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THE (ALLEGED) FAILURE OF PRIVATE EXPERT EVIDENCE IN HUNGARIAN CIVIL LITIGATION

DOI: 10.24193/SUBBiur.69(2024).2.5
Data publicării online: 31.12.2024

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Abstract: The study examines why the Hungarian legislator decided to recognize the private expert commissioned by the testifying party as an expert on an equal footing with the court-appointed expert in the new Civil Procedure Code [Act CXXX of 2016 on the Civil Procedure Code (Ptk.)], entered into force on the 1st of January 2018, and why the legislative efforts to make this method of expert evidence more widely available failed. It examines why the legislative intention was not fully implemented in practice. This legal instrument is not completely unknown: it was also used in previous procedural codes, although there are differing opinions about its nature, application and evaluation. The Ptk. sought to definitively resolve this uncertainty - not entirely successfully. The aim of this research is to examine the institutional system and regulatory nature of private experts.

During the codification of expert evidence, the legislator placed great emphasis on the regulation of private expert evidence. Already during the codification, numerous questions arose regarding the legal institution, but after the 2016 Civil Code, the expected ideas were not reflected in legal practice. The study examines the institution of private experts based on the practical experiences of domestic law.

Keywords: private expert, evidence, civil procedure

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Introduction

> "The expert has been involved in the administration of justice since time immemorial. The frequency with which cases are brought to a decision, the knowledge of the person or persons called upon to decide on them being insufficient, makes this a natural consequence".[1]

The study examines why the Hungarian legislator decided to recognise the private expert commissioned by the party giving evidence as an expert on an equal footing with the court-appointed expert - in contrast to the previous legislation - in the new Civil Procedure Code (Act CXXX of 2016 on Civil Procedure (CCP)), which entered into force on 1 January 2018 - and why the legislator's efforts to make this way of expert evidence more widespread seem

[1] Árpád ERDEI: *Fact and Law in Expert Opinion*, Economic and Legal Publishing House, Budapest 1987, p. 9.

to have failed. Examine why the legislator's intention has not been fully realised in practice. This legal instrument is not entirely unfamiliar to us: it was used in previous codes of procedure, although different views have been expressed on its nature and application, as well as on its evaluation. This uncertainty was intended to be resolved definitively by the Civil Code - not entirely successfully. This research aims to examine the system of requirements and the regulatory nature of the private expert institution.

In the codification process concerning expert evidence, the legislator has placed great emphasis on the regulation of private expert evidence. Already during the codification process, a number of questions were raised regarding the legal institution, and after the entry into force of the 2016 Civil Code, the expected ideas were not reflected in the case law. The study examines the institution of private expert based on the case law experience of the domestic legislation.

I. The rationale behind the regulation

In Hungary, the previous Code of Civil Procedure, Act III of 1952 on the Civil Procedure (1952 Civil Code), was in force for almost 70 years. Although it no longer contained socialist procedural law, the law went beyond the scope of its original ideology. After the change of regime, the law underwent almost a hundred amendments, which resulted in a breakdown of its regulatory unity and inconsistencies in the text of the norm. As a result, the legislator decided that a new Code of Civil Procedure, a new regulation of the Code of Civil Procedure, was needed instead of amendments. One of the most important innovations in the regulation of evidence was the conceptual renewal of expert evidence, including the regulation of the institution of private experts. The 2016 Code of Civil Procedure had to regulate the

evidentiary value of the use of experts and private experts in court and of the expert's opinion. However, the dispute was based on the difference in approach to the role of the expert in the application of the law, which clearly affected the institution of the private expert. After all, if there is no established position on the institution of the expert when it comes to its assessment as evidence, how can the private expert institution come to the fore and become an integral evidentiary tool in the application of the law?

The 2016 Code of Procedure aims to filter out objective, unbiased expert opinions. Consequently, the opinion of a private expert cannot be one-sided, because the 2016 Code of Civil Procedure requires the private expert to prepare his opinion not only on the basis of the information provided by his client, but also in an evaluative manner of the opponent's statements. He must inform his client's opponent about the subject of the assignment, allow the opponent to make statements and comments on the subject of the assignment before the investigation, be present during the investigation and answer fully and to the best of his knowledge any questions put by the opponent, or the private expert instructed by the opponent during the hearing. If the private expert does not comply with these obligations, his opinion will not be considered as evidence in the proceedings, but only as an argument by the client, and will be considered as a matter of concern in the terminology of the proposal.

In contrast, in 2016, the legal characteristics of the institution of private expert procedure before the Code of Procedure of the year 2016 - that in the performance of its duties it does not have the appointment of a court and thus the system of rights and obligations granted to the expert by law, but instead carries out its activities at the request of a litigant, most often on the basis of a contract of engagement - necessarily raise the question: how does the private expert's opinion, usually obtained unilaterally by one of the

parties, relate to the fundamental principles of civil procedure, in particular the principles of impartiality, the right to a fair trial and equality of arms? The basis of the debate lies in the differences of interpretation.

I am convinced that this has not been translated into practice, and that the institution's prominence in the theoretical arena has stagnated. On the basis of my hypothesis, I believe that the codification effort has not been realised on the practical stage, and that there is a certain concern about the opinions of private experts. In this respect, hopes for private expert evidence have faded. This is what the study seeks to demonstrate, as a lesson for the law of procedure in other countries.

II. Evidence in civil proceedings in general

The taking of evidence is the most important stage of civil proceedings, but it is not a necessary one. Its purpose is to establish the factual elements in issue in the dispute brought before the court by the parties to the dispute, i.e. to enable the court to verify the veracity of the facts on which the substantive and procedural conditions for the performance of substantive legal claims are based and to give a decision on the merits of the case, so that a decision can be reached on the basis of a correct interpretation of the legal provisions and a factually sound decision.[2]

If the legal facts are not disputed between the parties, there is no evidentiary procedure in the case, but the court, after defining the scope of the

[2] Attila DÖME, Mariann DZSULA, Tamás GÁLL, Judit GÁSPÁRNÉ BARABÁNY, János KOVÁCS, István LÉGRÁDI, Zsuzsanna PAPP, Mátyás PARLAGI, András POMEILS, Petra VOGYICSKA, Károly ZAICSEK *Evidence* In: István VARGA, Tamás ÉLESS: *Expert Proposal for the Codification of the New Civil Procedure Code*, HVG-ORAC Newspaper and Book Publisher Ltd. and Hungarian Gazette Newspaper and Book Publisher Ltd., Budapest, 2016., p. 386.

dispute and considering the facts and evidence presented by the parties, takes a position on the legal issue and makes a decision on the merits. The right of evidence covers the process of judicial fact-finding, including the rights and obligations of the parties to the proceedings in relation to the taking of evidence, the functions of the court in this area, the duty of the court to intervene, the method and means of taking evidence and, where other persons are involved in the proceedings, such as experts, the conditions of their participation, their rights and obligations. The rules of evidence in civil proceedings, which are based on continental legal traditions and are governed by domestic law, are essentially laid down in the Code of Civil Procedure.[3]

Evidence in civil litigation cannot be examined independently of the fundamental principle of procedural law, the principle of dispositive justice. Modern legal systems, including the Hungarian Civil Procedure Code, make it clear that the parties are the masters of the case. This principle is not, however, unlimited, as it could be exercised within the framework of the bona fide exercise of the right. The legal literature attaches so much importance to the dispositive principle because it best illustrates the relationship of the court and the parties to the subject matter of the litigation.[4] According to the legal literature, the dispositive principle has two meanings. On the one hand, the party has the right to exercise one aspect of his constitutional right of self-determination, i.e. to initiate the proceedings,[5] and, on the other hand, it asserts the autonomy of the individual by determining the subject matter and

[3] Attila DÖME - *Evidence* In: András JAKAB - Miklós KÖNCZÖL - Attila MENYHÁRD - Gábor SULYOK (eds.): Internet Encyclopaedia of Law (Civil Procedure Law section, column editor: Viktória HARSÁGI) http://ijoten.hu/szocikk/bizonyitas , 2019., 1. oldal (download date: April 12, 2024.)

[4] Miklós KENGYEL: *Hungarian Civil Procedure Law*. Osiris Publisher, Budapest, 2013. http://www.tankonyvtar.hu/en/tartalom/tamop425/2011_0001_520_magyar_polgari_eljarasjog/ch02s03.html Part 1-7, p. 72.

[5] See: decision 8/1990 (IV.23.) AB, decision 9/1992 (I.30.) AB

the personal framework of the proceedings, and the course of the proceedings, once they have been initiated, since the procedural margin of manoeuvre of the court is also defined by the party, in accordance with the provisions of the law.[6] The parties' freedom of disposal also extended to the provision of the case file, which imposes on the parties a considerable obligation and duty in the area of evidence, given that they were and are obliged under the rules of the Code of Procedure currently in force to provide the court with the evidence at their disposal. The court is bound by the motions and requests submitted by the parties and cannot go beyond them and can only take evidence on the express request of the parties, with the exception of cases where the law permits evidence of its own motion.

The Hungarian Code of Civil Procedure refers to the right of disposal of evidence as a separate principle, one of the most important principles, which is expressed in the form of the *trial principle*. In relation to the trial principle, the law allows evidence to be taken ex officio as an exception to the general rule.[7] The trial principle does not only affect the rules of evidence, but also the division of tasks between the court and the parties to the proceedings and the position and activity of the court in the proceedings, given that it is one of the ways of gathering the material for the proceedings. The trial principle requires the parties to place the facts and evidence at the disposal of the court, from which the court will make a judgment. In this case, only what has been made available to the court can form the basis of the judgment. The interest of proof divides the burden of proof between the parties to the

[6] János NÉMETH - Daisy KISS (eds.): *Explanation of the Civil Procedure Code*. Complex Publisher, Budapest, 2007. p. 94-95.

[7] Such authorisation can be found in several places in the law. Paragraph 172 (3), CCP. § 317 (2), CCP. 323. § (2) bekezdés, CCP. § 429, CCP. § 323 (2), CCP. § 429, CCP. § 434 (3), CCP. Paragraph 492 (2).

litigation. The interest of the parties in providing evidence answers the question of which party the court should primarily expect to provide the facts on which its decision is based. The evidentiary interest is linked to the interest to allege, not to the factual allegations actually made. In other words, a party interested in making a statement of fact may have an interest in proving even if another litigant has made a material statement of fact in the case instead. The evidentiary interest can generally be determined on the basis of the substantive law which gives rise to the substantive right sought to be enforced. In addition to the trial principle, the gathering of evidence may be carried out in accordance with the *investigative principle,* which in civil proceedings is only subsidiary.[8] This means that even if the court finds it necessary to order the taking of evidence of its own motion, it will do so only if the party concerned has not made a proper application after having been informed of the substance of the case. The court may order evidence of its own motion if this is permitted by the Civil Code or other law.[9]

[8] István VARGA, Tamás ÉLESS: *Expert Proposal for the Codification of the New Civil Procedure Code*, HVG-ORAC Newspaper and Book Publisher Ltd. and Hungarian Gazette Newspaper and Book Publisher Ltd, Budapest, 2016. pp. 33-39.

[9]The Hague Convention, which was promulgated by a separate law and thus became part of the Hungarian legal order, does not authorise *ex officio* evidence [Curia Pfv.II.20.263/2020/5.]

> As Géza MAGYARY put it, "the balance between the judge and the party has been achieved in the trial, and the reason for this lies mainly in two things. First, that it has been possible to keep the parties' dispositions within reasonable limits. It should be up to the party whether he wants legal protection or not. But it should not be up to the party to decide how the proceedings should be conducted and how long they should last. If the party seeks legal protection, the judge should not be prevented from seeking justice."[10]

It follows from *the principle of freedom of establishment of the facts* that it is possible to use not only the methods of proof mentioned above, but also any other atypical method of proof. The basic requirements for methods of proof not specifically provided for by law are adequacy, expediency and compliance with public policy. In the absence of these requirements, the result of the procedural act cannot be considered as evidence.[11]

The fundamental principle of Hungarian civil procedural law that remains unchanged is freedom of evidence. Unless otherwise provided by law, the court is not bound by formal rules of evidence, a particular method of proof or the use of a particular means of proof in a lawsuit. The purpose of proof is not to establish the existence or otherwise of certain facts with scientific certainty, but to create in the members of the court a kind of strong conviction on which the court can base its judgment with a clear conscience. This is the purpose of the principle of free evidence, which is intended, inter alia, to ensure that the court is not obliged to base its decision, despite its best belief, on facts which are not known to exist, because the evidence is vitiated by a formal defect.

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[10] Géza MAGYARY: *Hungarian Civil Procedure Law,* Franklin- Company Hungarian Literary Institute and Book Printing House, Budapest, second completely revised edition, 1924. p. 36.

[11] Ferenc PETRIK: *Civil Procedure Law I-II.- new Civil Code - Commentary for Practice*, Third Edition, ORAC Publishing House, Budapest 2023. https://jogkodex.hu/doc/1089485?ts=2023-07-01#ss13986.

It follows directly from the characteristics of evidence described above that, if the case raises a technical issue on which the judge does not have the relevant knowledge, any evidence that is suitable for the purpose could be used to establish the facts - even the opinion of a private expert commissioned by the party giving evidence. In addition, the opinion of a private expert, preferably prepared in advance of the trial, will help to bring the proceedings to a conclusion within a reasonable time and will put the legal practitioner in a position to dispose of the dispute as quickly as possible. However, it is not that simple.

III. The role of the expert

The purpose of expert evidence is always to establish some facts, and the facts necessary for the court to form its opinion are established by the expert on the basis of the data of the court-ordered taking of evidence and his or her professional experience from the expert's examination. The examination and use of evidence and the establishment of facts are all a judicial task, not a specific feature of the means of proof. An expert's opinion is a factual statement based on scientific, technical or other scientific laws which objectively provides some information as to whether the facts or allegations put forward by the parties are true or false and thus serves to clarify the facts put forward by the parties in the proceedings. In the light of the above, it can be said that expert evidence is fundamentally different from other forms of evidence, as it is related to the judicial activity. It is precisely because of its scientific basis that an expert's opinion contains a kind of judgement, a judgment. At the same time, it is a scientific assessment of the facts and a scientific, professional statement of connections and

conclusions.[12] Several perceptions have developed around the role of the expert. According to two completely opposing views, the expert can be considered both *as an assistant to the court* and as *an evidentiary tool*. These two positions also determine the positioning of the private expert institution in the evidence. The legislator's position that the expert is an assistant to the court leads to specific consequences. In this case, private expert evidence as a legal institution cannot be given a place in civil procedural law. Indeed, by designating the expert as an assistant to the court, as a body attached to the court, the legal status of the expert is accepted as being dependent on the judge, thereby excluding the possibility of a legal relationship of commission between the parties to the proceedings and the private expert to carry out the private expert's work. If this is the starting point, then the line of reasoning according to which only the opinion of the expert appointed by the court is capable of answering the technical question is correct.

If the legislator considers the role of the expert as an evidentiary tool that can be used in the context of free evidence, this approach already allows the use of private expert opinion as a basis for a judgment, but at the same time the question immediately arises: how does private expert opinion relate to the right to a fair trial, the principle of equality of arms between the parties, or the principle of equal opportunity in a trial, the principle of impartiality and independence? The use of a private expert's opinion is clearly guaranteed by the system of judicial experts, including the use of the register of judicial experts as a fundamental criterion to ensure that a private expert can only be a registered judicial expert. With regard to the relationship of appointment, although the private expert called upon by one of the parties carries out the investigation and gives an expert opinion to answer the technical question, it is mandatory, on the one hand, to inform the opposing party and ensure that

[12] Géza IMREGH: *Expert evidence in civil proceedings.* Hungarian Law, 2002/11. p. 648.

he is present at the investigation and has the opportunity to make a statement and, on the other hand, the opposing party has the possibility, on the basis of counter-evidence, to appoint a private expert. In my view, what may cause fundamental problems is the parties' property and financial situation. In many cases, it is observed that, in the course of litigation, a party is not in a financial position to engage the services of an expert, and must pay the costs of such services in advance. Although it is well established that litigation is costly and that it is up to the party to decide whether or not to initiate it, bearing in mind the time and cost involved, in many cases it is not the plaintiff who is affected, but the defendant who is affected, because of his financial circumstances.

Overall, the issues surrounding the role of the expert have also had a major impact on the legal status of the institution of the private expert, since the expert, as a person or organisation dependent on the judge, is used as an assistant to the judge, which precludes the possibility of using a private expert, while the evaluation of evidence raises the necessary guarantees for a fair trial.

IV. Allowing the private expert to give evidence in civil proceedings - the challenge

The 1952 Code of Civil Procedure regulated the only way of expert evidence: evidence by an appointed expert. A seconded expert gives an expert opinion on the basis of an act of public authority of the court, at the request of the court. The predominance of the public authority character of the expert's appointment jeopardised the full development of the principle of the disposition of evidence. In judicial practice, it has become almost a rule that expert evidence is always controlled by the court: although the parties make a request for the expert to be appointed, the court asks the expert questions, the

court detects the shortcomings in the expert's opinion and it is the court's task to detect and remedy the shortcomings in the expert's opinion. On more than one occasion, it has been felt by the parties seeking justice that, although not formally, much of the expert evidence is provided ex officio, since the expert is not assisting the parties but the court, and it is therefore the court's responsibility and duty to obtain the full range of professional findings on which the judgment is based.

Increasingly, a party seeking to strengthen its litigation interests beyond the findings of a court-appointed expert has resorted to the possibility of bringing to the attention of the court the professional findings of a professional (not necessarily an expert) whom it has called upon. The practice of the time was for a private expert's opinion to be part of the case-file, on the basis of a unilateral mandate from a party, limited to answering only that party's questions, taking account only of that party's observations, not on the basis of the court's authorisation but presented at an unexpected and unforeseeable moment by the party, and increasingly becoming part of the case-file in civil proceedings. The submission of private expert opinions typically occurred in two periods of the litigation: on the one hand, the plaintiff often attached to the statement of claim a private expert's opinion supporting his professional claims, as if to 'scare' the other party; on the other hand, he usually attached it as a rebuttal to the opinion of the appointed expert he did not like. The opposing party could almost invoke unilateralism as a justification for all this: since it had no involvement in the preparation of the opinion, had no influence on its preparation, and since the opinion was drawn up expressly in the interests of the client and on his instructions, any consideration of it would be in serious breach of the requirement of a fair trial and could not therefore be accepted as a basis for judgment.

However, a rule covering only the evidence of experts called upon to give evidence appeared to be contrary to the fundamental principle of the free admissibility of evidence, according to which a civil litigant is not bound by formal rules of evidence, a particular method of proof or the use of particular means of proof, and is free to use the parties' statements and any other evidence that may be relevant to the facts of the case.[13]

This tension has arisen precisely in the assessment of the findings of the expert commissioned by a party to provide an expert opinion. It is undoubted that the private expert's report, drawn up on the basis of a unilateral request, did not in any way comply with the guarantee provisions of the Code of Civil Procedure and, as regards the expert himself, with the legislation governing the status of the expert, but it did contain information of a professional nature and was part of the case-file, a tension which the court, acting under the principle of the free system of evidence, had to resolve somehow. This constant pressure to improve the interpretation of the law led first to the identification of problems and then to a complete reform of private expert evidence. The literature has been consistent in pointing out that the use of private experts in litigation has long been a pressing practical need, and has also been required to ensure consistency with the substantive law applicable to forensic experts.[14]

[13] 1952 CCP. § 3 (5)

[14] Péter SZALAI: *Chapter XXI: Experts*. In Zsuzsa WOPERA (ed.): Commentary to Act CXXX of 2016 on Civil Procedure. W. P. WAKAS, Hungarian Official Gazette and Book Publisher, 2017. p. 528.

V. Reform of private expert evidence

When the new Code of Civil Procedure was drafted, the legislator wanted to achieve a complete reform of expert evidence. In view of this, it is essential that the study summarises the milestones in the reform of expert evidence and then describes the institution from legal theory to practical application.

The Civil Code, which entered into force on 1 January 2018, introduced new provisions to ensure the conditions for a concentrated litigation, by focusing on the parties' responsible litigation, which made the parties' substantive claims even more efficient before the courts. These efforts were mainly achieved through the introduction of the principle of the provision of evidence, in which the legislator sought to completely overhaul and reform the rules governing the taking of expert evidence.[15]

Civil procedural law can satisfy both individual and abstract legal protection if it recognises the parties' right to dispose of their property and allows them to exercise their rights from the commencement of proceedings to the taking of evidence.[16] The Code therefore expressly sought to ensure the effective enforcement of private law claims through the consistent application of the principle of *lis pendens*. Although the obligation to provide material was imposed on the parties by the principle of the right to be heard, which was of equal importance to the principle of the right to be heard and could be exercised by the parties in the context of the free provision of evidence, this principle was not consistently applied in the previous legislation in relation to expert evidence. The new Code of Civil Procedure sought to overcome this

[15] László PRIBULA: The practical problems of determining the expert fee in the renewed civil procedure model. Legal Gazette 2022/2, p. 49.

[16] László PRIBULA: i.m. p. 49.

problem by allowing the opinion of private experts into evidence for the first time in the history of Hungarian law.

The basic principle of the legislation is that a party can choose between using an appointed expert or a seconded expert, and it is not necessary for the expert to be appointed by the court, as the opinion of an expert appointed in other proceedings can also be used as evidence in the proceedings. Whichever route is chosen by the party giving evidence, an expert under the Act on Forensic Experts or an ad hoc expert as defined therein may be used as an expert.

Expert evidence is based on the extensive material support of the court. Although it follows from the trial principle that it is the party giving evidence who must move for the expert's appointment and then move to correct any errors in the expert's opinion that may give rise to concern - the judge's role is far from passive. If there is a dispute between the parties as to which party should bear the burden of proving a fact, the court should also inform the parties of the consequences of failing to provide evidence or to move for the production of evidence, and of the possible failure of the evidence to be produced.[17] In addition, the court must draw the party's attention to the need to call an expert, to the fact that an expert may be called by law only on a secondment basis, to the need to obtain an expert opinion on the basis of information not provided in the proceedings, and to the fact that the expert opinion is not suitable for the purpose of reaching a decision, i.e. that the private expert's opinion or the opinion of the seconded expert is of concern.[18]This much greater involvement than in the previous solution increases the responsibility of the judge.

[17] CCP. § 237 (2)

[18] CCP. § 317 (1)

The submission of a private expert opinion may be requested by the party giving evidence, unless otherwise provided by law.[19] The party interested in providing evidence may decide whether it wishes to provide evidence on a particular issue by a private expert or by a seconded expert. In this respect, the expert mode of proof can be considered to be uniform in procedural law, since there is no difference between the expert routes in terms of their function and evidential value. This is also facilitated by the Ministerial Decree, which applies uniformly to the activities of both seconded and commissioned experts.[20]

If you choose the private expert route, you must file a motion for an expert opinion, without which you cannot attach a legally valid expert opinion to the file, at least the court will not consider the private expert opinion submitted in spite of this as evidence in the same line as the expert opinion. The motion will be governed by the general rules of evidence and other relevant rules of procedure, and the court will apply them in deciding whether or not to grant the motion and, if so, when.[21] In the case of an expert on secondment, the party must already indicate in his motion the questions he wishes to put, which the court may grant. In the case of the use of a private expert, unlike in the case of a secondment, the specific questions to be answered by the expert do not have to be indicated in the application. Indeed, in the case of a private expert's opinion, the expert must act not according to the instructions given by the court in its order, but in accordance with the party's instructions, on the basis of the information provided by the party.

[19] CCP. § 302 (1)

[20] Mátyás PARLAGI: *Experts,* In: István VARGA (ed.) Commentary on the Code of Civil Procedure and related legislation II., HVG-ORAC Kiadó, Budapest, 2018., p.1246.

[21] Géza BARTAL: *Private Expert Opinion in the New Civil Code*, Hungarian Law, Budapest, 2018/6. p. 322.

However, if private expert evidence has not been obtained before the opening of the proceedings, this may be done after the private expert opinion has been drawn up, which is to be assessed in the context of the supplement to the private expert opinion.

The rules of the Code of Civil Procedure give the private expert the rights to perform his or her task in accordance with the mandate and in full, but also impose obligations on him or her to ensure that the private expert's opinion is not one-sided solely on the basis of the information provided by the party commissioning the expert and does not jeopardise the possibility of providing an independent - impartial - objective expert opinion. The client may not instruct the expert providing the private expert opinion in relation to the professional content of the private expert opinion, which, in my view, is a form of guarantee of the private expert opinion, which is intended to provide an independent, impartial expert opinion. The private expert has the right, under the general rules, to inspect and copy documents and to be present at the hearing or otherwise at the taking of evidence and to ask questions there after presenting his opinion. The private expert shall act in full compliance with the professional rules governing his activities, independently of the interests of his client, impartially and impartially, and shall formulate his opinion on the basis of an objective and objective assessment of the facts established and refuse to accept any assignment which is contrary to the law. This means, therefore, that the opinion of a private expert can never be one-sided: the party giving evidence is obviously first informed as to which recognised expert he wishes to use to answer the technical question of his evidentiary interest, and therefore seeks out a suitable expert and asks him to give an expert opinion on the basis of his mandate in the case - but at that stage the private expert has not yet started to give the opinion. It then agrees with the chosen expert on the remuneration, the timeframes that can be

agreed and the conditions for presenting the expert's findings - but at this stage the private expert has still not started to prepare the expert report. The trial then starts, where, after the court has been informed, the party giving evidence moves for a private expert - but the private expert still does not start to prepare the expert report. The court then grants the motion and orders the witness to submit the expert opinion within a reasonable time - and only then does the private expert begin to prepare the opinion. However, the expert's opinion is then given with the involvement of the other party, in the light of his comments and questions, and with the utmost equality of arms. Once the expert's opinion has been drawn up, the private expert will hand it over to the party who commissioned him to submit it to the court. The private expert's opinion can only be the basis for a conviction if it has complied with all these strict rules.

The private expert's opinion shall be served by the court on the opposing party, who may put questions to the private expert concerning the private expert's opinion, whether or not he/she has employed a private expert.[22] The opposing party may also comment on the private expert's opinion. They may state why they consider that the expert's opinion is of concern and should not be taken into account as evidence. The opposing party may, in accordance with Pp. With regard to Article 304 (1), the opposing party may submit questions for which the law imposes time and content limits, and the court shall call the opposing party to this effect by setting a time limit. Since the private expert is not an intervener, the opposing party may not ask questions to verify the impartiality and credibility of the private expert's opinion, and his right to question is limited to the content of the private expert's opinion.

[22] CCP. § 304 (1).

Questions or comments by the opposing party in relation to the expert opinion or information in the proceedings that has emerged after the submission of the expert opinion or a conflict between the opinions on a technical issue may also justify a party's request to supplement the expert opinion submitted by it in order to make the private expert opinion suitable for evidence or counter-evidence. The law also provides for the possibility, in the context of supplementation, for the party to address other concerns raised about the expert opinion. A supplement to a private expert's report submitted by a party may only be made if the party moves to supplement the private expert's report submitted by the party.[23]

A specific feature of the legislation is that, although only one expert may be called to give evidence on a specific issue in a case, private expert evidence is an exception to this rule: the opposing party may also submit a private expert's opinion if he disputes the private expert's opinion and seeks to overturn it. A private expert's opinion requested by the opponent of the party giving evidence is drawn up in the same way as a private expert commissioned by the party giving evidence: on the basis of impartiality, objectivity and equality of arms.[24]

If the private expert's opinion thus drawn up is free of objections, because it is professionally correct, has complied with the rules governing its preparation, and has provided the necessary answers to the party's comments and questions, it will be the basis for the judgment. If, on the other hand, the private expert's opinion does not meet these conditions, i.e. if it is not satisfactory, including where there is an irresolvable contradiction between the opinions of the party giving evidence and those of the private expert

[23] CCP. § 304 (2) paragraph b).

[24] CCP. § 302 (3).

commissioned by the opposing party, the private expert's opinion will fail and cannot be the basis for a judgment.[25]

In this case, it is not possible to continue the private expert evidence, the party giving evidence cannot ask for another private expert after the expert's opinion has been challenged - but can switch to the seconded expert evidence route.[26]

The legislation described above is the result of a lengthy professional and social debate, and the legislator expected it to lead to an increase in the number of experts used by the parties and, indirectly, to an increase in the prestige of the profession. However, practical experience shows that this has not been the case.

VI. The main problems of application of the law in relation to private expert evidence

Relatively soon after the entry into force of the Civil Code, the difficulties in the application of the law were revealed, which cast doubt on the smooth implementation of the legislative aspirations.

After the reform of the private expert evidence, it was noticeable that it remained typical: the plaintiff attached to the statement of claim, as if to "scare" the defendant, a private expert's opinion which was unilaterally drawn up on the basis of his questions, in which the other parties were not involved. This is precisely what the new legal solution was intended to avoid. It was therefore for the courts interpreting the legal provisions to take the view that the private expert's opinion could be drawn up before the submission of the application for a private expert's opinion and that the private expert's opinion

[25] CCP. 316 § (2).

[26] CCP. 307 (1) paragraph (1) point b).

could be annexed to the application. However, this does not constitute a private expert's opinion, but merely the grounds for the application for the employment of a private expert. If the private expert's report is drawn up before the application is lodged, failure to comply with the private expert's obligations in the proceedings under this Act may give rise to a risk of concern. It can be seen that the preparation of a private expert's report in this way is contrary to the purpose of the Act.[27]

Despite the fact that, due to the correct interpretation of the court, the right of the party challenging the opinion of the seconded expert to challenge it by requesting a private expert had to be reduced, the old habits persisted: it still happened that, after the seconded expert's opinion had been presented, the party challenging it attached a private expert's opinion, also unilaterally prepared, answering questions asked to refute the seconded expert's findings, and prepared without the involvement of the other party. This too had to be dealt with in judicial practice. A guiding final decision stated. The court ruled.[28]

However, the fact that this could have arisen at all after the entry into force of the CP indicates the difficulty of changing the mindset of litigants. In my view, a major problem of application of the law in the light of the available court decisions against the private expert institution is that the procedural role of the expert is still not given sufficient weight in the evidence and is sometimes considered as a personal presentation of the party, with the fundamental problem that the procedural role of the private expert, given that

[27] Resolution No. 7 of the Consultative Body on Legal Interpretation Issues of the new Civil Code, adopted at the meeting of the Consultative Body on Legal Interpretation Issues of the new Civil Code on 8 December 2017, Resolution No. 45 of the National Consultation of Heads of Civil Affairs Colleges of 20-21 November 2017.

[28] Court of Pécs Pf.III.20.012/2023/7. (published: BDT2023. 4672).

only a forensic expert can perform such an activity, is given by his specific expertise. Many decisions show that the opinion of a private expert is not given sufficient weight to ensure the right to a fair trial, the principle of equality of arms between the parties, the principles of impartiality and independence. I see one reason for this in the prevailing view of the private expert - although there are guarantees that he will give an impartial, independent, professional opinion - that he will accept a fee from one of the parties, that he will act on their behalf, which makes him incapable of giving an impartial, independent expert opinion. This approach is based on the erroneous assumption that it is obvious that a private expert's opinion cannot contain findings that support the facts and allegations of the opposing party, in direct contradiction to the position of the party who commissioned it.

By adopting the principle of one expert and essentially seeking to ensure that the principle of concentration of litigation prevails, i.e. that the dispute between the parties is resolved as quickly as possible, the Code of Procedure rejects the possibility that litigants should be free to appoint private experts in all respects. In relation to the specific subject matter, the current text of the law imposes a limitation by stating that a new private expert may only be engaged if the private expert has been excluded from the proceedings by the court or cannot give a private expert opinion, since he is not entitled to act as a forensic expert or to answer the specific question under the law.[29]

If we take the view that the private expert is influenced by the framework of the mandate and the remuneration received during the mandate, then we can say that the interests of the court in the speedy conduct of the proceedings and the reaching of a decision on the merits are best served and adequately secured by the procedure of the appointed expert, However, in practice, it can be observed that the proceedings of seconded experts are

[29] CCP. 305. §.

slower, if only because the range of forensic experts authorised to answer a given question is narrower, so that using only them in all litigation leads to a significant delay in the proceedings. In many cases, whether civil or criminal, the court allows an extra time limit for answering the questions, does not apply the penalties for delay and, because of the greater judicial intervention provided by the secondment, orders the experts to provide further and further evidence, even out of an unnecessary sense of caution. In my view, the institution of private experts would remedy this, as it would allow a wider range of forensic experts to be used in relation to the specific issue, and the higher fee for the engagement, as opposed to the fee for the seconded expert, would encourage the private expert to proceed more quickly and efficiently.

In addition, the question arises whether the fairness of the proceedings can really be ensured only by the appointed expert or whether it could be ensured by private experts used by the parties, which, although not in favour of the one expert principle, would be more efficient.

Another important enforcement problem is that private expert opinions suffer from substantive deficiencies which are not adequately addressed by the court in the proceedings. In this respect, judicial practice appears to be too strict. In my view, if the findings of fact, the research methodology, the references to the literature and the summarised conclusion drawn in the private expert's opinion are thorough, clear and logical, then grounds such as the fact that the opposing party was not invited to make a statement by the private expert should not be grounds for rejection. First, in my view, that omission and deficiency can be remedied in litigation and, second, in many cases, the opposing party will seek to prevent the private expert from being called so that it is later possible to exclude the private expert's opinion from the evidence on the basis of a challenge to the private expert's opinion. In a number of cases, private expert opinions, if they are not

in accordance with the CP. 303 (2) are not fulfilled, they are not admitted into evidence and their findings are disregarded by the court. This is a further challenge to private expert evidence.[30]

It is also a problem for the application of the law and leads to the marginalisation of the use of private experts that the fee for a private expert, if there is a concern, cannot be charged as part of the cost of the litigation and that in a significant number of proceedings the private expert's opinion is found to be of concern. While the fee for the expert's report is part of the litigation costs, the fee for the private expert can easily become an unnecessary extra cost for the party instructing him. In practice, it can be observed that a private expert's opinion may be of concern not only because it is incomplete, or because it contains findings that are contrary to itself or to the facts of the case, or because it is vague, but also if there are, for example, two private expert opinions that take different positions and reach different conclusions. If, however, the party later requests the appointment of an expert to prove its position and the expert confirms the findings of one or other of the private experts, it may be that the private expert's opinion, which has been found to be questionable, is well founded, but the fee paid cannot be charged as legal costs. If the wording of the standard would allow the fee for the private expert's opinion, which has been found to be well-founded by a new expert, to be included in the costs of the proceedings, the hiring of a private expert would also be more attractive for the parties. In this context, the question of over-proof arises, where it is essential to take a position on whether litigation

[30] Decisions on which the findings are based: the Curia Kfv.X.37.416/2019/4., the Curia Kfv.35.482/2020/5., the Curia Pfv.20.154/2022/8., the Curia Gfv.V.30.208/2023/4. (published: BH 2024.3.65.), Capital Court 7.Pf.20.679/2021/8/II., Court of Debrecen Pf.II.20.067/2023/7.

efficiency is served by 'discovering' the truth or by a speedy resolution of the case.

The difficulties in the application of the law were essentially confirmed by the first comprehensive amendment of the Civil Procedure Code, Act CXIX of 2020 (Civil Procedure Code Novella), which entered into force on 1 January 2022, and which - although only in certain types of litigation, but definitely - curbed the use of private expert evidence. The Pp. According to the general explanatory memorandum to the amendment[31] one of the main objectives of the amendments aimed at personal status litigation was to introduce provisions aimed at enhancing the protection of the interests of minor children. In view of this, Article 51 of the amendment to the Civil Code excluded the possibility of private expert evidence in all personal status actions.[32] The reason given for this was that if expert evidence is conducted in accordance with the former provisions of the new Civil Code and the provisions of the new Civil Code are not complied with, the court may not be able to take evidence. 434 § (5) and 444 § (1) of the new CP., the law provides for the possibility of private expert evidence in all proceedings concerning personal status other than guardianship proceedings, the parties will - also by virtue of the principle of free evidence - make use of the possibility of private expert evidence, in which case the case of a doubtful, contradictory expert opinion may arise, which the court must endeavour to resolve. In such a case, in the course of a claim relating to matrimonial or parental custody, the private expert, private experts or ultimately the appointed expert may have to examine/remove the minor child several times, depending on how the contradiction or concern of the expert opinion is resolved, which is contrary

[31] See Explanatory memorandum 2020/148, final explanatory memorandum to Act CXIX of 2020,

[32] CCP. short story § 51.

to the provisions of the Civil Code. 4:2 (1), which provides for increased protection of the child's interests and rights in family relationships.

The fundamentally reformed private expert evidence was not affected by the amendment to the Civil Code, except for the provisions on personal status, but it did send a message that private expert evidence is not considered to be on a par with the path of evidence of an appointed expert.

VII. The answer to the hypothesis

The study aimed at examining how the spirit of the new Hungarian civil procedure code, the emphasis on the institution of private experts, has affected the practice, and whether the theoretical aspirations of the codification process have been successfully translated into practical application. On the basis of my hypothesis, I have argued that the codification effort has not been realised on the practical stage, and that a certain anxiety about the opinions of private experts can be observed. In this respect, hopes for private expert evidence have faded**.**

In the case studies it can be seen that, although private expert evidence was an innovation of the CP. and there were high hopes for it, its practical application and the evaluation of private expert opinions were still under the spell of the difference in approach before the new CP., and the doubts were not dispelled. The jurisprudence was somewhat lagging behind the legal provisions and approached this legal institution with trepidation.

In my view, firstly, because if the private expert's opinion was excluded, unnecessary litigation costs were incurred, which remained the burden of proof. On the other hand, because it was subjected to greater scrutiny - whether the right to impartiality, independence, fairness, impartiality, whether the opposing party was able to assert its rights during

the private expert's proceedings, whether the private expert took due account of them - as the appointed expert. Although the parties could and do agree on the person of the appointed expert, judicial control is still present, since ultimately - in the absence of a compromise - it is the court that appoints the expert.

The reasons for refusing to use a private expert institution should be examined. There may be legal sociological reasons for this, but the most likely reason is that the courts do not see the application of civil law principles as guaranteed when assessing the private expert's private opinion. Despite the fact that the private expert's opinion is drawn up on the basis of and in accordance with the criteria and requirements applicable to forensic experts, the presence of a relationship of trust jeopardises the principles of impartiality, independence and the right to a fair trial, which are fundamental to the whole litigation process.

Based on the analysis of the court decisions, the assumption seems to be somewhat confirmed, i.e. that the acceptance of private expert opinions has produced worse results than expected and in many cases was either excluded from the evidence or was not suitable to be used as a basis for a decision on the merits, because it was based on the judicial reasoning or suffered from some deficiency that could not be remedied in the procedure. Although it could be presumed that the court in charge probably did not dare to take the risk of issuing a judgment that could be challenged because the right to a fair trial, the requirements of impartiality and independence were not fully respected in the proceedings - this could clearly not be justified, however, because no decision in the context of the appeal proceedings could be found which had established a procedural violation in this respect, and therefore no such conclusion could be drawn.

Overall, it is clear that the use of a private expert has not been as widespread as the legislator expected within the framework of the Code of Procedure. Even if there is no basis for this in the legal guarantees, the violation of impartiality is regularly raised by litigants. It is difficult to prove, and can only be deduced from the results, that the courts are also more cautious about this expert evidence route, and several problems of application of the law arise. Society has not been able to change its thinking on this issue, and the seemingly radical changes in the law have only partially been followed by everyday practice.

VIII. *De lege ferenda* proposal

Because of the shortcomings of the institution of private expert witnesses, I do not see the solution to the practical problems in legislative amendments, I believe that the legislator has provided an adequate background for this form of evidence through the legal provisions, but at the same time, in my opinion, it is necessary to take measures which, if not directly, then indirectly, will act as a guarantee.

In my opinion, the judicial practice has not yet fully caught up with the private expert institution, which is also one of the drawbacks of the new Civil Code, since it has not been regulated yet, which could perhaps be facilitated by reducing the tasks that have to be included in the scope of the judge's supervision and by omitting the necessary training, since the court is given a number of additional tasks with the private expert institution (its procedural assessment, its financial supervision, and later its substantive assessment).

In my view, it is not permissible to allow the practice of making private expert opinions inadmissible on the grounds of concerns about the lack of involvement of the opposing party. The expert works from material brought

in, and of course, if he or she enters into a relationship of trust with one of the parties, he or she can rely mainly on documents and data obtained from him or her. In view of this, he cannot be expected to be complete and accurate in cases where the opposing party does not participate in the proceedings - does not want to participate and thus impedes the taking of evidence, but at the same time, on the basis of judicial practice, there are a significant number of private expert opinions which are excluded from evidence not because they are not logically convincing to the court or contain contradictions which could not be resolved, but because they suffer from formal or substantive deficiencies (e.g: the opposing party was not informed of the examination, or, if it was, it was not informed that it could comment, make a statement, be present during the examination, or the expert's report does not contain the methods to be used, indicating which of them the expert applied and why he chose them), which could be absolutely eliminated. In my opinion, this could be resolved by imposing on the expert - who, being a private expert, can only be a forensic expert and must be aware of the relevant provisions of the Civil Code if he accepts an assignment - the obligation to give an expert opinion in which he at least pays sufficient attention to the formal and mandatory content requirements, by appropriate means, in particular by the professional supervisory body.

The study showed that there were also a number of practical difficulties and questions regarding the newly introduced private expert evidence. It has tried to formulate proposals to solve these problems, which hopefully contain suggestions useful for legislation and law enforcement.