

ESSAYS OF FACULTY OF LAW
UNIVERSITY OF PÉCS
YEARBOOK OF 2016

STUDIA IURIDICA

AUCTORITATE UNIVERSITATIS PÉCS PUBLICATA

154

Essays of Faculty of Law
University of Pécs
Yearbook of 2016

Pécs 2017

Published by University of Pécs, Faculty of Law
H-7622 Pécs, 48-as tér 1. Hungary

Responsible publisher

Kecskés, László (dean)

Linguistic supervision

Czirkóné Ormai, Judit; Hónig, Klára; Pókay, Marietta; Zelnik, Zsófia

Advisory Board

Andrássy, György, University of Pécs, Faculty of Law
Ádám, Antal, University of Pécs, Faculty of Law
Bakota, Boris, J.J. Strossmayer University of Osijek, Faculty of Law
Ban, Tiberiu, Bogdan-Voda University (Cluj-Napoca), Faculty of Law
Czoboly Gergely, Corvinus University of Budapest, Corvinus Business School
Fabó, Tibor, University of Pécs, Faculty of Law
Faludi, Gábor, Eötvös Loránd University (Budapest), Faculty of Law and Political Sciences
Fábián, Gyula, Babeş-Bolyai University (Cluj-Napoca), Faculty of Law
Halmai, Gábor, Eötvös Loránd University (Budapest), Faculty of Social Sciences
Kecskés, László, University of Pécs, Faculty of Law
Kiss, György, University of Pécs, Faculty of Law
Lévay, Miklós, Eötvös Loránd University (Budapest), Faculty of Law and Political Sciences
Polčák, Radim, Masaryk University (Brno), Faculty of Law
Pókecz Kovács, Attila, University of Pécs, Faculty of Law
Wiebe, Andreas, Georg-August University of Göttingen, Faculty of Law

Editor-in-chief

Szöke, Gergely László, University of Pécs, Faculty of Law

Editorial Board

Benke, József, University of Pécs, Faculty of Law
Csoknya, Tünde, University of Pécs, Faculty of Law
Drinóczi, Tímea, University of Pécs, Faculty of Law
Fábián, Adrián, University of Pécs, Faculty of Law
Herke, Csongor, University of Pécs, Faculty of Law
Pánovics, Attila, University of Pécs, Faculty of Law

HU ISSN 0324 5934 (Studia Iuridica Auctoritate Universitatis Pécs Publicata)

HU ISSN 2061 8824 (Essays of Faculty of Law University of Pécs)

Printed by University of Pécs, University Print Office
Responsible manager Kittkáné Bódi, Katalin
H-7624 Pécs, Szigeti út 12. Hungary

AUTHORS

BÉKÉSI, LÁSZLÓ – PhD candidate, University of Pécs, Faculty of Law, Doctoral School.

BIEŃ-KACAŁA, AGNIESZKA – associate professor at the Department of Constitutional Law, Faculty of Law and Administration, Nicolaus Copernicus University in Toruń and a Researcher at the Institute METRO of the Faculty of Law, Maastricht University.

HERKE-FÁBOS, BARBARA KATALIN – assistant lecturer at the Department of Civil Law, Group of Family and Social Law of the Faculty of Law, University of Pécs.

ILLYÉS, ZSOLT – PhD student at the University of Pécs, Faculty of Law, guest lecturer and associate researcher at the Cluj School of Public Health, College of Political, Administrative and Communication Sciences, Babeş-Bolyai University, and member (attorney at law) of the Cluj Bar Association.

KIRÁLY, LILLA – seniour lecturer, University of Pécs, Faculty of Law, Department of Criminal and Civil Procedure Law.

MALIK, ÉVA – PhD student at the Doctoral School of the Faculty of Law, University of Pecs, Hungary.

MEZEI, KITTI – PhD student (with scholarship) at the Criminal Law Department of the Faculty of Law, University of Pécs.

MÉSZÁROS, GÁBOR – assistant professor at Department of Criminal and Civil Procedure Law of the Faculty of Law, University of Pécs.

NAGY, ZOLTÁN – associate professor at the Criminal Law Department of the Faculty of Law, University of Pécs.

OSIEJEWICZ, JOANNA – assistant professor, Head of the Legal Communication Laboratory, Faculty of Law and Administration of the University in Zielona Góra, Poland; attorney at law at the District Bar Council in Warsaw; enrolled in the ministerial list of sworn translators for German in Poland.

CONTENT

BÉKÉSI, LÁSZLÓ Unequal treatment in certain areas of municipal employment	9
BIEŃ-KACAŁA, AGNIESZKA Dissolution of political parties by the Polish Constitutional Tribunal in light of the Venice Commission's standards and decisions	29
HERKE-FÁBOS, BARBARA KATALIN The Legal Policy Objectives of Preventive Patronage	45
ILYÉS, ZSOLT The Smokescreen of a Daisy: Critical Notes on the EU Ecolabel scheme	61
KIRÁLY, LILLA Taking of Evidence in the New Hungarian Code of Civil Procedure	79
MALIK, ÉVA Alternative Civil Dispute Resolution in numbers in Hungary	101
MÉSZÁROS, GÁBOR The Hungarian Response to Terrorism: a "blank check" for the Government	129
MEZEL, KITTI – NAGY, ZOLTÁN Organised cybercrime groups and their illicit online activities	143
OSIEJEWICZ, JOANNA The opt-out-clause of Article 114 TFEU: remarks on the Judgment of the General Court of 7 March 2013 – <i>Republic of Poland v. European Commission</i> (Case T-370/11)	161
FORMER VOLUMES OF <i>STUDIA IURIDICA</i>	179

Taking of Evidence in the New Hungarian Code of Civil Procedure

KIRÁLY, LILLA

ABSTRACT Act no. III of 1952 on the Code of Civil Procedure (hereinafter referred to as CCP) provides a legal framework for 200 to 230 thousand civil proceedings a year, and it constitutes a legislative background for more than one million non-litigious proceedings a year; thus the CCP represents the leading source of law within the Hungarian legal system. In its Government Decision no. 1267/2013 of 17 May 2013, the Government decided to elaborate a new Code of Civil Procedure in order to create a new procedural framework that is better suited to the more complex legal disputes of the 21st century.¹

In April 2016, a draft proposal on the new Code of Civil Procedure elaborated by the Ministry of Justice² (hereinafter referred to as the MoJ draft proposal on the new CCP) was uploaded to the website “kormany.hu”,³ the publication of which was preceded by a three-year codification process. At the end of the first phase, a collection of studies entitled “Egy új Polgári Perrendtartás alapjai” (The foundations of a new Code of Civil Procedure)⁴ was published, outlining with scientific depth the potential directions and methods of codification.⁵ The collection of studies that covers all the central fields of civil procedural law does not only document the large professional debate on the preparations of the codification, but also served as one of the bases for the subsequent public debate and the drafting of the new piece of legislation”.⁶

At the end of the second phase, a work entitled “The draft version of the provisions and explanatory memorandum of the new Code of Civil Procedure as elaborated by the experts of the Working Committee on the New Code of Civil Procedure” (hereinafter referred to as the Experts’ Draft Proposal on

¹ Commentary to the general explanatory memorandum of the Draft Bill

² Draft proposal on the new Code of Civil Procedure, 11 April, 2016.

³ the source was accessed 11 May, 2016. http://www.kormany.hu/download/c/4c/a0000/20160411%20Pp%20el%C5%91terjeszt%C3%A9s_honlapra.pdf.

⁴ János Németh and István Varga, ed., *Egy új Polgári Perrendtartás alapjai* [The foundations of a new Code of Civil Procedure] (Budapest: HVG Orac Publishing House, 2014.)

⁵ The concept of the new Code of Civil Procedure – commissioned on the basis of the Government Decision – was adopted by the Government on 14 January 2015.

⁶ Source: http://hvgorac.hu/egy_uj_polgari_perrendtartas_alapjai_kiadvany, accessed 8 June, 2016.

the new CCP)⁷ was delivered,⁸ which was followed by the draft proposal of the Ministry of Justice, published on the website “www.kormany.hu”.

After an extremely short public debate,⁹ the MoJ draft proposal was presented to the Government in the second quarter of 2016, and Parliament started to discuss the draft bill on the new Code of Civil Procedure on 2 September 2016. The present study analyses the rules of the new Code of Civil Procedure on access to information and evidence on the basis of Act no. CXXX of 2016 on the Code of Civil Procedure (hereinafter referred to as the new CCP) adopted by Parliament and coming into force on 1 January 2018.

KEYWORDS *new Hungarian Code of Civil Procedure, codification, concentration of proceedings, split structure of proceedings, exigency of alleging facts and providing evidence, taking of evidence, methods and means of evidence taking*

1. Principles related to the taking of evidence

1.1 The principle of the concentration of proceedings

The legal instrument of the concentration of proceedings is intended to identify the characteristics of the parties’ legal dispute as early as possible, to provide the court with all the facts and evidence necessary for the delivery of its judgement at the earliest opportunity, in other words, to determine, as early on as possible, the substantive and procedural legal framework of the

⁷ Tamás Éless and István Varga ed., *A Polgári Perjogi Kodifikációról szóló 1267/2013. (V. 17.) kormányhatározat által elkészíteni rendelt Munkabizottsági Szakértői Javaslat Normaszöveg- és Indokolás Tervezete* [The draft version of the provisions and explanatory memorandum of the new Code of Civil Procedure as elaborated by the experts of the Working Committee on the New Code of Civil Procedure on the basis of Government Decision no. 1267/2013 of 17 May 2013 on the Codification of Civil Procedural Law], 30 October, 2015. (hereinafter referred to as the Experts’ Draft Proposal on the new CCP), 1025 page-long manuscript

⁸ The drafters handed over their proposal to the Minister of Justice on 30 October 2015.

⁹ As of April 2016, the MoJ draft proposal had been discussed at national level, mainly due to the co-operation and efforts of the National Office for the Judiciary and the Curia of Hungary, for instance, an international conference entitled “New Hungarian Civil Procedure Act and the Development of European Rules of Civil Procedure” was held jointly by the Institute for Legal Studies of the Hungarian Academy of Sciences, the National Office for the Judiciary and the European Law Institute (UNIDROIT) at the Hungarian Judicial Academy on 30-31 May 2016 with the support of the Ministry of Justice

legal dispute.¹⁰ The court and the parties should seek to have all the facts and evidence necessary for the delivery of the court's judgement in such a time as to allow the court to dispose of the dispute, if possible, at one single hearing.¹¹

The *raison d'être* of the substantive measures of organisation of procedure is to avoid the delivery of a decision that does not definitively settle the legal dispute:¹² for this purpose, the court should endeavour to ensure that the parties put forward appropriately the essential facts necessary for the court's decision and to provide the parties with all the information necessary for the establishment of the relevant facts and the proving thereof. The court's contributive actions do not conflict with the dispositive principle and the parties' obligation to produce evidence, since the parties are free to decide whether they wish to comply with the court's "call" or not, in the latter case, they have to bear the sanctions of their non-compliance as laid down in the detailed rules.¹³

The principle of the concentration of proceedings appears to simply emphasise the importance of timeliness, however, it also implies the element of effectiveness, as one of the means of the acceleration of the adjudication of cases is the reduction of inputs (e.g. the court organises the questions to be addressed in a logical order, on the basis of which it does not allow the parties to bring forward such arguments that would be of relevance only as regards the case's details to be examined at the later stages of proceedings).¹⁴

1.2 The parties' obligation to assist the court in administering justice and to tell the truth

If the party brings an action in court, he becomes obligated to assist the court in dealing with his action. If he fails to comply with the above obligation, he has to bear the procedural consequences (preclusion, lack of proof etc.) of his non-compliance. This principle applies to all procedural acts, including the submission of statements, motions and pieces of evidence, as well as appearing at the court's hearing.¹⁵

The new CCP specifically provides for the *parties'* obligation to tell the truth.¹⁶ "Section 8 of the CCP in force regulates the obligation of the parties

¹⁰ Commentary to section 3 of the Draft Bill

¹¹ Commentary to section 3 of the Draft Bill

¹² This requirement stems from the principle of "definitive dispute settlement", defined in section 2 subsection (1) of Act no. CLXI of 2011 on the Organisation and Administration of the Courts (OAC Act).

¹³ The Experts' Draft Proposal (manuscript), 2015.

¹⁴ Commentary to section 3 of the Draft Bill

¹⁵ We can find this obligation also in the Act III of 1952 on the Code of Civil Procedure (CCP in force) section 141 subsection (2)

¹⁶ "The court will impose a financial penalty upon the party, who - whether deliberate-

and their representatives to tell the truth as one of the elements of the obligation to pursue litigation in good faith. In addition, it also contains certain elements that fall within the scope of the exercise of rights in good faith, but go beyond the obligation to tell the truth, such as the prohibition of delaying the conclusion of proceedings and the prohibition of causing unnecessary expenses. On the basis of an approach different from the one taken in the CCP in force, the new CCP links up the parties' obligation to assist the court in administering justice and their obligation to tell the truth, the latter being part of the former. By virtue of the obligation to tell the truth, set forth by the new CCP, the parties are obligated to reveal the truth only insofar as they wish to make a statement. The parties' obligation to tell the truth includes active and passive statements of fact alike (allegation-disaffirmation). The obligation to tell the truth also applies to representatives and interveners who make an allegation or a statement. Since the allegations of other participants to the proceedings, in particular, those of witnesses and experts (deemed to be means of evidence) are treated differently, in terms of dogmatic positions, from the allegations of the parties, the former are subject to special rules (perjury, delivery of a false expert opinion, etc.) and special legal consequences".¹⁷

Hence, there is a separation between the principle of good faith and the obligation to tell the truth in the new CCP: the new CCP does not precisely identify what kind of acts, carried out by the parties or other participants to the proceedings, could qualify as an exercise of rights in bad faith, and it provides a wide margin of discretion for the courts in respect of the assessment of such acts and the application of legal consequences attached thereto".¹⁸

The obligation to assist the court in administering justice requires active participation from the parties: they are obligated to make relevant, adequate and concise statements, having also regard to cost-effectiveness. The parties' obligation to assist the court in administering justice extends to the institution of proceedings, therefore the new CCP lays down higher criteria to be met by the plaintiff's statement of claim as well.¹⁹

For the purposes of achieving the objectives of civil proceedings, the obligation to pursue litigation in good faith means that the court, the parties and other participants of the proceedings have to co-operate with each other on the basis of the court's duty of care and the various requirements imposed on the parties. This obligation is manifested in the exercise of rights under the prin-

ly or as a result of gross negligence presents any facts to the case that later prove to be false." (Section 4 subsection (4) of the new CCP)

¹⁷ Commentary to section 4 of the Draft Bill

¹⁸ Commentary to section 5 of the Draft Bill

¹⁹ Ibid.

ciple of due course of law and in the principle of acting in good faith, which also includes the prohibition of acting in bad faith.²⁰

1.3 The court's contributive actions (substantive measures of organisation of procedure)

One of the greatest challenges for today's civil procedural law all over the world is effectiveness and speediness. In order to achieve this objective, legislators tend to introduce new legal institutions and carry out overall reforms affecting even the structure and role of the judiciary and the course of civil litigation. One of the ways legal disputes can be adjudicated within a reasonable time and soundly is to emphasise the role of the preparatory phase of the proceeding and make the parties more active in solving their dispute.²¹

Legal academic literature differentiates between substantive and procedural measures of organisation of procedure: the procedural measures of organisation of procedure include measures for the timing of the different phases of proceedings and for ensuring the continuity of proceedings (e.g. setting the date of a hearing, adjourning a hearing, setting deadlines, determining legal consequences related to procedural impediments, etc.), while the substantive measures of organisation of procedure affect the merits of the legal dispute (e.g. clarifying the legal basis and factual background of the case) and the substantive rights claimed by the parties.²²

The court's contributive actions should effectively facilitate the exercise of the parties' right to dispose of their legal action.²³ The substantive measures of organisation of procedure are adopted by the court to organise its proceedings on the basis of the assessment of the substantive legal aspects of the parties' statements and procedural acts. The substantive measures of organisation of procedure aim to ensure the availability of all the relevant facts and statements necessary for the court to decide on the case, primarily through the clarification of the parties' allegations, but not without respect for the parties' right to

²⁰ Erika Herédi, "A ius nevében," ["In the name of ius,"] in *Codificatio processualis civilis, Studia in Honorem Németh János II*, ed. István Varga (Budapest: ELTE Eötvös Publishing House, 2013), 92.

²¹ Laura Ervo, "Preface" in *Current Trends in Preparatory Proceedings, A Comparative Study of Nordic and Former Communist Countries*, ed. Laura Ervo and Anna Nylund (Switzerland: Springer International Publishing House, 2016), v.

²² Zita Pákozdi, "Új intézmények a Pp. koncepciójában- az anyagi pervezetés jog-összehasonlító megközelítésben," ["New institutions in the concept of the new CCP – substantive measures of organization of procedure from a comparative legal approach,"] *Acta Universitatis Szegediensis, Forum, Acta Juridica et Politica*, IV, no. 2, (2014 [2015]): 146.

²³ Commentary to section 6 of the Draft Bill

dispose of their legal action, and by way of questioning, informing and calling upon the parties. The parties' right to dispose of their legal action entails that they are free to decide whether, in their procedural acts and statements, they wish to use and comply with the court's substantive measures of organisation of procedure.²⁴

“The material of the case file necessary for the court to conclude the case can be gathered in two different ways: in the “inquisitorial system”, the court is – at least in part – actively involved in investigating the facts of the case instead of the parties. In the “adversarial system”, the court relies on the parties' obligation to produce evidence on the basis of their right to dispose of their legal action, and the court may be entitled to take evidence *ex officio* only in exceptional cases defined by law.²⁵ The substantive measures of organisation of procedure extend the scope of the adversarial system, since these measures (the court's obligation to ask certain questions and to call upon the parties to carry out certain procedural acts, to provide them with information, and the court's obligation to encourage the parties to settle their case by amicable agreement) may help those parties who are not familiar with the applicable legal provisions, are not skilled in handling their affairs or are not represented by an adequate legal representative to properly enforce their claims. By eliminating the risks and deficiencies of an excessive adversarial system, the substantive measures of organisation of procedure intend to safeguard the parties' interests and protect the parties - who make incomplete or unclear statements or put forward deficient or ambiguous petitions primarily due to their lack of legal expertise - from losing out on the legal protection of which they are the beneficiaries based on the relevant substantive legal norms. The substantive measures of organisation of procedure are limited by the requirement of fair legal process. Such measures may be adopted by the court only insofar as the latter is capable of preserving the appearance of impartiality for the litigants“.²⁶

At the end of the preparatory phase, the court provides the parties with general information on the facts that need to be proved and on which party has to bear the burden of proof. Upon the court's call, the parties are obliged to put forward their motions for evidence within a deadline set by the court. The court does not take into account motions submitted out of time due to the parties' fault.²⁷ Till the end of the preparatory phase, the parties are entitled to modify their initial statements – within the framework of the present Act – without the consent of their adversaries (modification of the statement of

²⁴ Commentary to section 237 of the Draft Bill

²⁵ The Experts' Draft Proposal (manuscript), 2015.

²⁶ The Experts' Draft Proposal (manuscript), 2015.

²⁷ Ibid.

claim – modification of the counter-plea).²⁸ The end of the preparatory phase, as part of the division of procedural phases, basically entails the prohibition of the modification of the statement of claim. The statement of claim is considered to be modified if the plaintiff changes the rights claimed in his statement of claim, which leads to the modification of the relevant facts, but does not necessarily entail the modification of the plaintiff's petition. Following the end of the preparatory phase, such modification of the statement of claim is allowed only if the defendant gives his – explicit or tacit – consent to the modification. An unauthorised modification of the statement of claim qualifies as a withdrawal of the petition.²⁹

The court may take evidence during the preparatory phase only in cases defined by law. This provision should be interpreted in compliance with the rules on the parties' posterior motions for evidence, which allows taking of evidence to be carried out between the delivery of a court order that closes the preparatory phase and the closure of the hearing phase before the delivery of the first instance judgement.³⁰

“According to the new CCP, initial statements include pieces of evidence and motions for evidence, hence, the court has limited competence in the taking of evidence, and is obliged to intervene only when necessary, in particular if the parties submit incomplete initial statements in relation to the relevant facts of the case or if there is a dispute between the parties as to which of them should bear the burden of proof as regards the given facts.

The court's substantive measures of organisation of procedure are limited by the statement of claim and the counter-plea, as well as by the rights claimed and the legal bases referred to by the parties. The system of substantive measures of organisation of procedure does not require the court to inform the parties if their factual allegations raise the necessity of the application of legal norms that have not been referred to in their claims and counter-pleas, in particular if such allegations would necessitate the modification of the claim, counter-plea or the rights claimed.³¹ The above viewpoint is not shared by the members of the Meeting of the Heads of Councils of the Curia who considered it unfavourable and even unacceptable that “a statement of claim well-founded on the facts may be rejected on the basis of the sole fact that the plaintiff referred to the wrong legal title, such judicial practice is not compatible with the social mission of proceedings. The principle that the court is bound by the legal titles referred to by the parties is based on the misinterpretation of the principle that the parties delimit the subject matter of the proceedings: in reality, the court is only bound by the parties' claims and factual allegations,

²⁸ Commentary to section 183 of the Draft Bill

²⁹ Commentary to section 183 of the Draft Bill

³⁰ Commentary to section 220 of the Draft Bill

³¹ Commentary to section 237 of the Draft Bill

but not by the legal titles referred to by them. It is the court that is given the task of qualifying the parties' legal relationship based on their allegations and the pieces of evidence brought forward by them, since the principal issue of the proceedings is whether the plaintiff's claims and factual allegations are well-founded, and not whether the legal grounds have been correctly put forward by the plaintiff".³²

Albeit with different intensity and content and to a different extent, substantive measures of organisation of procedure are necessary in the preparatory phase, the phase dealing with the merits of the case and in second instance proceedings as well,³³ because, as part of its contributive actions, the court is obliged to clarify the facts of the case and to determine the factual background of the legal dispute.³⁴

1.4 The principle of the free establishment of facts

The principle of the free establishment of facts is regulated under the title "Basic provisions related to the taking of evidence" in the chapter on the taking of evidence of Part 4 of the new CCP.³⁵

"The principle of free evidence taking – in a narrow sense – includes the freedom to choose any method for the taking of evidence and the freedom of the court to use any appropriate means (e.g. witness testimony, expert opinions, inspection and documents) as a piece of evidence. The means of evidence are regulated by procedural legal norms, which set certain formal requirements, for instance, private documents with full probative value have specific formal features defined by law, and these documents are given a greater probative value, even if the court is free to assess the probative value of documents.³⁶ In other cases, the use of images, video- and audio-recordings as pieces of evidence without the consent of the persons concerned is, in principle, prohibited due to personality rights issues.

The principle of the free establishment of facts – in a broader sense – means that the parties are obliged to prove the veracity of their allegations in court. Their veracity can be proved by other pieces of evidence. If the allegations

³² Letter of the Head of the Civil Department of the Curia, Mr. György Wellmann addressed to the President of the National Office for the Judiciary, 2015.E1.I.G.21/2., Budapest, 30 March, 2015.

³³ Commentary to section 237 of the Draft Bill

³⁴ For more, see Adél Köblös, "Hungary: Towards More Efficient Preparatory Proceedings," in *Current Trends in Preparatory Proceedings, A Comparative Study of Nordic and Former Communist Countries*, ed. Laura Ervo and Anna Nylund (Switzerland: Springer International Publishing House, 2016), 185-204.

³⁵ Section 263 subsections (1)-(2) of the new CCP

³⁶ See Constitutional Court decision No. 531/B/1997.

are proved to be true, the court remains free to use them for the establishment of the relevant facts”,³⁷ but the proceeding court is not bound by the decision of a State authority or other court or by the facts established therein in the establishment of the factual background of the case heard by it and in the subsequent delivery of its decision, hence, there are no obstacles to a civil court establishing – on the basis of the assessment of all the pieces of evidence in its proceedings – a factual background different from the one found by a criminal court.³⁸

2. Rules on the taking of evidence in first instance proceedings and the preliminary taking of evidence

2.1 The preparatory phase

The new CCP – on the basis of the split system of procedural phases introduced in first instance proceedings – separately regulates the preparatory phase and the phase dealing with the merits of the case. In the split system of proceedings, the preparatory phase aims at determining and clarifying the content and framework of the legal dispute in order to decisively define its factual and legal basis on the occasion of a single preparatory hearing following detailed and comprehensive preparatory work in writing.³⁹

One of the main legal effects of the ending of the preparatory phase is that the pieces of evidence and motions for evidence submitted by the parties during that phase cannot subsequently be modified and no new evidence or motion for evidence put forward posteriorly can be accepted by the court, however, exceptions to this prohibition should be justified in cases where the modification of the statement of claim and counter-plea is allowed.⁴⁰ As a result of the separation of the preparatory phase and the taking of evidence, in principle, no evidence can be taken during the preparatory phase. Evidence in relation to the merits of the case can be taken during the preparatory phase only in cases defined by the new CCP (e.g. gathering documents and data necessary for preparing the adjudication of the case upon the parties’ motions).

³⁷ The Experts’ Draft Proposal (manuscript), 2015.

³⁸ BH 2003.457. (Collection of Court Decisions No. 2003.457.)

³⁹ Trials should be as concentrated as possible to be effective. The Recommendation Rec. 84 (5) advises the establishment of a typical procedure based on “not more than two hearings, the first of which might be a preliminary hearing of a preparatory nature and the second for taking evidence, hearing arguments and, if possible, giving judgment.” European Commission for the Efficiency of Justice (CEPEJ), Compendium of “best practices” on time management of judicial proceedings, CEPEJ(2006)13, Strasbourg, 8. December 2006, point 4.3.

⁴⁰ Commentary to section 220 of the Draft Bill

The taking of evidence not in respect of the merits of the case is, nevertheless, not excluded (e.g. requirements of admissibility).⁴¹

The preparatory hearing starts with summarising the relevant initial statements based on the results of the written preparations, which prevents the court from misunderstanding or misinterpreting the parties' statements and enables the court to verify whether it has correctly interpreted the parties' statements and intentions. In addition, the parties may present observations.⁴²

"According to the new CCP, it is considered strictly necessary in the interest of ensuring the effectiveness of the preparatory hearing that the parties be present at the preparatory hearing and that the persons present be appropriately familiar with the facts of the case and its evidentiary issues. The new CCP Bill seeks to guarantee the presence of parties or representatives who are completely prepared to engage in the litigation by prohibiting the adjournment of the preparatory hearing on the grounds that the parties or their representatives did not take reasonable care to prepare for it. The writ of summons has to contain a warning for the persons summoned of the consequences of failing to appear and be properly prepared".⁴³

"The new CCP does not in principle differentiate between the regional courts' preparatory phase and the district courts' preparatory phase (uniform rules of procedure). Following the submission of a written counter-plea (or eventually a counter-claim or set-off claim), there are three ways to reach the conclusion of the preparatory phase: 1.) the court may order the provision of further written documents; 2.) the court may set the date of the preparatory hearing, or 3.) the court may close the preparatory phase without ordering the parties to submit further written materials and without holding a preparatory hearing. Thus, the court is given the competence to decide on the most appropriate method and procedural steps for preparing the case's adjudication (in oral or written form), which should be adapted to the specificities of the particular case at hand".⁴⁴

Based on the schedule of procedural phases contained in the new CCP, in a significant number of the cases, the court may have to hold only one preparatory hearing to close the preparatory phase, and it may be able to start dealing with the merits of the case and taking substantive evidence either already at the preparatory hearing or at a subsequent hearing at the latest.⁴⁵

There may be cases in which there is absolutely no need to hold a preparatory hearing or to order the provision of further written materials, because the legal dispute is not complicated at all (e.g. the defendant admits the plaintiff's

⁴¹ Commentary to section 183 of the Draft Bill

⁴² Commentary to section 183 of the Draft Bill

⁴³ Commentary to sections 188 and 189 of the Draft Bill

⁴⁴ Commentary to section 187 of the Draft Bill

⁴⁵ Commentary to section 192 of the Draft Bill

claims). In such cases, the preparation of the adjudication of the case can be carried out without holding a hearing,⁴⁶ but the court has to issue a prior warning and enable the parties to request the court to hold a hearing. If no preparatory hearing is held by the court, then the latter proceeds to close the preparatory phase by delivering an out-of-hearing order the content and legal effects of which are identical to the one rendered at a preparatory hearing. The date of the court's on-the-merits hearing has to be fixed at the same time as the order closing the preparatory phase is delivered.⁴⁷

The preparatory phase is closed by the court's formal order that is not subject to appeal and declares the closure of the preparatory phase. As regards this type of court order, the new CCP states that, despite being a procedural order, it binds the court, which is not allowed to modify it.⁴⁸ Procedural acts to be performed during the preparatory phase can be carried out at the subsequent stages of proceedings only in cases and under conditions laid down by the new CCP.⁴⁹

In the context of the substantive measures of organisation of procedure, the new CCP provides additional and different types of assistance to parties acting without a legal representative. Lay persons may need to be heard in person to clarify their initial statements, be assisted in exploring their opportunities in the area of evidence taking, and be informed, in respect of the facts to be proven, about the possible means of evidence, methods of proof and the conditions of evidence taking in terms of procedural law.⁵⁰

“Additional preparatory measures may need to be taken in case of the extension of the statement of claim and the submission of a set-off claim as well. These additional measures apply only to the modified parts of the claims and

⁴⁶ The rules on “Questioning the parties without holding a hearing” (section 155 of the new CCP) serve the purpose of allowing the proceeding court to gather information, request clarification or call for the delivery of a statement from the parties without holding a hearing, which basically extends the court's scope of action in respect of the written preparation of the adjudication of the case for the merits phase of proceedings. The Draft Bill provides for the use of such action by the court only in the case of parties acting without a legal representative, since those who are represented by a legal representative have to submit their statements in writing.

⁴⁷ Commentary to sections 197 and 198 of the Draft Bill

⁴⁸ For more, see: Tamás Éless and Vilmos Ébner, “A percezés – az érdemi tárgyalás előkészítése,” [“The division of procedural phases – the preparation of the hearing on the merits,”] in *Egy új Polgári Perrendtartás alapjai [The foundations of a new Code of Civil Procedure]* ed. János Németh and István Varga (Budapest: HVG Orac Publishing House, 2014), 377-392.

⁴⁹ Commentary to section 194 of the Draft Bill

⁵⁰ Commentary to section 253 of the Draft Bill

petitions, which means that the entire preparatory phase does not have to be re-opened.⁵¹

2.2 The merits phase

“In the split system of procedural phases, the second phase serves the purposes of taking evidence – relevant to the legal dispute identified in the preparatory phase – and delivering a decision on the merits of the case.

In this procedural phase, the parties are given the opportunity to modify or supplement –without the consent of their adversaries – their initial statements in compliance with their obligation to assist the court in administering justice and to tell the truth and the principle of good faith. The party who makes an initial statement or modifies his earlier statement only in the merits phase despite having been given the opportunity to do so in the preparatory phase is deemed to fail to engage in reasonably expected procedural conduct. To prevent the parties from engaging in such misconduct, the new CCP provides for the possibility of imposing a fine on them”. As a result of the preparatory phase, the court has to carry out targeted and, in many cases, scheduled measures of evidence taking in the merits phase; therefore, the new CCP states that the court is also entitled to fix several hearing on the merits dates at the same time, and such hearings can be held on consecutive days as well.”⁵²

In the – oral – merits phase, no further evidence or motion for evidence can be submitted, and the court is given the task of taking evidence and delivering a decision on the merits of the case, preferably at a single hearing on the merits.⁵³

The new CCP restricts, *inter alia*, the submission of evidence and motions for evidence to the initial statements, hence, the closure of the preparatory phase essentially leads to the fixing of the framework of evidence taking. “No other pieces of evidence than the ones available at the court’s hearing and capable of immediately establishing the veracity of contested allegations or immediately disproving the statement of claim can be assessed by the court”.⁵⁴

⁵¹ Commentary to section 222 of the Draft Bill

⁵² Commentary to section 183 of the Draft Bill

⁵³ Those foreign civil procedural codes that recognise the principle of the concentration of proceedings define its meaning, similarly to the new CCP, by the requirement to adjudicate and conclude a case at a single hearing on the merits, see, for instance, section 7 of the Lithuanian Code of Civil Procedure, and section 272, subsection (1) of the German Code of Civil Procedure. This requirement was present in section 224 of the 1911 Code of Civil Procedure drafted by Sándor Plósz and it also derives from section 141, subsection (1) of the CCP in force. Commentary to section 3 of the Draft Bill

⁵⁴ Commentary to section 214 of the Draft Bill

The presence of the parties at hearings on the merits is not indispensable, thus, the new CCP – by changing the relevant provisions of the CCP in force, which favour only the plaintiff – makes it possible for any of the parties, including the defendant to request the court to hold a hearing on the merits in their absence.⁵⁵

2.3 The preliminary taking of evidence

The findings of the preliminary taking of evidence may be used by any of the parties in the subsequent proceedings. It is therefore not excluded that the party refers to the favourable findings of a preliminary taking of evidence requested by the other party.⁵⁶

The preliminary taking of evidence may significantly simplify and thus shorten the proceedings, or, in the optimistic case, may avoid them if, for instance, the preliminary expert opinion on a disputed issue is accepted by both parties, who are then able to conclude an out-of-court settlement. The preliminary taking of evidence may take place – upon request – either prior to the beginning of court proceedings or in the preparatory phase.⁵⁷

3. The rules of the new CCP on the taking and assessment of evidence

3.1 The parties' autonomy to allege facts and the method of the court's monopoly to establish the case's facts: the court's discretionary power

The main element of the court's hearings is the taking of evidence; hence, efficient evidence taking is vital to the well-functioning adjudication of cases by the court.⁵⁸ The court should not seek to reveal the truth,⁵⁹ but to ensure the

⁵⁵ Commentary to section 223 of the Draft Bill

⁵⁶ Commentary to section 338 of the Draft Bill

⁵⁷ Commentary to section 334 of the Draft Bill

⁵⁸ For more, see: István Légrádi, "Gondolatok a bizonyítás általános kérdéseihez," ["Thoughts on the general issues of the taking of evidence,"] in *Egy új Polgári Perrendtartás alapjai*, [The foundations of a new Code of Civil Procedure,] ed. János Németh and István Varga (Budapest: HVG-ORAC Publishing House, 2014), 443-473.

⁵⁹ "A distinction should be made between seeking legal truth (formal truth) and seeking substantive truth. The former means that the court examines the veracity of only those factual allegations that are contested by the parties, while it accepts the remainder of their allegations without questioning them. The latter entails that the court seeks to reveal the whole truth in the genuine sense of the word." in József Farkas,

fairness of proceedings: it should endeavour to establish the facts of the case by respecting the parties' right to dispose of their legal action.⁶⁰ On the basis of their private autonomy and right to dispose of their own legal action, the parties are also given the right to choose the facts that they wish to share with the court and which they refer to so as to request legal protection from the court.⁶¹ The parties are obliged to allege only those facts that "based on the law, are capable, if proven to be true, of supporting their claim for the enforcement of their substantive rights."⁶²

Within the framework of the parties' motions for evidence, the court is free to decide on the methods and means of evidence taking, as well as on the scope and chronological order of the individual measures for the taking of evidence.⁶³ The principle of free evidence taking has three main elements in relation to the court's discretionary power in the establishment of facts:

- 1) The *principle of free assessment of evidence* directly stems from the principle of free evidence taking. The court assesses whether the parties' factual allegations are supported by the pieces of evidence submitted by them or not.⁶⁴
- 2) A distinction has to be made between the free assessment of evidence by the court and the court's *discretionary decision-making*, on the basis of which the court is entitled to determine the amount of damages or any other claim to be awarded at its own discretion, after weighing all circumstances of the case, provided that it cannot be established based on the opinions of experts or other evidence. The principle of discretionary decision-making does not apply to cases in which the court may take evidence *ex officio*.⁶⁵
- 3) The court's freedom in respect of the assessment of evidence also extends to the parties' factual allegations: the court does not automatically consider the parties' undisputed allegations (concurrent allegations, acknowledgements) true, as it checks them against common knowledge, common experience and its official knowledge, and examines their in-

Bizonyítás a polgári perben [*The taking of evidence in civil proceedings*] (Budapest: KJK Publishing House, 1956), Scientific Library of the Institute for Political and Legal Sciences, Issue 11, 24-25.

⁶⁰ Miklós Kengyel, *Magyar polgári eljárásjog* [*Hungarian civil procedural law*] (Budapest: Osiris Publishing House, Twelfth edition, 2014), 289.

⁶¹ Tamás Éless and Mátyás Parlagi, "Az érvényesített joghoz kötöttség," ["The prohibition of going beyond the limits of the rights claimed,"] in *Egy új Polgári Perrendtartás alapjai*, [*The foundations of a new Code of Civil Procedure*,] ed. János Németh and István Varga (Budapest: HVG-ORAC Publishing House, 2014), 358.

⁶² *Ibid.* 358-359

⁶³ Commentary to section 278 of the Draft Bill

⁶⁴ Commentary to section 279 of the Draft Bill

⁶⁵ Commentary to section 279 of the Draft Bill

ternal coherence, i.e. it assesses them. There are cases in which the party's factual allegation is an essential element of the taking of evidence; that is why the CCP provides for the compulsory hearing of the party concerned (e.g. in actions for the establishment of origin⁶⁶). In the process of the establishment of the case's facts, the court is entitled to assess not only the parties' allegations, but their procedural conduct as well.⁶⁷

The court assesses not only the results of the taking of evidence, but the process of evidence taking as well: it decides on whether the means of evidence proposed is capable of proving the veracity of the factual allegation to be proved or whether the piece of evidence can be used in court (e.g. the presence of grounds for prohibiting the taking or assessment of evidence, the pieces of evidence have been obtained or used unlawfully).

Since a conclusive break with the requirement of ensuring the discovery of substantive truth,⁶⁸ courts have been required to satisfy themselves with a degree of certainty that excludes any reasonable doubts. One of the reasons behind the changed requirement is that expert opinions, more and more necessary for deciding on the merits of the legal dispute, are usually delivered with a certain level of certainty or that the court's degree of certainty may vary depending on the type of the legal action. For instance, in actions that affect the legal status of the litigants (civil status actions, actions for the establishment of origin, certain family law and guardianship actions, etc.), a higher degree of certainty is required, while in other types of actions, a lower level of certainty may also be sufficient. However, an objectively set minimum degree of certainty has to be achieved in all types of cases.⁶⁹

The court's conviction is subjective in the sense that it results from the proceeding court's intellectual activity aimed at getting to know the case's factual background and making conclusions based on it, nonetheless, this conviction should not originate from a "peculiar" intellectual process or from "a kind of unclear emotional process or a general assumption."⁷⁰

⁶⁶ BH 1984.453., BH 1983.196. (Collection of Court Decisions No.1984.453. and No.1983.196.)

⁶⁷ We can find this also in the Act III of 1952 on the Code of Civil Procedure (CCP in force) Section 206 subsection (2) „Upon weighing the facts based on the case file, the court shall determine, also according to its conviction, the relevance that the party's failure to appear may have as to the judgment of the case, or the party's or his counsel's non-compliance with any request, or the relevance of their refusal to answer a question, or their pleading to having no knowledge or recollection of certain specific facts.”

⁶⁸ Act no. CX of 1999 on the modification of Act no. III of 1952 on the Code of Civil Procedure

⁶⁹ The Experts' Draft Proposal (manuscript), 2015.

⁷⁰ János Németh and Daisy Kiss ed., *A Polgári perrendtartás magyarázata* [Com-

3.2 Unlawful means of evidence

The legal literature has elaborated three theories in respect of the usability of illicit means of evidence. According to the first theory, it follows from the principle of free evidence taking that a procedural act that is not prohibited by law can be freely carried out; therefore, the unlawfully obtained pieces of evidence can be freely used. By virtue of the second theory, there is an absolute prohibition on the use of illicit evidence in civil proceedings. The third and most widespread theory – approved at international level as well – is based on the so-called principle of reciprocity, according to which the different interests – the party’s legitimate private interests in evidence taking or the protection of the other party’s personality rights – have to be weighed against each other in every case, and the court must when weighing those interests have due regard to the degree of unlawfulness of the obtaining and use of evidence.⁷¹

“The exclusion of illicit means of evidence from the taking of evidence may make it extremely difficult, if not impossible, for the parties to submit their pieces of evidence. The principle of good faith and the parties’ obligation to assist the court in administering justice require the parties to act in a lawful manner and support the enforcement of rights. In the event, then, that there is a lawful method to produce evidence (it is objectively not impossible), even if that method is more difficult or more complicated than the unlawful method, the parties have to choose the lawful way of producing evidence.

The rule on the exigency of providing evidence is that the opposing party is given an option: he either approves of the use of illicit means of evidence by subsequently renouncing to object to the unlawfulness of evidence or giving his authorisation or consent to the use thereof, or takes the consequences of the exigency of providing evidence, which ultimately prevents the means of evidence from being used at an open court hearing”.⁷²

3.3 Rejection of a motion for evidence

According to the new CCP, the court may reject a motion for evidence, on the one hand, on the grounds defined in the CCP in force (the evidence proposed is unnecessary for passing a decision on the merits of the case, or

mentary to the Code of Civil Procedure] (Budapest: CompLex Jogi és Üzleti Tartalomszolgáltató Kft., 2010), vol. 1, 778.

⁷¹ For more, see: Miklós Kengyel, *A polgári peres eljárás kézikönyve* [The manual of civil procedure] (Budapest: KJK-KERSZÖV Jogi és Üzleti Kiadó Kft., 1995), 408-410.; Adrienn Nagy, *A Polgári perrendtartásról szóló 1952. évi III. törvény magyarázata* [Commentary to Act no. III of 1952 on the Code of Civil Procedure] (Budapest: CompLex Publishing House, 2015.), commentary to section 166.

⁷² The Experts’ Draft Proposal (manuscript), 2015.

the party fails to comply with his obligation to advance the costs of evidence taking proposed by him) and, on the other hand, on a new ground (the motion for evidence does not include all the elements required by law).⁷³ In addition to these grounds for rejection, the court is bound by the prohibition of using illicit means of evidence.

The new CCP introduces, as a new element, the possibility of rejecting a motion for evidence on the grounds of economy of procedure. Thus, necessary and possible, but uneconomical taking of evidence may be rejected by the court (e.g. legal expenses are many times in excess of the amount of the plaintiff's claim). The above ground for rejection cannot be applied in legal actions where the law allows *ex officio* evidence taking.

3.4 The rules on the exigency of alleging facts and the exigency of providing evidence

The parties are under the exigency of alleging facts in the preparatory phase, while they are under the exigency of providing evidence in the merits phase.⁷⁴

“The legislator provides for the rules on the newly introduced exigency of alleging facts within the scope of the preparatory phase. The exigency of alleging facts is based on the understanding that, in certain information-asymmetric situations, the party, without any fault on his part, may not be aware of all the pieces of information necessary for the enforcement of his substantive rights, therefore he is unable to make precise factual allegations, while the opposing party is in the possession of the missing pieces of information, but it is not in his interest to reveal them in the proceedings.

The main reason behind the introduction of the exigency of alleging facts is that in such situations the party under the exigency of alleging facts and the court are exempted from the obligation to reveal those circumstances of the case that are affected by the exigency, and the missing elements can be considered as proved facts. The new CCP, however, does not oblige the court to abide by the above rule if the court has reasonable doubts as to its application, similarly to the provisions related to the acceptance of the veracity of the parties' concurrent and undisputed statements and their acknowledgements”.⁷⁵

The party is under the exigency of alleging facts if *a)* he makes it probable that the pieces of information necessary for making factual allegations are in the exclusive possession of the opposing party, *b)* he verifies that he has taken

⁷³ Commentary to sections 272-274 of the Draft Bill

⁷⁴ New CCP, section 184 subsections (1)-(2): exigency of alleging facts, section 265: interests in producing evidence and exigency of providing evidence

⁷⁵ The Experts' Draft Proposal (manuscript), 2015.

the necessary measures to get and retain these pieces of information, *c)* the opposing party does not disclose the information despite having been requested by the court to do so, and *d)* the opposing party does not make it probable that the requirements as provided for under points *a)* and *b)* are not met.⁷⁶

By virtue of the requirement of pursuing litigation in good faith, the parties are expected to give an account to the court of the relevant pieces of information that they are aware of – regardless of the general and special rules on the taking of evidence –, and to provide the court with the pieces of evidence available to them:⁷⁷ describing this set of facts as “pieces of information necessary for revealing the particular circumstances of factual allegations.”⁷⁸

The exigency of alleging facts has been recognised in the courts’ case-law as well under the term of the reversal of the burden of proof.⁷⁹

The exigency of providing evidence occurs when “it is impossible to provide full evidence [...], but the relevant facts are highly likely to be present, and the court’s conscience is not in favour of strictly applying the rules on the burden of proof...”⁸⁰

Certain exigencies of providing evidence are properly regulated by substantive legal norms via the reversal of the burden of proof, e.g. by establishing presumptions and temporarily true allegations to be taken into account *ex officio* by the court.

The exigency of providing evidence may be applied if “the party under the burden of proof reveals that there is an exigency of providing evidence, and there is a certain likelihood (e.g. empirical rule) that his factual allegations are true. In the event that the other party is in the possession of convincing proof to the contrary, he is able to disaffirm, without too much difficulty, the above factual allegations”.⁸¹

The new CCP defines four situations in which the exigency of providing evidence may be applied:⁸²

⁷⁶ New CCP, section 184, subsections (1)-(2): exigency of alleging facts

⁷⁷ Légrádi, “Gondolatok a bizonyítás általános kérdéseihez,” 469-470.

⁷⁸ László Névai and Jenő Szilbereki, *Polgári eljárásjog [Civil procedural law]* (Budapest: Tankönyvkiadó, Third edition, 1974), 297.

⁷⁹ For more, see: Lilla Király and Károly László Simon, “A bizonyítási kötelezettség és a bizonyítási teher különös szabályai a gyakorlat tükrében,” [“Special rules on the obligation to produce evidence and on the burden of proof in the light of the courts’ practice,”] in *A polgári perbeli bizonyítás gyakorlati kézikönyve [A practical handbook on the taking of evidence in civil proceedings]* ed. Miklós Kengyel (Budapest: KJK Kerszöv, 2005), 143-186.

⁸⁰ József Farkas and Miklós Kengyel, *Bizonyítás a polgári perben [The taking of evidence in civil proceedings]* (Budapest: KJK-KERSZÖV Jogi és Üzleti Kiadó Kft., 2005), 62.

⁸¹ Légrádi, “Gondolatok a bizonyítás általános kérdéseihez,” 211-226.

⁸² New CCP, section 265 subsections (2)-(3): interests in producing evidence and ex-

- 1) the data necessary for the evidence-seeking party to submit a motion for evidence is in the exclusive possession of the opposing party (or other person);
- 2) it is impossible for the party to provide evidence, but it would be expected from the opposing party to give evidence to disprove the party's allegations;
- 3) it is at least likely that the opposing party has obstructed the taking of evidence, "in such situation, the opposing party, by way of disposing of the pieces of evidence, intentionally or negligently influences the outcome of evidence taking;
- 4) the party would be able to provide evidence only in an unlawful manner, and the opposing party does not give his consent to the use of such evidence, in this case, the opposing party who is not interested in the taking of evidence has a right of disposal over the means of evidence.⁸³

The legal consequences of the exigency of providing evidence can be avoided by the opposing party only if he makes it probable that (1) he or any other person not involved in the proceedings but having the same interests has never disposed and has never needed to dispose of the relevant data; (2) there is a third person who does not share the interests of the opposing party and also disposes of the relevant data; (3) the evidence-seeking party failed to make every effort which may reasonably be expected of him to obtain the necessary data or means of evidence (for instance, he could have done something else besides the actions he has allegedly taken); (4) it is theoretically possible for the evidence-seeking party to produce evidence beyond the opposing party's exclusive scope of control; (5) it cannot be reasonably expected from the opposing party to give evidence to refute the party's allegations; (6) the taking of evidence has not been obstructed; (7) it was not him or any other person having the same interests who has obstructed the taking of evidence; (8) the evidence-seeking party failed to make every effort which may reasonably be expected of him to prevent, or eliminate or mitigate the consequences of the obstruction of the taking of evidence; (9) the harm to be suffered by the opposing party in case of providing information or evidence, or giving his consent to the use of evidence would be disproportionately greater than the evidence-seeking party's interests in the taking of evidence; (10) he has lost his right to dispose of the data and means of evidence required due to reasons beyond his scope of control;⁸⁴ (11) the obstruction of the taking of evidence is not attributable to him.

igency of providing evidence

⁸³ Légrádi, "Gondolatok a bizonyítás általános kérdéseiről," 216.

⁸⁴ The notion of the scope of control was introduced into the Hungarian legal system by the 2013 Civil Code, the explanatory memorandum of which states the following: "Circumstances that cannot be controlled or influenced by the party (e.g. the tradition-

This highly differentiated regulation serves the purposes of preventing the parties from being placed in an unfair procedural situation.

In the proceedings, the parties are not obliged to allege facts. The parties are free to allege those facts that, due to lack of common or official knowledge or of examination, the court is unfamiliar with: the interested party is expected, while the other party is allowed to do so.⁸⁵

4. Summary

The new CCP does not entail fundamental changes in the system of civil procedural law. It seeks to retain the well-established instruments, but “the introduction of new rules should be of significant benefit, otherwise the well-established legal provisions are to be maintained instead”.⁸⁶ The codification of the new Code of Civil Procedure is in conformity with the legal premise of Ulpian only if it does not fall victim to the compulsion to over-regulate and [...] the litigants are able to enforce their claims within a transparent, simple, fast-track and clear procedural framework.⁸⁷

I agree with Tünde Handó, the President of the National Office for the Judiciary, in that the introduction of scientifically over-complicated legal institutions⁸⁸ (that are understandable almost exclusively by those who have a bar exam) did not serve the above purposes, and the legislator forgot about the litigants. Another predictable consequence of the over-complex wording of procedural rules is that the non-professional parties will misinterpret them, and they will need to be clarified, counselled and informed about them, which will make the proceedings unnecessarily burdensome.⁸⁹

The codification of the new Code of Civil Procedure primarily results from the adoption of the new Civil Code⁹⁰ and from the need to align the procedural

al forms of *vis maior*) are beyond his scope of control.”

⁸⁵ The Experts’ Draft Proposal (manuscript), 2015.

⁸⁶ *Digesta*, IV. *cfm*-De constitutionibus principum, 2., Ulpianus, see in the observations of the President of the National Office for the Judiciary, Ms Tünde Handó in respect of the draft proposal on the new Code of Civil Procedure, April 2016, 2014. OBH.XXII.C.1.1./164., attachment no 1.

⁸⁷ Letter of the President of the National Office for the Judiciary, Ms Tünde Handó addressed to Minister of Justice Mr. László Trócsányi, President of the National Office for the Judiciary, 2014.OBH.XXII.C.1.1./164., 12 April, 2016.

⁸⁸ By virtue of Recommendation Rec(81)7 of the Committee of Ministers of the Council of Europe on measures facilitating access to justice, the use of strange terminology, unduly complex and too technical expressions should be avoided and the language used should be comprehensible (principle 5 on the simplification of procedural acts).

⁸⁹ the observations of the President of the National Office for the Judiciary (2016) *loc. cit.*n. 102.

⁹⁰ Act no V of 2013 on the New Civil Code

rules on non-litigious proceedings, increasing in quantity and importance with the Procedural Code, secondarily, it stems from social pressures, the most overwhelming of which is to prevent the backlog of court cases.⁹¹ To address the issues raised by legal practitioners, the drafters had to take into account the courts' procedural law related case-law and the needs of other legal professions as well.⁹²

The most important innovations of the new CCP are the implementation of the principle of the concentration of proceedings and the introduction of the split system of procedural phases. "In the split system, there is a preparatory phase aiming at determining the framework of the legal dispute and there is an on-the-merits phase with evidence taking. The courts' jurisprudence shows that the protraction of proceedings is often and mainly due to the fact that the CCP in force does not restrict or only partially restricts the modification of the statement of claim, allows the defendant to essentially limitlessly modify his defence in the first instance proceedings and allows the parties to submit their pieces of evidence and motions for evidence at almost any time".⁹³ The implementation of the principle of the concentration of proceedings can be ensured only if the taking of evidence is under the court's control and not under the parties' control, as they may be interested in the protraction of proceedings, while the court is obliged to render a lawful and well-founded decision within a reasonable time and with regard to the principle of cost efficiency.

The rules on the taking of evidence in the new CCP essentially aim to align the legal provisions in force with the newly established split system of procedural phases and to codify the courts' existing case-law, at the same time, they clarify certain notions, for instance, the principle of free evidence taking is replaced by the principle of the free establishment of facts, while the notion of the obligation to provide evidence is substituted by the parties' interests in evidence taking. A substantial change is the regulation of the involvement of private experts, and the question arises as to how the courts will cope with the problem that the opinion of a private expert commissioned by the party (the details of commissioning not being known to the court) and the opinion of a forensic expert commissioned by the court will have the same evidentiary force.

⁹¹ Lajos Cserba, "A perjogi kodifikáció elé," ["Foreword to the codification of civil procedural law,"] in *Codificatio processualis civilis, Studia in Honorem Németh János II*, ed. István Varga (Budapest ELTE Eötvös Publishing House, 2013), 11.

⁹² István Varga, "Perrendi szabályozási igények azonosítása jog-összehasonlító kitekintéssel," ["The identification of regulatory needs in civil procedure from a comparative law perspective,"] in *Codificatio processualis civilis, Studia in Honorem Németh János II*, ed. István Varga (Budapest ELTE Eötvös Publishing House, 2013), 489.

⁹³ Commentary to section 214 of the Draft Bill