of ordinary summoning to be compensated by the mechanism of public summoning, which cannot be combated by the absent defendant through any kind of procedural instruments. As a result, we find that the defendant has no procedural remedy that would allow him to challenge the judgment rendered in his absence, being extremely vulnerable in front of the plaintiff, who is present and actively participates in the trial of the case. Moreover, taking into account the principles of availability and adversariality on which the civil process is built, as well as given the supervisory role of the judge in the process, being an arbitrator and observer of the confrontation between the plaintiff and the defendant, in the absence of the defendant, the court has to accept the arguments and claims presented by the plaintiff and in the absence of objections from the absent defendant, with the „tacit agreement" of the appointed lawyer. Therefore, the court is often forced to admit the claims of the plaintiff, which the defendant will not be able to contest later in an effective way.

Thus, returning to the major problem regarding the identification and ensuring the procedural balance between the present plaintiff and the absent defendant, a problem faced by all modern legal systems, we must note that the legislation of the Republic of Moldova did not solve this problem and did not ensure the necessary and effective balance between these parties. Moreover, in order to move on to ensuring balance, the legislator first needs to understand and find this balance, but this can only be done after an acceptance and recognition of the existence of the problem in itself.

The question remains open: Does the legislator accept and recognize the existence of the problem related to the procedural status of the absent defendant? Based on the research carried out, we can find that the issue regarding the procedural status of the absent defendant was and is being ignored, and the interests of over 1 million fellow citizens abroad simply continue to be neglected.

The solution of the stated problem can be ensured by restoring the procedural balance between the parties, which can be achieved through a series of legislative amendments.

In reaching these conclusions, we came up with a series of recommendations and made *lege ferenda* proposals, designed to change the rules of the game and balance the legal standing of the absent defendant. In particular, we must highlight the following **proposals and recommendations**:

1. To ensure appropriate summoning procedure, as well as to make this procedural exercise more efficient we propose to introduce a new task for the court, at the stage of preparing the case for judicial debates, by **including in the text of art.183 para. (2) CPC RM of letter c[1]** – *verification of data about the domicile or headquarters of the participants in the trial*. At the same time, this legislative amendment also involves additional technical equipment for the courts, which would allow the courts access to the database records of the population, offering judges the same access to these databases same as notaries and bailiffs have.
2. Taking into account that the legislator provided for the possibility of appointing an ex officio lawyer only when the domicile of the defendant is not known, we are forced to note the limited character of this guarantee. In order to make the mechanism of appointing an ex-officio lawyer accessible to any defendant absent from the trial, who cannot be summoned due to the lack of knowledge of his location, it is proposed to replace in **art. 77 CPC RM** the term *domicile* with the term *location*, as it follows:

   The court requests the territorial office of the National Council for Legal Assistance Guaranteed by the State to appoint a lawyer for the party or intervener:

   *a) if the **location** of the defendant is not known;*
3. Subsequently, in order to exclude ambiguities and to facilitate the understanding of the practical applicability of the mechanism of appointing an ex officio lawyer, we propose to supplement **art.108 parag. (5) CPC RM**, as follows: *If the **location** of the defendant is not known, the court will examine the case after the expiration of the publicity term, **requesting the territorial office of the National Council for Legal Assistance Guaranteed by the State to appoint an ex officio lawyer to defend the absent defendant.***

4. In order to solve the problem related to the possible exercise by the designated lawyer of the appeal, which leads to depriving the defendant, who could possibly appear, of the possibility to lodge an appeal, we consider it necessary to supplement **art.360 CPC RM**, by introducing **parag.(1[1])**, with the following wording: *Lodging an appeal by the lawyer appointed according to art. 77 letter a) of this Code does not deprive the defendant of the right to lodge an appeal regarding other circumstances or facts than those invoked in the lawyer's appeal.*

5. In order to make the mechanism of defendant's search truly functional and for this mechanism to become a genuine guarantee for the defendant, we propose a fundamental reformation of the defendant's search procedure, set out in **art.109 CPC RM**, as follows:

Article 109. Search of the defendant

(1) The court is obliged to order the search of the defendant, whose location is unknown, in the actions:

a) Concerning immovable property, having as its object the alienation, encumbrance, transformation, termination, or modification in other ways of the defendant's rights over the immovable property or a part of them;

b) Concerning the securities, having as its object the alienation, encumbrance, transformation, termination or modification in other ways of the rights of the defendant;

c) Concerning the defendant's shares in commercial companies, having as its object the alienation, encumbrance, transformation, termination or modification in other ways of the rights of the defendant;

d) Concerning the intellectual property rights owned by the defendant, having as its object the alienation, encumbrance, transformation, termination or modification in other ways of the rights of the defendant;

e) Concerning the divorce, the division of wealth, the determination of the child's domicile;

f) Whose value exceeds 50 average salaries for the economy, approved by the Government.

(2) If, when judging other categories of cases than those from parag. (1), the location of the defendant is not known, the judge may order, ex officio or at the request of the interested person, the search of the defendant, through the competent bodies.

(3) The search for the defendant is carried out by the police on the basis of a court ruling.

(4) In addition to the mandatory elements, specified in art.270, the ruling will additionally include:

a) *Summary statement of the object of the action and the claims submitted by the plaintiff;*

b) *Known data about the defendant, including the last known information regarding the location of the defendant, the location of the defendant's assets, the place of work or other data relevant to the search for the defendant;*

c) *The obligation of the police to communicate to the defendant, whose location has been identified, under signature, the copy of the court ruling. The defendant's refusal to accept the ruling of the court is documented in a report, having the effect of the refusal provided for in art.106;*

d) *The obligation of the police bodies to draw up and submit a report to the court, in case of identification of the defendant's location, or at the expiration of the 3-month period from the date of ordering the defendant's search, in case of impossibility to identify the defendant's location , indicating the performed search actions;*

e) *The obligation of the police bodies to continue the search for the defendant including after the presentation of the report;*

f) *The defendant's right to come court, to examine the files of the case and to be handed a copy of the application and summons;*

g) *The obligation of the defendant to inform the court about the change of his location, otherwise the summons sent to the established address of the defendant is considered to have been duly communicated.*

(5) As a result of establishing the location of the defendant, the court summons him in accordance with the provisions of this chapter.

(6) Simultaneously with the presentation of the report, the police bodies also present the costs of searching of the defendant, with the request for their compensation. The search expenses of the defendant are charged to the budget according to the rules set forth in art.98.

6. In order to overcome the problem related to the difficulty of motivating the judgement, as a result of the passage of a long period of time from the date of the pronouncement of the judgement, if the trial of the case in the court of first instance took place in the absence of the defendant, we consider it necessary to supplement the grounds for the full motivation of the judgement provided for in **art.236 parag. (5) CPC RM**, by introducing **letter d)** - *the decision was adopted as a result of the examination of the case in the absence of the defendant.*

7. In order to offer the defendant, in whose absence the examination of the case took place, the opportunity to contest the summoning procedure itself, its legality and correctness, we

propose to introduce a new ground for the revision that would establish a control mechanism and an effective procedural remedy. Thus, we propose to complete the revision grounds, provided for in **art. 449 CPC RM**, by introducing **letter d)** - *the case was tried by the court in the absence of a participant in the trial who was not informed of the place, date and time of the court hearing or who was prevented from appearing at the trial and notifying the court about it, due to a circumstance beyond his will.*

8. At the same time, a legal time-limit must be introduced within which the revision request can be submitted. Thus, it is necessary to include in **art. 450 CPC RM** letter **c[1])** with the following text: *within 3 months from the day on which the court judgement was communicated to the defendant, but no later than 5 years from the date the judgement became irrevocable - in the case provided for in art. 449 letter d);*.

9. However, all the amendments proposed above will be truly effective only as a result of the amendment of **art.108 paragraph (1) CPC RM**, by excluding from this paragraph the formula that establishes: *„Publishing summons in the press is considered legal citation."* At the same time, taking into account the „beheading" of the public summoning instrument, we consider that the legislator in general could abandon this extraordinary form of summoning the trial participants, which ultimately does not provide any certainty regarding the defendant's informing about trial of the case, constituting a retainer in the conduct of court proceedings and only an instrument of abuse in respect of the absent defendant.

The civil procedure guarantees of the parties when examining the case in the absence of the defendant is an exceptionally important subject for the national doctrine and practice. In this researche we adressed not only the most acute social problems, but also correlative legal problems. The present research is the first work of its kind, carried out on this subject, and we believe that through this work, solutions have been presented for several theoretical and practical problems in the field of guarantees, as well as in the field of *in absetia* procedure. At the same time, we believe that through this research several topics and problems were opened and raised for discussion, the solution of which the author will continue to be concerned with. Likewise, we believe that the topics addressed will arouse the interest of other researchers, who will find solutions and offer new visions and original approaches.

BIBLIOGRAPHY

1. BELEI, E. *et al. Drept procesual civil: Partea specială*. Chișinău, 2016. ISBN 978-9975-4072-9-8. – 490p.
2. DELEANU, I. *Ficţiunile juridice*. Bucureşti: All Beck, 2005. ISBN 973-655-795-2. – 512p.
3. DELEANU, I. *Tratat de procedură civilă*. Vol. I. București: Wolters Kluwer, 2010. ISBN 606-8201-33-7. – 960p.
4. HADÎRCĂ, V. Unele considerațiuni privind garanțiile procedurale ale dreptului la un proces echitabil. În: *Revista Națională de Drept*, 2013, nr.12, p.90-96. ISSN 1811-0770.
5. ILANJI, A. *Particularitățile judecării cauzei în lipsa inculpatului*: Teză de doctor în drept. Chișinău, 2019. – 205p.
6. KUHN, T. *Structura revoluțiilor științifice*. Disponibil: https://monoskop.org/images/f/f9/Kuhn_Thomas_S_Structura_revolutiilor_stiintifice.pdf
7. MICU, D. *Garantarea drepturilor omului în practica Curții Europene a Drepturilor Omului și în Constituția României*. București: ALL BECK, 1998. ISBN: 973-98766-3-3. – 285p.
8. **MOSCALCIUC, V. Garanțiile juridice în sistemul și structura generală a garanțiilor. În: *Rezumatul comunicarilor la Conferinţa ştiinţifică naţională cu participare internaţională „Integrare prin Cercetare şi Inovare”.* Chișinău: CEP USM, 2018, p.130-133. ISBN 978-9975-71-812-7.**
9. **MOSCALCIUC, V. Poziționarea și identificarea garanțiilor procesual-civile în sistemul general al garanțiilor. În: *Rezumatul comunicarilor la Conferinţa Ştiinţifică Internațională „Perspectivele și Problemele Integrării în Spațiul European al Cercetării și Educației”.* Cahul: Centrografic, 2018, p.73-77. ISBN 978-9975-88-040-4.**
10. **MOSCALCIUC, V. ”E-citare” în cadrul procesului civil. În: *Rezumatul comunicărilor. La Conferinţa ştiinţifică naţională cu participare internaţională „Integrare prin Cercetare şi Inovare”.* Chișinău: CEP USM, 2017, p.261-264. ISBN 978-9975-71-812-7.**
11. **MOSCALCIUC, V. Participarea la examinarea cauzei civile: drept sau obligație? În: *Revista Institutului Național al Justiției*, 2018, nr.4(47), p.27-31. ISSN 1857-2405.**
12. **MOSCALCIUC, V. Garanțiile procesual-civile ale reclamantului la examinarea cauzei în lipsa pârâtului. În: *Legea și Viața,* 2019, nr.11, p.37-43. ISSN 1810-309X.**
13. **MOSCALCIUC, V. Mijloacele moderne de citare în cadrul procesului civil, starea actuală și perspective de dezvoltare. În: *Revista Institutului Național al Justiției,* 2017, nr.4(43), p.53-60. ISSN 1857-2405.**
14. **MOSCALCIUC, G. MOSCALCIUC, V. Citarea și aducerea silită a contravenientului în instanța de judecată. În: *Revista Institutului Național al Justiției,* 2017, Nr.1(40), p.37-41. ISSN 1857-2405.**
15. NEGRU, B., NEGRU, A. *Teoria generală a dreptului şi statului.* Chișinău: Bons Offices, 2006. ISBN 978-9975-928-90-8. – 520p.
16. POALELUNGI, M. *et al. Manualul judecătorului pentru cauze civile*. Ed. a 2-a. Chişinău: Tipografia Centrală, 2013. ISBN 978-9975-53-197-9 – 1200p.
17. POALELUNGI, M. *Convenţia europeană a drepturilor omului: obligaţii pozitive şi negative* (monografie). Chişinău: Tipografia Centrală, 2015. ISBN 978-9975-53-539-7. – 320p.

18. PUTNAM, R. *Cum funcţionează democraţia? Tradiţii civice ale Italiei moderne.* Iaşi: Polirom, 2001. ISBN: 973-683-806-4. – 276p.
19. SCIUCHINA, N. *Drepturile sociale ale omului și cetățeanului în Republica Moldova: garanții constituționale*: Teza de doctor habilitat în drept. Chișinău, 2019. – 271p.
20. SLUSARENCO, S. Aspecte conceptuale privind definirea garanţiilor de protecţie a drepturilor omului. În: *Legea și Viața*, 2013, nr.10, p.20-22. ISSN 1810-309X.
21. TABACU, A. *Citarea și comunicarea actelor de procedură civilă*. Bucureși: Universul Juridic, 2013. ISBN 978-606-673-104-1. – 190p.
22. АЛЕКСЕЕВ, С.С. *et al. Теория государства и права: Учеб. для студентов вузов, обучающихся по специальности "Юриспруденция"*. 3.изд., перераб. и доп. Москва: НОРМА, 2004. ISBN 5-89123-785-7. – 484p.
23. АЛЕХИН, С.А., *et al. Гражданское процессуальное право: Учебник.* Москва: Проспект, 2004. ISBN 5980323678. – 580p.
24. БОБРОВА, Н.А. *Гарантии реализации государственно-правовых норм:* Монография. Воронеж: Изд. Воронежского Университета, 1984. ВВК-код Х062.051,0. – 163p.
25. БОДАКОВА, О.В. Проблема неявки сторон на судебное разбирательство в гражданском процессе. В: *Проблемы Управления*, 2009, №. 4 (33), p.247-252. ISSN 2071-3711.
26. БОГОМОЛОВ, А.А. *Процессуальные гарантии правильности и своевременности рассмотрения и разрешения гражданских дел*: Автореф. дис. ... канд. юрид. наук. Саратов, 2004. – 22p.
27. БОРТНИКОВА, Н.А. *Представительство по назначению суда в гражданском судопроизводстве*: Монография. Воронеж: Издательские решения, 2017. ISBN 978-5-4483-9674-8. – 242p.
28. БРАТУСЬ, С.Н. *Юридическая ответственность и законность.* Москва: Юридическая литература, 1976. – 215Р.
29. ВАЛЕЕВ, Д.Х. *Процессуальные гарантии прав граждан и организаций в исполнительном производстве*: Монография. Казань: Унипресс, 2001. ISBN 5-900044-77-7. – 163Р.
30. ВАСЬКОВСКИЙ, Е.В. *Курс гражданского процесса. Т. 1.* Москва: Изд. Бр. Башмаковы, 1913. – 691p.
31. ВИКУТ, М.Л. *Гражданский процесс России*. Москва: Юристъ, 2005. ISBN 5-7975-0666-1. – 459p.
32. ВИТРУК, Н.В. *Общая теория правового положения личности*. Москва: Норма, 2008. ISBN 978-5-468-00162-2. – 447p.
33. ДЕНИСОВ, А.И. *Советское государственное право*. Москва: Юрид. изд-во МЮ СССР, 1947. – 367p.
34. ЕРЁМЕНКО, О.В. *Процессуальные гарантии защиты прав и законных интересов заинтересованных лиц по неисковым производствам:* Монография. Астрахань: Астраханский Университет, 2009. ISBN 978-5-9926-0179-4. – 124p.
35. ИВАНЮЖЕНКО, А.Б. *Процессуальные гарантии участников производства по делам об административных правонарушениях:* Дис...канд.юрид.наук. Санкт-Петербург, 1999. – 259p.

36. КОЖУХАРЬ, А.Н. Гражданско-процессуальные гарантии реализации гражданами конституционного права на судебную защиту. В: *Обеспечение прав и свобод граждан в СССР*: Сборник статей/ Под ред. Е.Г. Мартынчика. Изд. Картя Молдовеняскэ. Кишинев, 1988. ISBN 5-362-00387-9.
37. ЛОШКАРЕВ, А.В. *Правовые Гарантии: Теоретические Проблемы Определения Понятия и Классификации*. Дис. ... канд. юрид. наук. Самара, 2008. – p.245.
38. МОРДОВЕЦ, А.С. *Социально-юридический механизм обеспечения прав человека и гражданина.* Под ред.: Матузов Н.И. Саратов: Изд. Сарат. ВШ МВД РФ, 1996. ISBN 5-7485-0091-4. – 285p.
39. МУСИН, В.А., *et al*. *Гражданский процесс*. Москва: Изд. Проспект, 1998. ISBN 5-7896-0030-1. – 271p.
40. НЯГУ, А. Гарантии прав человека: сущность, значение и классификация. В: *Закон и Жизнь*. №8, 2012, p. 28-33. ISSN 1810-309X.
41. ТАРАБРИН, Д.В. *Механизм реализации гарантий гражданского судопроизводства:* Дис.... канд. юрид. наук. Саратов, 2007. – 174p.
42. ХАЗОВ, Е.Н. *Конституционные гарантии прав и свобод человека и гражданина в России: теоретические основы и проблемы реализации: монография*. Москва: ЮНИТИ: Закон и право, 2012. ISBN 978-5-238-02038-9. – 342p.
43. ЮРКОВ, Б.Н. *Процессуальные гарантии прав граждан при рассмотрении и разрешении судом жалоб на действия административных органов*: Дис... канд. юрид. наук. Харьков, 1974. – 167p.
44. Letter from the Ministry of Justice of the Republic of Moldova nr.02/1241 of 06.05.2022.
45. Letter from the Legal Committee on Appointments and Immunities of the Parliament of the Republic of Moldova CJ-05 nr.228 of 03.10.2022.

ADNOTARE

Moscalciuc Vitalie, „Garanțiile procesual-civile ale părților la examinarea cauzei în lipsa pârâtului”, teză de doctor în drept. Școala doctorală științe juridice a Universității de Stat din Moldova. Chișinău, 2022.

Structura tezei: Prezenta lucrare însumează 222 de pagini, ce includ: adnotare în limbile română, engleză și rusă, lista abrevierilor, introducere, cinci capitole, concluzii generale şi recomandări, bibliografie din 312 titluri. Rezultatele obținute sunt publicate în 5 lucrări științifice și în 3 comunicări la foruri științifice.

Cuvintele-cheie: proces civil, garanții, antigaranții, lipsa pârâtului, căutarea pârâtului, citare publică, citare legală, desemnarea avocatului, termen rezonabil, acces liber la justiție, contradictorialitate și egalitate, procedură în contumacie, procedura *in absentia*.

Domeniul de studiu derivă din problematica legată de examinarea cauzei în lipsa pârâtului și implică identificarea garanțiilor procesuale de care beneficiază părțile la procesul civil.

Scopul tezei este de a identifica garanțiile drepturilor părților la process oferite de legislația Republicii Moldova și de a stabili existența unui echilibru între aceste garanții, în condițiile speciale de examinare a cauzei în lipsa pârâtului.

Obiectivele tezei constau în conceptualizarea garanțiilor prin indentificarea structurii, funcționării și aplicabilității acestora; identificarea garanțiilor procesuale de care beneficiază părțile, în condițiile speciale de examinare a cauzei civile în lipsa pârâtului; determinarea nivelului de protejare a drepturilor și intereselor părților în condițiile examinării cauzei în lipsa pârâtului.

Noutatea şi originalitatea ştiinţifică rezidă în realizarea unei cercetări în premieră, la nivel național, ce se concentrează pe problematica examinării cauzei în lipsa pârâtului și pe identificarea garanțiilor procesuale specifice părților la proces. Originalitatea lucrării constă în cercetarea problematicii privind derularea procedurilor *in absentia* prin prisma garanțiilor procesuale de care beneficiază părțile la proces, ceea ce permite, pe lângă identificarea spectrului de garanții procesuale ale reclamantului și ale pârâtului, să concluzionăm inclusiv cu privire la gradul de protejare a drepturilor acestor părți.

Rezultatele obținute ne oferă posibilitatea să reevoluăm conceptul de garanții, cercetând detailat toate aspectele ale acestei categorii, să stabilim algoritmul de identificare a garanțiilor părților și să concluzionăm cu privire la nivelul de garantare a drepturilor părților în condițiile examinării cauzei în lipsa pârâtului, ceea ce ne permite să înaintăm un șir de propuneri conceptuale și de amendamente legislative.

Semnificaţia teoretică constă în abordarea mai multor probleme pur teoretice ce țin în primul rând de înțelegerea a însuși conceptului de „garanții”; în stabilirea rolului prezenței fizice a părților la proces și a impactului absenței lor asupra drepturilor părților; în determinarea volumului de garanții de care beneficiază părțile la proces; în contrapunerea garanțiilor părților, oferind astfel o imagine clară a statutul juridic procesual al fiecărei părți la proces.

Valoarea aplicativă a lucrării ține de identificarea lacunelor și contradicțiilor în legislația procesual-civilă, fiind expuse și motivate soluții practice pentru problemele și dificultățile cu care se confruntă instanțele de judecată în caz de examinare a cauzelor în lipsa pârâtului. Totodată, sunt formulate propuneri *de lege ferenda* menite să îmbunătățească cadrul legal, urmărindu-se astfel ca scop consolidarea statutului juridic al părților la proces, eficientizarea procedurilor, reducerea costurilor și termenelor procesuali.

Implementarea rezultatelor ştiinţifice: Cercetările efectuate și concluziile elaborate pot servi în calitate de material didactic pentru instruirea studenților și masteranzilor din cadrul instituțiilor de drept. Totodată, dat fiind că multe dintre subiectele abordate sunt inedite pentru știința procesual-civilă națională, considerăm că această lucrare poate servi drept reper pentru cercetările viitoare ce urmează să dezvolte, să amplifice, inclusiv (de ce nu?) să combată cele constatate în prezenta lucrare.

ANNOTATION

Moscalciuc Vitalie „The civil-procedure guarantees of the parties when examining the case in the absence of the defendant", doctoral thesis. Doctoral School of Legal Sciences of the State University of Moldova. Chisinau, 2022.

Structure of the thesis: This work includes 222 of text pages, annotation in Romanian, English and Russian, list of abbreviations, introduction, five chapters, general conclusions and recommendations, bibliography consisting of 312 titles. The results obtained are published in 5 scientific papers and in 3 communications in scientific forums.

Keywords: civil trial, guarantees, anti-guarantees, absence of the defendant, search of the defendant, public summons, legal summons, appointment of attorney, reasonable term, free access to justice, contradictoriality and equality, contumacy procedure, procedure *in absentia*.

The field of study derives from the issue related to the examination of the case in the absence of the defendant and involves the identification of procedural guarantees that the parties in the civil trial benefit from.

The purpose of the thesis is to identify the guarantees of the rights of the parties to the trial provided by the legislation of the Republic of Moldova and to establish the existence of a balance between such guarantees, in the conditions of absence of the defendant.

The novelty and scientific originality lies in conducting a research for the first time in the national procedural science, focusing on the issue of examining the case in the absence of the defendant and identifying specific procedural guarantees of the parties to the trial. The originality of the paper consists in researching the issue of procedural absenteeism in terms of procedural guarantees enjoyed by the parties to the trial, which allows us, in addition to identifying the spectrum of procedural guarantees of the plaintiff and of the defendant, to conclude even on the degree of protection of the rights of these parties.

The obtained results allow us to re-evaluate the concept of guarantees, researching in detail all aspects of this category, to establish the algorithm for identifying the guarantees of the parties and to conclude on the level of guarantee of the rights of the parties, allowing us to come up with a series of conceptual proposals and of legislative amendments.

The theoretical significance lies in addressing several purely theoretical problems, which are primarily related to the understanding of the very concept of „guarantees"; in establishing the role of the physical presence of the parties to the trial and the impact of the absence of the defendant on the rights of the parties; in determining the volume of guarantees that the plaintiff benefits from on the one hand, and the defendant on the other hand; in confronting the guarantees of the parties, which provides a clear picture of the procedural legal status of each of the parties.

The applicative value of the paper is related to the identification of gaps, omissions and contradictions in the civil procedure legislation, being exposed and motivated practical solutions for the problems and difficulties that courts encounter, in the circumstances of examining the cases in the absence of the defendant. At the same time, proposals for ammending the law are drafted, aimed at improving the legal framework, thus aiming to strengthen the legal status of the parties to the process, streamline the procedures, reduce the costs and the procedural terms.

Implementation of scientific results: The carried out research and the drawn conclusions can serve as teaching material in the field of training of students and masters, in law institutions. At the same time, since many of the topics addressed are innovative for the national civil-procedure science, we consider that this work can be percieved as a starting milestone for future researchers, who shell develop, amplifie and why not, combat those concluded in this research.

АННОТАЦИЯ

Москальчук Виталий „Гражданско-процессуальные гарантии сторон при рассмотрении дела в отсутствие ответчика", диссертация на соискание ученой степени доктора наук. Докторская школа юридических наук Государственного университета Молдовы. Кишинев, 2022.

Структура диссертации: Данная работа состоит из 222 страниц, включающих: аннотацию на румынском, английском и русском языках, список сокращений, введение, пять глав, общие выводы и рекомендации, библиографию из 312 названий. Полученные результаты опубликованы в 5 научных работах и в 3 докладах на научных конференциях.

Ключевые слова: гражданский процесс, гарантии, антигарантии, отсутствие ответчика, розыск ответчика, публичный вызов, судебный вызов, назначение адвоката, разумный срок, свободный доступ к правосудию, состязательность и равенство, процедура в отсутствие.

Область исследований проистекает из вопроса, связанного с рассмотрением дела в отсутствие ответчика, и включает в себя определение процессуальных гарантий предоставленных сторонам в гражданском процессе.

Цель дипломной работы - выявить гарантии прав сторон судебного разбирательства, предусмотренные законодательством Республики Молдова и установить наличие баланса между этими гарантиями в особых условиях рассмотрения дела в отсутствие ответчика.

Задачи диссертации - концептуализирование гарантии путем определения их структуры, действия и применяемости; определение процессуальных гарантий, которыми пользуются стороны в особых условиях рассмотрения дела в отсутствие ответчика; определение уровня защиты прав и интересов истца и ответчика в условиях рассмотрения дела в отсутствие ответчика.

Новизна и научная оригинальность заключаются в том, что впервые на национальном уровне проводится исследование вопроса о рассмотрении дела в отсутствие ответчика и выявляются конкретные процессуальные гарантий сторон. Оригинальность исследования состоит в том, что вопрос о рассмотрении дела в отсутствие ответчика исследуется с точки зрения процессуальных гарантий, которыми пользуются стороны судебного разбирательства, что позволяет нам, помимо определения спектра процессуальных гарантий истца и ответчика, сделать вывод и о степени защиты прав этих сторон.

Полученные результаты позволяют по-новому оценить понятие „гарантий", детально исследуя все аспекты данной категории, установить алгоритм выявления гарантий сторон и сделать вывод об уровне гарантированности прав сторон, что позволяет нам выдвинуть ряд концептуальных предложений по внесению поправок в законодательство.

Теоретическая значимость заключается в решении ряда чисто теоретических проблем, которые в первую очередь связаны с пониманием самого понятия „гарантии"; в установлении роли физического присутствия сторон в судебном процессе и влияния их неявки на права сторон; в определении объема гарантий, предоставляемых, с одной стороны, истцу, а с другой - ответчику; в противопоставлении гарантий сторон, тем самым выделяя процессуально-правовой статус каждой из сторон.

Прикладная ценность работы состоит в выявлении пробелов, упущений и противоречий в гражданско-процессуальном законодательстве и в предложении аргументированных практических решений проблем и трудностей, с которыми сталкиваются суды при рассмотрении дел в отсутствие ответчика.

Внедрение научных результатов. Полученные выводы могут послужить учебным материалом при подготовке студентов и магистров в юридических вузах. Поскольку многие из рассматриваемых нами вопросов и тем не были до сих пор затронуты национальной гражданско-процессуальной наукой, считаем, что эта работа может стать солидным подспорьем для дальнейших исследований в данном направлении.

MOSCALCIUC, Vitalie

THE CIVIL PROCEDURE GUARANTEES OF THE PARTIES WHEN EXAMINING THE CASE IN THE ABSENCE OF THE DEFENDANT

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