

University Doctoral (PhD) Dissertation Abstract

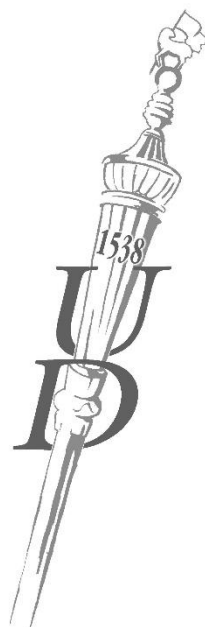
THE METAMORPHOSIS OF PROCEDURAL INSTITUTIONS

-

THE DEVELOPMENTAL PECULIARITIES OF THE INSTITUTIONS OF HUNGARIAN AND ROMANIAN
CIVIL PROCEDURE FROM THE FOURTH DECADE OF THE XX CENTURY TO TODAY

Székely János

Supervisor: Dr. Pribula László Head of Department, habil. Associate Professor



University of Debrecen
Marton Géza Doctoral School of Legal Studies

Debrecen, 2017

I. Precursors and aims of the doctoral dissertation

I.1. The object and sample of the doctoral dissertation

In the states of Eastern Central Europe, the course of the development of civil procedural norms is comparable under many aspects. The codifications in this region, primarily aimed at modernization began in the last decades of the XIX century. Their results were based on the examination of the legal systems and the import of legal norms of some (or several) prestigious model giving great powers.

The economic, political and historic factors affecting the region are also comparable, even sometimes common. The multitude of these common elements make the region being examined most proper for comparative law research.

This, because it is a given, that the paths of legal development are necessarily influenced by common factors, but these do not necessarily lead to the same end result. It is also a given – as was ascertained¹ in Hungarian specialty literature by NÉVAI – that civil procedure is situated on the surface of contact between the individual and the state, and is therefore more susceptible to react to historic, economic and social factors. Therefore, it is fertile ground for research due to two reasons: on the one hand with its help, the peculiarities of the factors affecting the legal system, on the other hand the similarities and differences of the legislator's answers given to these, can be identified. Keeping in view the fact, that the aim of civil procedure law in all states – more or less – is some amalgam of the resolution of disputes civil by nature, and the implementation of some policies thought to be important during this resolution, in this field we can at the same time compare and examine those legal norms aimed at the adjudication of lawsuits, and those which fill that given adjudication with some ideological content, or bring such content to effect during its course. It was to reach these objectives that we began the realization of the object of our doctoral thesis, the historic-comparative examination of some institutions of civil procedure.

The spatial frame of our examination we set to the civil litigious procedure law of Hungary and Romania, because we found these two states to be the most representative sample to be found in the Eastern Central European region from the perspective of comparison of laws. The – partly common – history of both states was exposed to comparable factors, but the basis for

¹ NÉVAI László, *A szocialista polgári eljárásjog elméleti alapkérdései*, Akadémiai Kiadó, Budapest, 1987, 64.

their civil procedure systems was provided by differing foreign patterns (in Hungary the Germano-Austrian, in Romania the French civil procedure held more sway).

The temporal frame of our examination we have defined as the interval starting from the end of the 1940s up to today, albeit the efforts to modernize the civil procedure of both states and their precursors were summarily presented, in order to make known the context of the transformations being examined in detail.

The timeliness of our research is provided by the fact that during its time in Hungary the recodification of the rules of civil procedure took place and was finalized, which itself was at least in part based on the result of comparison of laws by structure and content. In Romania the civil procedure codification finalized in the year 2013 has by these days even provided experiences in the field of some innovations brought into effect to speed the processing of lawsuits along. For these reasons placing into parallel the historic and current transformations of these two systems of procedural law was promising some lessons.

1.2. The methods of research employed

Our research has the character of *basic research*; therefore, it does not set as its aim the confirmation or refutation of pre-existing theories. We strive more for the deduction and proof of conjectures and correlations not previously formulated from the similarities and differences of the transformations of the two systems of civil procedure being compared, or from their peculiarities.

During this we have conducted our research based on the *inductive method*, which was set on the foundation of gaining knowledge from legal literature, the *black letter law*, that is taking into consideration the legal norms available in source materials. It was not the aim of our research to prove or refute the measure to which norms of civil procedure are effectively applied during their every day use. Therefore, their effects in practice we've only mentioned, when it could be unequivocally read out from the sources that we have examined.

We have kept in view some hypotheses of a higher order of abstraction: we have examined the validity of DAMAŠKA's model² with respect to the institutions of procedure which were subjected to examination, the validity of PETRIK's chronology regarding codification periods

² DAMAŠKA Mirjan, *The Faces of Justice and State Authority: A Comparative Approach to the Legal Process*, Yale University Press, New Haven, 1986, 181.

in the development of the law of civil procedure of Hungary and Romania, the speculative prognoses of GILLES³ regarding the development of civil procedure we have also kept in view.

I.3. The hypotheses of our research

At the beginning of our research we have established some working hypotheses, which we have attempted to confirm or refute in our thesis. These are as follows:

I. The systems of civil procedure law at the beginning of the XX century, following their first modern codification were characterised by the main peculiarities of their donor legal systems, and showed some signs of crisis, which made necessary (or justified post facto) the intervention of the legislator which later took place.

II. The political and social changes which took place at the end of the 1940s have caused conformation to the Soviet pattern of civil procedure, primarily as a result of the transformation of the constitutional principles of civil procedure, which were incompatible with their traditional legal culture. The measure of conformation therefore was not complete, even more, it was achieved by the minimal transformation, simplification, or modification of scope of pre-existing norms of civil procedure, and not by legal transplants. The role of the court and the prosecutor during the civil procedure constitutes an exception from under this hypothesis, which – primarily due to its political significance – was greatly extended as compared to what came before.

III. Following the turn of events in 1989 both systems of civil procedure experienced a reversion towards national traditions, along with some common modifications stemming from the same source – as required by European integration – which did not affect the core of the civil trial. It is also part of the hypothesis, that the changes which occurred in the Hungarian legal system were the result of a more rigorous constitutional concept, and in their formation the role of the Constitutional Court was accentuated. In the case of Romania such a phenomenon was not experienced, even more, the Constitutional Court of Romania catalysed the further maintaining of previous procedural patterns.

IV. The recodification of the law o civil procedure finalized in Romania in 2013 does no longer show explicit conformation on the part of the Romanian legislator to any

³ GILLES Peter, *Civil Justice Systems and Civil Procedures in a Changing World*, Russian Law Journal, 2014/1, 54–56.

foreign system or concept of civil procedure, and along with the patterns adopted shows signs of organic development, whereas the Hungarian recodification of the year 2016 builds strongly on national traditions of civil procedure. Along with all these, both transformed legal systems show convergence from the perspective of the structure of civil procedure, the split structure of procedure, and from the perspective of the partitioning of power between the parties and the court, in the direction of the increased responsibility of the parties, and the strengthening of the court's material leadership of the procedure. This convergence is realized by the historically traditional methods of the two legal systems under examination.

1.4. Review of the literature

The main directions and tendencies of the development of Central Eastern European procedural law, especially regarding Romania and Hungary did not earlier constitute the object of complete comparative examination in the time interval selected by us. Albeit, the procedural law development of the region has been processed by renown authors⁴ (e.g. UZELAC, KENGYEL) in their different works. Upon the paradigm constituting specifics of their works we have relied extensively under the aspects of the abstract goal and direction of development of civil procedure. The thoughts expressed by EÖRSI regarding legal development⁵ and VARGA Csaba regarding codification⁶ have also been kept in sight.

We consider the legal history specialty literature basis⁷ of our dissertation as being the procedural law history writings of STIPTA, MEZEY, BÓNIS, DEGRÉ és VARGA Endre, as well as GÁSPÁRDY. To the primary source material of the development of civil procedure along with

⁴ UZELAC Alan, *Goals of Civil Justice and Civil Procedure in the Contemporary World*. In: UZELAC Alan (ed.), *Goals of Civil Justice and Civil Procedure in Contemporary Judicial Systems*, Springer, Cham, 2014. KENGYEL Miklós, *A bírői hatalom és a felek rendelkezési joga a polgári perben*, (academic doctoral dissertation), Pécs, 2003, http://real-d.mtak.hu/249/1/Kengyel_Miklos.pdf (accessed: 2015.06.05).

⁵ EÖRSI Gyula, *Összehasonlító polgári jog. Jogtípusok, jogcsoportok és a jogfejlődés útjai*, Akadémiai Kiadó, Budapest, 1975, 394–396.

⁶ VARGA Csaba, *Codification as a Socio-Historical Phenomenon* (2nd edition), Szent István Társulat, Budapest, 2011, 114–115.

⁷ STIPTA István, *A magyar bírósági rendszer története* (2nd edition), Multiplex Média - Debrecen University Press, Debrecen, 1998. BÉLI Gábor — BÓDINÉ Beliznai Kinga — HORVÁTH Attila — KÉPES György — MEZEY Barna — et al., *Országbírói értekezlet*, <http://majt.elte.hu/Tanszekek/Majt/Magyar%20JogtorteNET/magyarazatok/orszagbiroiertekezlet.htm> (accessed: 2013.01.13). BÉLI Gábor — BÓDINÉ Beliznai Kinga — HORVÁTH Attila — KÉPES György — MEZEY Barna — et al., *1868:54. tc. - A polgári törvénykezési rendtartás tárgyában*, <http://majt.elte.hu/Tanszekek/Majt/Magyar%20JogtorteNET/magyarazatok/1868-54.htm> (accessed: 2013.01.20). GÁSPÁRDY László, *Modern magyar perjogtörténet*, Novotni Kiadó, Miskolc, 2000. MEZEY Barna (ed.), *Magyar jogtörténet*, Osiris Kiadó, Budapest, 2007. MEZEY — SZENTE cited. above. MEZEY Barna, *Horvát Boldizsár az Országbírói Értekezleten*, Jogtörténeti Szemle, 2005/3.

these are also added, along with the above mentioned academic doctoral dissertation of KENGYEL detailing the historic transformation of the power of the judge, numerous writings by GYEKICZKY.⁸

1.5. The structural partitioning of the content of the dissertation

From the point of view of its structure our dissertation is partitioned into fourteen chapters.

Of these *chapter I* as an introductory part clarifies the causes of the choice of topic and sample, the historic period examined, the nature of the legal norms examined, and the processing of the topic of the dissertation in earlier specialty literature. The research aim of the dissertation was to draw relevant conclusions from the comparative examination of the development of the Hungarian and Romanian law of civil procedure, with regard to the peculiarities of this development. Its temporal horizon is bounded by the turning to socialist procedural law at the end of the 1940s, and the newest transformations of civil procedure law, the codifications of procedural law in 2013 in Romania and 2016 in Hungary. The basis of our inquiry was constituted by the tracking of some transformations – significant from the point of view of the governing principles of civil procedure, and comparable between legal systems – of procedural institutions during some eras of civil procedure law which preoccupied the specialty literature and the legislator.

With a view to the acknowledged lack of literature for the methodology of comparative civil procedure, we have attempted in *chapter II* of our dissertation to list the comparative law methods used in other parts of the dissertation, and to conceptually define the main notions of our dissertation. Based on the literature of comparative civil procedure law, and that of the comparative law method in general, in Hungary and abroad we have ascertained that the comparison of the civil procedure law systems of different states is possible. The working method of comparison must however, as a necessity be eclectic. By means of the *functional method* the main element of comparison which can be identified in the field of civil procedure is *the – abstract – function of civil procedure, which at all times, along with the adjudication*

⁸ GYEKICZKY Tamás, *Töréspontok*, Collectio Iuridica Universitatis Debreceniensis, 2006/6. GYEKICZKY Tamás, *Helyzetjelentés (Levéltári iratok polgári eljárásjogunk történetéből)*, Gondolat – Debreceni Egyetem Állam- és Jogtudományi Kar Kiadványai, Budapest, 2006. GYEKICZKY Tamás, *Törvény születik. Adalékok az 1952. évi polgári perrendtartás keletkezésének történetéhez. (Egy levéltári kutatás előzetes tapasztalatai)*. In: WOPERA Zsuzsa (szerk.), *50 éves a polgári perrendtartás. A Miskolci Egyetem és a Debreceni Egyetem Polgári Eljárásjogi Tanszékei közös konferenciájának kiadványa*, Novotni Kiadó, Miskolc, 2003. GYEKICZKY Tamás, *Befordítva – Levéltári iratok a jogpolitikáról, a bíróságokról, és a bírászkodás lehetőségeiről a „Kádár” korszakban (1958-1990)*, Patrocinium, Budapest, 2016.

of legal disputes also contains the implementation of some policy goals, however the emphasis on these two characteristics is not identical in all systems of procedural law. By keeping track of the transformations of the functions of the civil trial, and of the procedural institutions quasi-subjected to them (with an increased political content) deeper conclusions can be deduced as to the tendencies regarding the evolution of civil procedure. The structure of these functions is also significant during the taxonomic classification of civil procedure systems, as is possible based on the model proposed by DAMAŠKA, according to the hierarchical or coordinative principles of the organization of justice and the judiciary, and according to the level of activism displayed by the state in the field of civil justice.⁹

We have also examined as an applicable method tracking *legal transplants*, and the factors which introduce them into particular legal systems, and also the *comparative historical perspective*, which will bare significance during the treatment of the topic of our dissertation and the drawing of conclusions.

The comparison of two complete systems of civil procedure would have exceeded significantly the boundaries of our dissertation, so by using the toolkit of comparative law, and in a more narrow sense the toolkit of comparative procedural law, we strived to isolate *those procedural institutions, which subjected to examination would yield the best results*, based to a great extent on the conclusions of VARGA István and GERBER with regard to the comparison of civil procedure laws, and the abstract structure of civil procedure. In this way we have marked out those topics (the aim of the civil suit, its principles, the sharing of roles between the subjects of the procedure, the structure of the procedure, the rules pertaining to lodging applications and their preconditions, the role of the parties and their representatives during the civil procedure, the role of the public prosecutor, the effect of default on material rights, the rules of evidence, the structure of the trial) to the transformations of which we have dedicated special attention during our later analysis.

In *chapter III* of our dissertation we have examined the modern development of procedural law prior to the period under examination, in the states subject to analysis, in order to determine the characteristics of their first modern codification of civil procedure law.

In *chapter IV* of our dissertation we have examined the transformations of the rules of Romanian and Hungarian civil procedure, with the beginning of the installation of state

⁹ DAMAŠKA *cited work* 188.

socialism, and up until the regime change. In this period in both Hungary and Romania, the state socialist takeover of power took place. The signs of this became palpable in the rules of civil procedure in a short time.

The general scheme of the development of procedure during state socialism in Hungary, and (with regard to the first two periods) Romania took place according to the chronology established by PETRIK: the transformation of the civil procedural system did not constitute a priority immediately after the installation of the totalitarian systems (“the period of conversion”). After this, linked to the transformation of the organization of the judiciary (the generalization of the participation of assessors, the emphasis on the active role of the judge and the prosecutor) or immediately prior to this, the socialist recodifications began (“the codification of basic institutions”), which later showed an increased level of mobility in the case of the Hungarian civil procedure, especially in the context of the economic transformations which began with the 1960s, which resulted in the reforms of certain basic institutions of civil procedure.

In the case of Romania, subsequent to the procedural recodification of 1948, visible novel changes did however not occur until the regime change of 1989.

The *participation of assessors*, which aimed to complement the professional activity of the courts with practical experience, an absurdity hard to interpret, has described a somewhat similar path in both countries which can be characterised by periods of its introduction at the end of the 1940s, its zenith up to the end of the 1960s, and its decline beginning with the start of the 1970s (slowly in Hungary, more visibly in Romania).

The socialist interpretation of the *principle of directness* proved to have a longer lifespan, subsequently to the repealing of compulsory legal representation, such cases were next codified only during the 1990s in Hungary, even against pressures exerted by the legal literature as early as the 1960s.

As regarding the *structure of the civil suit*, on the backdrop of directness and strengthening judicial control of the proceedings the unitary structure of the civil trial was introduced. In Romania at the same time the written preparation of the trial lost its significance.

In a way characteristic to the socialist transformation of the countries studied, by the end of the 1940s and during the 1950s, this was influenced by the civil procedure of the USSR, as a model giving system of law, on the one hand as a constant point of reference for legal literature, and on the other as the wellspring of the basic principles of civil procedure. The principals in the

introductory part of the Hungarian civil procedure can be traced to this. The Romanian code of civil procedure did not however have an introductory part of basic principles, even though the literature of the age emphasized that the basic principles of socialist law can be found in its contents. The explanation for this basic difference is, that the development of the constitution which informed the basic principles of civil procedure took place prior to the codification of civil procedure in Hungary, but subsequently to it in Romania. A common characteristic of both country's civil procedure is that during their recodification the influence of the Soviet-Russian civil procedure was relegated to the basic principles.

During the codification and subsequently it was the common objective of socialist legislators to reduce the number of disputes which can be resolved by means of a civil trial, especially with regards to remedies in law against administrative acts, the disputes between economic entities, and – in the case of Hungary – labour disputes. The realization of justice before forums closer to the parties can also be considered a similarly unitary objective, the placement of general first degree jurisdiction to the lowest rung of the court system. The suppression of sanctions for negligent proceedings (preclusion, default judgements) is also worth mentioning here.

During the socialist era the *adaptive* transformation of laws of civil procedure (as mentioned in the introductory part of the dissertation, with a notion applied by EÖRSI) were primarily induced by the change of judicial organization, which manifested itself in the reduction of the number of rungs of the court system, and the suppression of procedural remedies. The increase in the unifying function of the jurisprudence of the supreme courts was also a manifestation of this same centralizing tendency in both countries, by granting them permission to arbitrarily proceed to the trial of cases being tried in the lower courts, and the introduction of extraordinary remedies which can be exercised by the Prosecutor General.

Beginning with the second half of the 1950s an increasing divergence can be detected between the two legal systems: in Hungary, by means of the provisions of the second amendment to the rules of civil procedure, the regulation of the role of the prosecutor during the civil trial starts to differ from soviet law, the role of the parties in providing evidence is emphasized, and the subsidiarity of administering evidence at the motion of the court is declared. In the field of preconditions of civil procedure the repealing of the precondition barring “manifestly ill founded” applications, introduced for political reasons can also be interpreted as a move towards (socialist) legality, if not rule of law.

Following all this, the III amendment to the rules of civil procedure – widely debated in the literature, and ripened for more than ten years – is the result of tendencies to reform, and can be interpreted as a watershed in Hungarian civil procedure. On the one hand Soviet-Russian sources of law, including the 1961 basic principles of the USSR civil procedure, played no role in its development. On the other, between the progressive provisions of the III amendment we can mention the coordination of the role of the public prosecutor with the right of self determination of the party (if no harm comes to the rights of third persons), the reduction of the assessor system, and the reintroduction into civil procedure of decisions by default. All these measures were meant to accentuate the formalism of civil procedure, in order to force the parties to concentrate on dispute resolution, and reduce the increasing duration of the procedure.

The attempts at codification during the 1980s in Hungary, which due to the historic context did not reach fruition, have resulted in even greater attention from the literature than that experienced prior to the development of the III amendment.

In *chapter V* of our dissertation we analyse the transformation of the legal systems under examination from the regime change up to the codifications achieved in the second decade of the XXI century. Subsequently to the regime changes of 1989 in both studied legal systems the introduction, or the assimilation of the procedural requirements of the rule of law began. This period was primarily characterised by the epoch change¹⁰ type of adaptation of the rules of civil procedure. During this adaptation in the case of both legal systems five factors proved significant: the necessity to accommodate civil procedure law to the requirements of procedural fairness, the transformation of the court system with three rungs, and its corresponding system of remedies which were incompatible with national traditions of civil procedure in sync with these traditions, the practice of the constitutional courts with respect to civil procedure, and the fight against the growing workload and duration of procedures at some levels of the justice system.

The – shortest – *chapter VI*. of the dissertation details the main causes and objectives of the recodification of the law of civil procedure during the XXI century. In this, we ascertain that in the case of Hungary, again the change of the constitution is the main causative factor of the codification which has the role of transferring the principles of the responsible behaviour of the individual into the civil procedure. In the case of Romania, the codification was primarily

¹⁰ EÖRSI *cited work* 394–395.

the effect of the monitoring exercised by the EU under the Mechanism of Cooperation and Verification. Whereas the Hungarian codification is the declared result of comparison of laws, in the case of its Romanian counterpart the legislator makes no such mention in its reasons.

In the field of codification we can ascertain, that according to the directives established in the legislative concept of the new Hungarian rules of civil procedure the legislator did not strive for the complete transformation of the law of Hungarian civil procedure, nor to the introduction of foreign models during the codification, however it implements some solutions presented in the literature prior to and during codification (especially the reintroduction of the split structure of civil procedure), in order to achieve “systemic” procedural efficiency.

In *chapter VII* of our dissertation we compared the basic principles of Hungarian and Romanian civil procedure, with a view to the norms of Act CXXX of 2016 (the new rules of civil procedure).

We demonstrated, that with regards to the principle of procedural self-determination, the meaning of this principle differs as a constant between the Romanian and Hungarian civil procedures. In the case of the trial principle, this has achieved a special significance in the Hungarian law of civil procedure, transferring to the parties all duties regarding the provision of facts and proposal of evidence, exempting the court from under the burden of providing for evidence and seeking the truth of its own motion. In Romania this process has also not taken place during the most recent codification of procedural law. Finally, in Romania, during the codification of the basic principles of civil procedure by Act 134 of 2010 (New Code of Civil Procedure) the separate introductory part reserved for these principles places strong emphasis on guaranteeing the time-efficiency of the civil process, providing for its conclusion within an optimal duration, and the obligation of its participants to seek this result. Alas, such provisions of basic principle, which do not effect the structure of the civil procedure, do not directly lead to more procedural efficiency.

We have ascertained that the catalogues of basic principles of the Hungarian rules of civil procedure and the Romanian new code of civil procedure are fundamentally different: the former contains the basic principles specific to the civil procedure, the latter also the basic principles which can be deduced from constitutional rules and the contents of the European Convention on Human Rights.

In the final part of our dissertation, beginning with *chapter VIII* we move to the comparison of some institutions of Hungarian and Romanian civil procedure law.

As resulting from our inquiry into the legal status of the subjects of civil procedure, we ascertain that in the field of the regulation of the parties to civil procedure and locus standi the Hungarian and Romanian laws of civil procedure show no significant difference, either in their current, past or predictable future forms. In the field of procedural intervention, the new Hungarian rules of civil procedure do not entirely respect the regulatory priorities advanced in the literature and in the legislators' initial concept. The main differences of the Hungarian and Romanian laws of civil procedure in the field of intervention (the possibility of principal intervention in the Romanian law of civil procedure and its exclusion in the Hungarian law) shows no differences in view of future regulation.

In the question of joint defendants or plaintiffs in the Hungarian system, the rules regarding the independence respectively the dependence of joint plaintiffs and defendants show no change, albeit the new rules of civil procedure would open up the possibility for persons standing trial as co-defendants to join the plaintiff, subject to the approval of the court, a rule which does not exist in Romania.

Regarding the procedural position of the public prosecutor the Romanian law has undertaken a significant modification of systematization with regard to its standing in the procedure, placing the rules regarding him in a different text than that regulating the position of the parties. Regardless, (due to the unchanged constitutional background) the procedural rights of the prosecutor remain unchanged, although an explicit rule is now provided that the right of self-determination of the party must be respected in all its forms. The new rules of civil procedure in Hungary would also place the procedural role of the prosecutor in a different text than the one in force, following the regulation of the parties' aid, thereby marking his removal from among the 'protagonists' of the civil procedure, ensuring a separate chapter for his applications in the public interest. We can ascertain from the convergence of procedural development in this field that the changes in the political environment also resulted in the transformation of the symbolic role of the public prosecutor during the civil procedure.

The norms regarding the representation of the parties we analysed in *chapter IX* of our dissertation. We have ascertained that in the field of representation, the broad circle of representatives established in the norms in force governing Hungarian civil procedure would be narrowed by the new rules of civil procedure. Striving for the achievement of "real compulsory council" and simplifying the current complicated rules of compulsory legal

council, this would be required in the case of lawsuits falling within the first instance jurisdiction of the tribunals. The rules for lack of representation would also be made stricter.

During the recodification of the Romanian law of civil procedure, the position of legal council was also broadened in this system, compulsory legal council being introduced when the second appeal to cassation (recourse) is exercised, which however, contrary to the opinion formulated in Romanian legal literature the Constitutional Court of Romania declared unconstitutional, showing that the Romanian law of civil procedure is not yet ready for the reintroduction of compulsory legal council.

In *chapter X* of our dissertation we have examined the procedural actions of the parties and the court in general. We have especially analysed the way of submitting an application, and the newly formulated expectations with regard to the form and content of the (letter of) application by the systems of the new Hungarian rules of civil procedure and new Romanian code of civil procedure. We have ascertained that the application as a document setting forth the claims of the parties has special significance from the point of view of the new codifications of civil procedure: it must meet higher requirements of form and content, and must be capable of substantiating the claims made to the court. In the field of the judicial preparation of the trial we have shown that both procedural systems we studied display signs of motion when compared to the earlier status quo, or such a motion can be expected under this regard. On the one hand both procedural systems show a developmental tendency to the thorough examination of the letter of application, and its rejection (its annulment in the Romanian system) when it does not meet the criteria of form and content newly described in minute detail in the new codes of civil procedure, including in both systems (although in Romania in a less significant way due to the active role of the judge) the substantiation of the claims made in the application, by setting forth the right being claimed and its basis in law. We can also consider as a common tendency the emphasis placed on the written preparation of the civil trial, which in both cases takes place after the verification of the form and content of the application, after the interested party has exhausted its possibility to correct or complete the application. The preclusion which operates during the written procedure is also a common tendency which in case of evidence not requested for submission, and exceptions not raised during the preliminary exchange of letters, excludes as a rule any motion to this effect at a later date. In the Hungarian law of civil procedure, the effect of the default of the defendant on the first trial, according to the new rules of civil procedure would from now on be applicable to that parties' failure to submit a written statement of defence, thereby further formalizing the written procedure.

The transformations of the structure of the civil process, the system of admissibility criteria of the claim and the preparation of the trial we have examined in *chapter XI* of our dissertation. In the field of preconditions of admissibility, the traditional solutions of the procedural systems under examination are more evident. In our opinion, in the context of the split structure of the civil procedure, the solution of the Hungarian legislator, by which it conserved the phase in which the admissibility criteria are verified outside the trial, even in the new rules of civil procedure is unfortunate. In Romanian civil procedure, the verification of admissibility criteria, with the exceptions of the formal requirements of the application are verified during an oral and contradictory procedure.

Regarding the structure and leadership of the trial we can ascertain that both legal systems show signs of moving towards the split structure of the trial.

In the system of the Hungarian new rules of civil procedure this tendency is more pronounced, as the statements and requests of evidence by the parties, as a rule, should be submitted during a preparatory hearing.

In the case of the Romanian new code of civil procedure this ‘split’ procedure is evident in two places: first, before the beginning of the trial phase (or if the preparatory exchange of letters is not compulsory, on the first trial) the statement phase, and the possibility to propose evidence by the parties becomes time barred for them as a rule, and only the court shall have the right to propose evidence after that time. The second split occurs after the administration of evidence (probably in closed session beginning with 2018), because only after the administration of evidence is completed can the debate of the parties commence.

In *chapter XII* of our dissertation we have examined the leading of the trial and of the procedure. In what concerns the leading of the trial, as a novelty in the Hungarian law of civil procedure, the material leadership of the trial would be introduced (even though this is already part of Hungarian judicial practice). In Romania this is rendered unnecessary by the active role of the judge. In its exercise the court can invite the parties to make statements during the trial, and can debate legal and factual aspects of the case with them, even make it evident to them that further evidence is necessary.

In order to preserve legal traditions, the lack of the active role of the judge in ascertaining the facts of the case is remedied by the Hungarian legislator (a measure unnecessary in systems which know this role) by the introduction of two procedural institutions – the emergency statement and the emergency proof. These would make it possible, in cases of information

asymmetry, to consider all statements, and all evidence available only to one party in favour of his opponent, if the former refuses to supply them contrary to good faith.

In *chapter XIII* of our dissertation, the final one before the theses we have summarized the rules regarding evidence in the Hungarian and Romanian law of civil procedure. In the field of the rules of evidence it can be ascertained, that the Hungarian legislator during the codification of the new rules of civil procedure made no significant changes to these, only to the extent made necessary by the split structure of the procedure, by making it possible to propose evidence even after the closure of the statement phase, the possible cases of which are highly similar to the cases of tardive proof known in Romanian law. The introduction of the emergency proof took place according to the parameters described in the literature into the structure of the new rules of civil procedure, as did the regulation of illegally obtained evidence, based on the principle of relativity. We found no analogous example to any of these rule in the Romanian law of civil procedure, in the case of emergency proof, because there was no necessity for that, and in the case of illegal evidence, because of the legislator's solution in the form of an explicit ban in the case of material evidence.

II. The new scientific results of the dissertation

II.1. The summary of scientific results

We have confirmed without a separate hypothesis for this aspect, that in the domain of methods for the comparison of laws applicable to the law of civil procedure, the comparison of two procedural systems is possible by the use of the abstract goal of the civil process and its functions as a *tertium comparationis*. We have also confirmed that the comparison of some institutions of civil procedure is possible as resulting from what can be stated as the universal structure of civil procedure, and we have isolated a particular catalogue of comparable procedural institutions.

Regarding the hypotheses of the dissertation we make the following statements:

With regard to hypothesis I

Observing the history of civil procedure in Hungary and Romania we have ascertained that in the case of both countries the modernization of the norms of civil procedure took place in the last third of the XIX century. In Hungary this process took place in several steps, through experimentation with a view to different models of civil procedure, and culminated in the adoption of Act no. I of the year 1911 of primarily Austrian and German inspiration which

brought into effect the *social-minded civil trial*, and was a result of decades' worth of work on behalf of the literature and the legislator. In Romania the development of modern civil procedure was a by-product of the unification of the Danube Principalities, and took place by use of the 'fast track' method of procedural codification, with a view especially towards the liberal civil trial of French inspiration, and which resulted in a substantially more unstable regulation than the Hungarian norm. It was modified numerous times even during the XIX century, its unity broken by the multitude of modifying acts in the first decades of the XX century, primarily with the purpose of accelerating civil trials. In this era both procedural systems were characterized by differentiated procedure according to the court of first instance with jurisdiction. In Hungary, as a result of Act no. I of the year 1911 the split structure of civil procedure was introduced, the introduction of which did not take place in Romania, even though the written preparation of the trial is comparable to this.

With regard to hypothesis II

In Romania the recodification of the law of civil procedure took place in 1948, already based on popular democratic principles – although it mostly unified the previous rules and brought novelties only in the case of norms with a pronounced political content – even before the adoption of the socialist constitution. In Hungary such a process of codification was finalized in 1952, in the spirit of the transformed concepts of the constitution of 1949.

Among the factors which induced the recodification of the law of civil procedure in Hungary, the transformation of the organization of the judiciary had a pronounced significance, with the introduction of the alien concept of the participation of assessors, while in Romania, at the time of codification of the civil procedure this was not yet in place. The creation of the code of civil procedure was primarily due to the unification of the norms applicable before the different levels of the court system, the transformation of judicial organization effected its first amendment.

In the case of both states the recodification followed the *model of change with conservation* with the transformation of procedural institutions with a political content (the procedural goal of discovering objective truth, the strengthening of procedures by the courts own motion, repealing compulsory legal council etc.), while the more technical norms of civil procedure were largely left unscathed, or slightly improved, unified and clarified. As somewhat opposed to the general conception according to which the imparting of political content upon the laws of civil procedure took place based on the Soviet model, by basic principles with an almost

cultic significance, we ascertain that in the case of the Romanian code of civil procedure, which did not explicitly contain a catalogue of basic principles, this is not completely valid. To our opinion the cause of this is that the Romanian codification of civil procedure took place before the adoption of the new constitution. The constitutional principles of civil procedure did not make their way into the code's content, because their catalogue was not yet established at the time of codification.

The political statements of the age which granted to the judge the complete control of the procedure – including the possibility of proof by the courts own motion – and provided for the application of class theory during adjudication linked with the hierarchical organization of the judiciary and the supervision of the procedure by the public prosecutor (part of an even stricter hierarchy) established in civil procedure the dichotomy of the activist state and a hierarchical model of organization. With this the role of the parties during the trial was reduced, and the policy implementing function of the civil trial came to supersede the adjudicative function, resulting in the passivity of the parties.

It is true that this era was not characterized by systemic legal transplants, but it is also true that the basic principles of civil procedure and the role of the public prosecutor were transplanted from Soviet-Russian civil procedure. Meanwhile in Romania such a transplant during the codification of the 1948 code of civil procedure cannot be established, only subsequently.

With regard to hypothesis III

During the transfer to rule of law the Hungarian and Romanian procedural systems opted for different paths. In Hungary the direction of the most significant reforms of civil procedure were set by Constitutional Court decision no. 8/1990(IV.23.) AB, which referred to the right of self-determination. The legislator strived to grant ever more emphasis to it during the civil trial.

Conversely in Romania the transformations of the basic principles of civil procedure and its goal were not on the agenda until the recodification of the civil procedure in 2013. As an effect of the transformation of the constitutional framework of civil procedure law, here the first to take place was the transformation of the court structure with the reintroduction of two levels of appeal. The first wave of procedural reform, which took place by means of Act 59/1993 strived to reduce the role of the public prosecutor during the civil procedure, but the Constitutional Court of Romania blocked this reduction.

By the time of the procedural codifications which began in both countries in 2010, both states' civil procedure went through a transformation following the regime change. While in Hungary

in the field of the goal of civil procedure, and dependent on it the sharing of powers between the court and the parties saw a return to previous models, in the case of Romania along with attempts by the legislator to increase the activity of the parties, this sharing of power remained unchanged, the court continued to assert itself as an entity meant to discover all aspects of the case. This way, in Romania the court retained its role received from the activist state, while in Hungary the role of the court during the civil procedure has transformed, by extending the adjudicative function of the civil trial in detriment of the policy implementing function (discovering objective truth, defence of third parties).

In the changes of the legal systems which occurred from the regime changes to the recodifications significant foreign influence did not characterize the legislation of either state with regards to the civil litigious procedure proper, with the exception of some steps of legal harmonization pertaining to European integration, even though in the causation of the Romanian procedural codification the monitoring under the Cooperation and Verification Mechanism did play a role.

With regard to hypothesis IV

Regarding the fourth hypothesis of our research we would like to point out that we indeed did not show a correlation between the results of the Romanian procedural codification and foreign model giving norms, neither in the legislator's reasons, and neither in the patterns of solutions adopted, which build on national procedural traditions. In the case of the Hungarian codification of civil procedure, the effects of historic patterns are highly noticeable, especially with regard to the procedural institution of the split civil procedure, the historic pedigree of which, along with its modern reinterpretation figured prominently in the reasoning of the legislator, as did the listing of numerous foreign examples which employ this system. It can also be ascertained, that the significance of the pleading phase is emphasized in both the Hungarian and the Romanian litigious civil procedure, and as a result both systems emphasize the increased responsibility of the parties in providing statements and evidence.

III. Applications of the results of the research

The above research results can primarily be utilized in increasing available knowledge in the field of comparative legal history. To our knowledge our dissertation is the first to process the history of Romanian civil procedure in the Hungarian language. We have ascertained that during the transformations of procedural institutions even in the case of two procedural regimes which have formed based on two entirely different models, convergent (and naturally,

divergent) common developmental phenomena can be identified. We have also ascertained that different legislators in the same historic periods are influenced not only by political fiat, or 'forced' harmonization of laws, but also national traditions made evident during the realization of the abstract functions of civil procedure, earlier codifications, but also the seemingly transcendental force of changing while conserving.

Contemplating the criticisms to DAMAŠKA's structuralist model we can state, that it is true at least in the case of the two legal systems studied, that: the Romanian civil procedure applied to a judicial system organized under hierarchical ideals, in an activist state, where the primary goal of litigation is to implement policies, takes on an inquisitorial character. Conversely, the system of Hungarian civil procedure which places at the centre individual liberty and responsibility of the parties, with the main function of solving a legal dispute tends towards the accusatorial ideal.

Finally, we note, that the prognoses set forth by GILLES regarding the possible directions of development of civil procedure can be examined in the light of our dissertation. He saw correctly, that there is a tendency toward a greater emphasis on the preparation of the trial and the principle of concentration in newer procedural codifications, and that the differentiation of procedures in the first instance is indeed coming back into fashion. Our research in the field of Romanian civil procedure also seems to confirm the repositioning of the constitutional principles of civil procedure into the text of the new codes, though this seems to be countered by the Hungarian example.

IV. The list of publications by the candidate on the topic of the dissertation



UNIVERSITY OF DEBRECEN
UNIVERSITY AND NATIONAL LIBRARY



Registry number: DEENK/22/2017.PL
Subject: PhD Publikációs Lista

Candidate: János Székely
Neptun ID: ITYMOG
Doctoral School: Géza Marton Doctoral School of Legal Sciences
MTMT ID: 10021233

List of publications related to the dissertation

Articles, studies (8)

1. **Székely, J.:** A kötelező jogi képviselet és alkotmányossága Magyarország és Románia polgári perjogában.
Jogtudományi Közöny 6, 311-318, 2016. ISSN: 0021-7166.
Level of HAS Committee on Legal and Political Sciences: A
2. Molnár, J., **Székely, J.:** The Order for Payment Procedure in Romanian and Hungarian Law of Civil Procedure.
Studia Universitatis Babeş-Bolyai. Iurisprudentia 4, 112-130, 2016. ISSN: 1220-045X.
3. **Székely, J.:** A szocialista polgári per egyes jellemzői, kialakulása és fejlődése Magyarországon és Romániában 1945-től a rendszerváltásig.
In: Kolosváry Bálint emlékkötet. Szerk.: Veress Emőd, Erdélyi Református Egyházkerület; Sapientia EMTE - Kolosváry Bálint Jogtudományi Kutatóközpont, Kolozsvár, 265-284, 2015. ISBN: 9789737971906
4. **Székely, J.:** A határon átnyúló jogviták esetén alkalmazandó költségmentességi szabályok magyarországi érvényesülése a Tanács 2003/8/EK irányelve és az Európai Bíróság gyakorlata tükrében.
In: Az Európai Unió új és megújuló jogforrásainak szerepe a magyar magánjog fejlesztésében. Szerk.: Harsági Viktória, Raffai Katalin, Suri Noémi; Pázmány Press, Budapest, 207-219, 2014. ISBN: 9789633081952
5. **Székely, J.:** A perorvoslatok rendszerének átalakulásában észlelhető közös tendenciák egyes európai államok polgári eljárásjogában.
Erdélyi Múzeum 76 (4), 240-254, 2014. ISSN: 1453-0969.
6. **Székely, J.:** Az új romániai Pejtk. újításai és azok hatása az ügyvédi munkára.
Ügyvédek Lapja 4, 33-35, 2014. ISSN: 1216-9102.

Address: 1 Egyetem tér, Debrecen 4032, Hungary Postal address: Pf. 39. Debrecen 4010, Hungary
Tel.: +36 52 410 443 Fax: +36 52 512 900/63847 E-mail: publikaciok@lib.unideb.hu, Web: www.lib.unideb.hu



7. **Székely, J.:** Egyes, az igazságszolgáltatás megvalósítása ellen irányuló bűncselekmények szabályozása Románia új büntető törvénykönyvében - tekintettel felvetődésük lehetőségére a polgári perben.
Acta Universitatis Sapientiae. Legal Studies 3 (2), 193-213, 2014. ISSN: 2286-0940.
8. **Székely, J.:** Újítások a bizonyítási eljárás terén Románia új Polgári eljárásjogi törvénykönyve rendelkezéseinek fényében.
In: Új jogalkotási perspektívák és tendenciák Magyarországon és az Európai Unióban.
Szerk.: Harsági Viktória, Raffai Katalin, Suri Noémi, Pázmány Péter Katolikus Egyetem Jog- és Államtudományi Kar, Budapest, 291-303, 2014. ISBN: 9789633081716





List of other publications

Articles, studies (6)

9. **Székely, J.**, Sztranyiczki, S.: Az ingatlan jelzálog szabályozásának újdonságai Románia új Polgári törvénykönyvében.
In: A tulajdonátruházás összehasonlító kereskedelmi és üzleti jogi kérdései. Szerk.: Erik Štenpien, Miskolczi Bodnár Péter, Károli Gáspár Református Egyetem Állam- és Jogtudományi Kar, Budapest, 116-130, 2015. ISBN: 9789639808645
10. **Székely, J.**: A perelőfeltételek szabályozásának jelene és jövője Románia és Magyarország polgári eljárásjogában.
Profectus in Litteris 6, 251-258, 2014. ISSN: 2062-1469.
11. **Székely, J.**: Developmental Similarities of Appeals Procedures in Several European Jurisdictions.
In: Tavaszi Szél konferenciakötet. Szerk.: Csiszár Imre, Kórmíves Péter Miklós, Doktoranduszok Országos Szövetsége, Debrecen, 276-282, 2014. ISBN: 9789638956064
12. **Székely, J.**: Szemelvények a romániai polgári perjogi kodifikáció főbb intézményi újításaiból.
Profectus in Litteris 5, 317-323, 2013. ISSN: 2062-1469.
13. **Székely, J.**: Pár gondolat a dologi jogok szabályzásáról Románia új Polgári törvénykönyvében, különös figyelemmel a tulajdonjog terén bekövetkező változásokra.
Scientia Iuris Magyar-Román Jogtudományi Közlöny 3-4, 25-42, 2011. ISSN: 2069-9301.
14. **Székely, J.**: A védzáradékok természete és működése.
Romániai Magyar Jogtudományi Közlöny 2, 49-54, 2007. ISSN: 1583-7335.

By the directives of HAS Committee on Legal and Political Sciences:

Publications in periodicals level „A”: 1, related to the dissertation: 1

The Candidate's publication data submitted to the iDEa Tudóstér have been validated by DEENK on the basis of Web of Science, Scopus and Journal Citation Report (Impact Factor) databases.

09 February, 2017

