

MIKLÓS KENGYEL *

Recent Developments in Hungarian Civil Procedure

1. Introduction

The Code of Civil Procedure of 1911 was one of the greatest achievements of Hungarian codification in the 20th century. The value of this statement is not diminished by the fact that our procedure had *German* and *Austrian* roots. Sándor Plósz, the creator of this field of law drew on the German and Austrian codes with a very fortunate and steady hand. The first Code of Civil Procedure of the 20th century was in force from 1915 to 1952, and during this period it had to be modified only once, namely in the early 1930s when the wave of bankruptcies following the economic crisis necessitated the acceleration of civil actions.

The *second model* of our civil procedure in the 20th century, the Code of Civil Procedure of 1952 in its original form intended to imitate the *Soviet-Russian Code of 1923*. For this reason among others, the institution of “people’s” assessors and the participation of public prosecutors were introduced, the obligatory representation by lawyers had been eliminated, the first instance procedures were unified, the review appeals were discontinued and a one-level legal remedy system had been developed with the possibility of protest on legal grounds.

The Code of Civil Procedure contained many “socialist” elements: The most important one was the change in the *principle of party control*. The law divided control over the scope and nature of the proceedings between the parties, the court, and the public prosecutor. As a result of this, the conventional right of disposal became illusory in practice because all the procedural acts of the parties felt under the control of the court and the public prosecutor.

Contrary to the principle of party control’s socialist transcript, the *principle of adversary hearing had not been implemented in a completely socialist way* in Hungarian civil procedure. The socialist idea on civil procedure, in which it

* Professor of Law, Head of the Institute for Civil Procedure and Sociology of Law at the University of Pécs, Faculty of Law.
E-mail: kengyel@ajk.pte.hu

is the parties' duty to disclose all relevant facts and the power of the court to take the initiative *ex officio* in discovering the true facts of the case is mixed up with the spirit of the Code of Plósz. As a result of this, Hungarian civil procedure had been protected even in the 1950s from the application of the principle of judicial investigation.

The Hungarian Code of Civil Procedure of 1952 was characterised by the active role of the judiciary as initiator, which contained the formal conduct of proceedings and made the judge's duty to clarify the facts. As a result of the *ex officio* automatism characterising each phase of the process, the parties were left little freedom of disposition over the course of the proceedings. The summoning, the service of process, the deadline fixing, and trial dates took place *ex officio*; the party was allowed to request the extension of the deadline only. The preparation for the trial and the conduct of the trial, the most important element of the conduct of proceedings, also formed part of the tasks of the court.

The four decades of socialist civil procedure cannot be defined as a uniform period: In Hungary at the beginning of the 1970s, the situation was suitable for reducing the dominance of the judge and the public prosecutor. The third amendment to the Code on Civil Procedure (Act XXVI of 1972) restricted the possibility of the initiation of a court action or intervention by public prosecutors. It also took steps to increase the weight and responsibility of the parties in the legal action, for the sake of improving the efficiency of the procedure.

Subsequent modifications of the socialist Code of Civil Procedure could not repeat the success of the third amendment to the Code. Between 1973 and 1979 hardly any provisions of law were made concerning civil procedure. The reasons for the decade's last relevant modification were not procedural but organizational ones.

In the second half of the 1980s, one more unsuccessful attempt at codification was made. The most important goal of this was the further simplification and acceleration of procedures. The concept of 1988 did not want to change relationship between the court and the parties, and it did not plan to renew the content of the socialist principles of disposition and hearing. The last socialist concept silently passed away in the whirl of the political transformation.

2. Renewal of Hungarian Civil Procedure after the Democratic Transformation

The Hungarian Constitutional Court played a determining role in the re-establishment of rule of law. One of the most significant decisions of the Constitutional Court relating to civil procedure was *Dec. 9/1992 (I. 30) AB*,

in which the institution of protest on legal grounds were declared unconstitutional and the rules were annulled. It was laid down as a fact that a protest on legal grounds was contrary to the rule of law, to the institution of legal force, and to the parties' right of control over their disputes.

The first amendment after the democratic transformation had as one of its primary purposes to substitute the protest on legal grounds annulled by the Constitutional Court and rules that were outdated or contrary to international conventions. The first amendment after the democratic transformation—in spite of the preliminary expectations—did not re-establish the remedy at (the?) third instance, which was abolished in 1951. This caused disappointment among the judiciary and in legal literature.

In the mid 1990's, the judicial government took the first steps for a further modification. The direct cause of this act was the considerable protraction of civil actions which already queried the functionality of jurisdiction. The acceleration of the procedure became the most important intention of the legislature. The new modification was aimed to change relations between the court and the parties in some important questions.

One of the greatest achievements of the 1995 reform amendment was the reformulation of the principle of party control. After the collapse of socialism, the principle of party control (which had embodied the ideology of the system) also became meaningless since private property, market economy, and constitutionality all required respect for private autonomy. Five years had to pass after the democratic transformation for the genuine content of the principle of disposition to be re-established on the basis of the decisions of the Constitutional Court and later on the basis of the 1995 modification of the Code of Civil Procedure.

The 1995 amendment, in accordance with *Dec. 1/1994 (I. 7) AB*, has maintained the general entitlement of the prosecutor to commence actions in cases where the entitled parties are unable to protect their rights for any reason. According to the point of view of the Constitutional Court, this restriction on the constitutional right of autonomy is an unavoidable restriction and corresponds Art. 51(3) of the Constitution; according to which, protecting and ensuring the constitutional public order, rights, and legal interests of citizens (and their organizations) is also the task of the public prosecutor's office.

The 1995 amendment set the principle of adversary hearing on a new basis. According to the new rule, the court may order the taking of evidence *ex officio* only when the law allows it, whereupon the proving of the facts required to decide the action is solely the task of the parties. The modification of art. 164(2) drastically restricted the possibility of ordering evidence officially to the number of cases defined by the Act, by which it wanted to ensure the

absolute effectiveness of the adversary hearing. By this solution, the legislature did not return to the moderate regulation (the principle of mixed adversary hearing) applied by the Code of Civil Procedure of 1911, but to the model applied by liberal civil procedure in the 19th century. Apart from the fact that the pure principle of adversary hearing does not have historical roots in Central Europe, the 1995 amendment also proved to be inconsistent as it maintained the court's obligation to endeavour to find out the truth stated in art. 3(1).

3. The Influence of Hungarian Judicial Reform on the Code of Civil Procedure

The large judicial reform scheduled for the end of the 1990s, made it necessary to modify the Code of Civil Procedure. The most important provisions of Act LXXII of 1997 did not come into force immediately because of the delay in the setting-up of the regional courts of appeals. In spite of this, the 1997 amendment is considered to be significant regulation because, by the introduction of the idea of disputes involving a small amount (less than HUF 200 000), it simplified both appeals and reviews, it restricted the possibility of appeals in administrative proceedings, and re-regulated labour disputes (arts 349–359).

The reform of the judicial organization, which broke down in 1998, was given a fresh start by Act CX of 1999. This amendment practically finished the change of model started at the beginning of the 1990s, re-formulated the principles of civil proceedings, and the purpose of the action. Forty seven years after the Code of Civil Procedure came into force, the legislature gave up the aim of ensuring the decision of civil legal disputes on the basis of truth. At the same time it released the court from the obligation to endeavour to find out the truth in civil actions. The new objective that replaced the just resolution of legal disputes, in harmony with the requirement of a fair trial laid down by Art. 6 of the ECHR, wishes to guarantee the impartial decision of legal disputes. The guarantee of this is the fact that the court has to proceed in accordance with the re-formulated principles of civil procedure.

Among the significant innovations, it should be mentioned that the 1999 amendment fixed numerous deadlines binding on all courts. For example art. 125(1) prescribed that the court has to take steps to fix a date for the hearing not later than within 30 days after the statement of claim is received by the court, and according to art. 125(3) the date of hearing shall be fixed in such a way that it could be held in four months.

4. In search of the 'Lost Truth'

The 1999 amendment to the Code of Civil Procedure produced little reaction in legal literature even though the elimination of the concept of truth from arts. 1 and 3 of the Code was one of the most important modifications since the coming into force of the Code. This step of the legislature was not unexpected, however, since the 1995 amendment restricting the possibility of ordering evidence officially anticipated the change strengthening the role of proof. (The apathy of the judiciary may be explained by the frequent modifications, since the time of the democratic transformation, that did not concern civil procedure only.)

The former judge István Novák was the first one who came to the conclusion that our civil procedure will surely resist to the shock caused by the lack of truth.

Tamás Földesi defended the 'lost truth'. There is a close connection between truth and justice, which can be expressed in a simplified way by the fact that a just judgement can generally be based on true statements, proved facts, or facts at least verified with a high probability. Földesi suggested reinstating provisions concerning truth in the course of further modifications of civil procedure.

As for ourselves, we do not oppose the declarative re-appearance of the concept of truth in civil procedure, and so it is expected by the majority of the judiciary and by the public seeking justice. We share the view of the great Austrian jurist, *Franz Klein* that legal action without truth is a 'rattling mill running with no loads'. However, we consider it more important that a future new Code of Civil Procedure should define the objective of proof more specifically than the present one.

5. 'Dimming' of the Role of the Judge

Another substantial part of the change of model between 1995 and 2000 was the dimming of the role of the Judge.

The 1999 amendment to the Code of Civil Procedure put even more emphasis on the principle of disposition by the re-formulation of the fundamental principles of the Code, by the modification of the existing provisions, and by the establishment of new rules. The modified art. 3(1) lays down the exclusive right of the party interested in the dispute to institute legal proceedings, which right can only be restricted by law. Article 3(2) declares that the court, unless provision is made to the contrary, is bound by the petitions and declarations submitted by the parties, and extends the application of the principle of disposition to the parties' control over the whole proceeding. Thus, the Code

makes it clear now that the parties are the ‘masters of the case’, they determine the subject-matter of the proceedings and so the procedural scope of action of the court. At the same time, the court is bound to prevent any procedural action of the parties and their representatives which is contrary to the requirement of good faith in the exercise of rights (art. 8). As a consequence, the parties’ right to disposition is not unlimited; it may only prevail within the framework of another principle: The exercise of rights in good faith.

Everybody agreed that the judge had to be relieved from unnecessary burdens, so the ‘hyperactivity’ of the socialist era had to be changed with a different role for judges. The modifications between 1995 and 1999 seemed to find this new role in the contemplative judge. In conformity with this, supplying facts in proceedings became solely the task of the parties and the modification did not allow the ordering of proof officially–contrary e.g. to the 1911 Code of Civil Procedure–not even for practical purposes, because it would restrict the right of the parties to self-determination.

It should be noted that the reduction of judicial power took place in the former socialist countries at a time when: In the common law legal system, the idea of judicial “case management” had evolved, which–by contrast–endeavoured to move judges out of their traditional passive roles (e.g. Civil Justice Act of 1990). This phenomenon may rightly be characterised as the convergence of procedural models from both directions. Development is aimed to balance judicial power and modern cooperation between the parties and the court.

Seeing this procedure, we can observe this third change of the model of our civil procedure within a century with some anxiety. In the mid 1950s, mechanical and uncritical acceptance of Soviet legal institutions replaced the German-Austrian orientation of values. Nowadays we are approaching a–partly-outdated–English-American model of civil procedure. Even besides the fulfilment of duties of legal harmonization, enough ground is left for the Code of Civil Procedure, which should be filled with legal institution based on Hungarian procedural traditions rather than with the development of a newer model of litigation. The judge’s role in civil litigation does not have to be re-invented since it was defined precisely by Géza Magyary nearly a century ago: ‘It must be up to the parties whether they want legal defence or not but it must not depend on them how the proceedings are conducted or how long they last’.

At the end of my presentation I would like to give a brief summary of the actual state of Hungarian Civil Procedure Law.

There had been no significant amendments since 1999. The attempt to reform the regulation of the review appeal of 2002 has failed. The judicial government issues, each year, new proposals which are regularly refused by the legal practice and literature. The economic crisis that Hungary is facing

now is not favourable for the reform either. Due to lack of funds, the recently adopted law on legal aid cannot be applied yet. The introduction of electronic proceedings are hindered by the insufficient equipment of the courts. We can only hope that after the reform of the Hungarian Civil Code, a new Civil Procedure Code will finally be on agenda.