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KRISTÓF SZIVÓS

## SÁNDOR PLÓSZ\*

(1846–1925)

### *I. Biography*

*“As I stood at his bier, [...] his gentle, smiling scholar-figure, his intellect in the serenity of his blue eyes, every bit of his knowledge and desire of knowledge and the modesty from knowing the finiteness of the minute human knowledge appeared from the smokes more vividly than vivid.”<sup>1</sup>*

### *I. Introduction*

*Sándor Plósz* was an epoch-making figure of the Hungarian law of civil procedure, whose work still is the basis of the modern procedural codification efforts since he – as *Fabinyi* pointed out – “created with his great legislative genius one of the most modern and greatest codes of civil procedure of the contemporary era”<sup>2</sup> with the Act I of 1911. *Plósz* heralded from an “educated middle-class family”, his paternal grandfather was an engineer, his paternal grandfather was *Imre Kreiner* a legal historian and his father, *Lajos Plósz* was a doctor.<sup>3</sup> Three of the four children were boys, all of them became “the champions of Hungarian culture, useful and elegant members of the society”, in which the paternal education played a significant role.<sup>4</sup>

*Plósz* became a Juris Doctor in 1868. In 1922, he told it had been much more difficult to complete the legal studies in his era; they had to attend the lectures diligently and study

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\* Translated by the author.

<sup>1</sup> MESZLÉNY 1925, 145.

<sup>2</sup> FABINYI 1930, 150.

<sup>3</sup> LENGYEL 1904, 147.

<sup>4</sup> Ibid. 148. While *Sándor* was a corresponding (1884), ordinary (1894), honorary (1902) and then directory (1902) member of the Hungarian Academy of Sciences, his older brother *Pál* was a corresponding member (1880) of the Academy and his younger brother *Béla* was an ordinary professor of the veterinary academy.

hard for their final exams, although newspapers containing jokes had already depicted lawyers then “as young men who do not attend the classes and play pool all the time.”<sup>5</sup> Parallel to the acquisition of the general (1868) and bill of exchange (1869) law degrees, he worked in the judicial system where he climb the professional ladder quickly: he was elected as a clerk at a municipal court in November 1867;<sup>6</sup> he was granted the “judicial vote” at the Municipal Court of the City of Pest upon the proposal of Lajos *Bogisich* in 1871.<sup>7</sup> Moreover, he became a vice-judge<sup>8</sup> at the District Court of the City Centre.<sup>9</sup> His first studies were published in this time in the *Jogtudományi Közlöny*.<sup>10</sup> He was appointed as judge at the Municipal Court of Pest in February 1872.<sup>11</sup>

In October 1872, Francis Joseph I appointed *Plósz* as ordinary professor of the laws of civil procedure, bill of exchange and commerce to the newly established Royal University of Kolozsvár.<sup>12</sup> In connection with it, *Dárdai* mentioned that the appointment of *Plósz* “is an inappreciable gain for not only the University of Kolozsvár but for the academic cultivation of domestic procedural law as well.”<sup>13</sup>

## II. Academic work

### 1. Academic work before his ministership

The year 1880 brought a significant change to the life of *Plósz* since the House of Representatives ordered Minister of Justice Tivadar *Pauler* in April to “take the development of proposals to the future introduction of orality, publicity and immediacy in civil procedure in hand immediately. Until the proposal of these, all judicial reforms shall be regarding the public orality and immediacy as reachable aims at the earliest convenience.”<sup>14</sup>

*Pauler* found it convenient and inevitable to “obtain orientation of the details of the newest foreign codes of civil procedure from legal scholars. Thus, they, who know our domestic relations as well, shall study not only the previous but the newer provisions, recognise not only the letters of the law and its provisions but its application in the everyday life, its effect on the practical life and comparing it to the provisions necessary in our relations. They shall make a report, based upon which it would be possible to propose a code of civil procedure to the legislator, which could meet our expectations

<sup>5</sup> LOVIK 1922, 4.

<sup>6</sup> Pesti Napló 1867/266. Melléklet [Supplement].

<sup>7</sup> Budapesti Közlöny 1871/16. 322.

<sup>8</sup> According to Act XXXI of 1871, the district courts consisted of a district judge, and vice-judges were appointed next to him when necessary. See in details STIPTA 1997, 130.

<sup>9</sup> Budapesti Közlöny 1871/295. 6477.

<sup>10</sup> PLÓSZ 1871a, 360–363. PLÓSZ 1871b, 399–403.

<sup>11</sup> Budapesti Közlöny 1872/36. 281.

<sup>12</sup> Budapesti Közlöny 1872/226. 1805. The monarch appointed his elder brother, Pál to an extraordinary professor to the Faculty of Medicine so both of them were founding professors of the University of Kolozsvár.

<sup>13</sup> DÁRDAI 1872, 302.

<sup>14</sup> Minutes of the House of Representatives (KN)1878 Vol. XII. 222.

regarding the newest achievements of the jurisprudence and the results of the legal practice, comparing and applying them to our relations.”<sup>15</sup>

Thus, the minister entrusted *Plósz* and member of the House of Representatives Kornél *Emmer*. *Plósz* was entrusted to study the German civil procedure since Germany – similarly to Hungary – struggled with the written procedure, and the Imperial Code of Civil Procedure (*Reichscivilprozeßordnung*) based on orality and immediacy was enacted during that time.<sup>16</sup> *Plósz* published his first draft on the code of civil procedure in 1885<sup>17</sup> containing the provisions of the entire civil procedure (apart from the special rules of the taking of evidence).<sup>18</sup> In contrast, the draft of *Emmer*<sup>19</sup> regulated only those questions, in which he differed from *Plósz*, so especially in the rules of preparing the procedure and the trial.

In 1889, *Dezső Szilágyi* became the Minister of Justice, who announced a wide range of reforms. This included the civil procedure as well since he wished to remodel the procedure and it was intended to come into force at both municipal courts and courts of appeal.<sup>20</sup> The necessity and the principles of the reform of the civil procedure were not in question in Hungarian public opinion, the only question was whether the whole procedure should be reformed or just some parts of it.<sup>21</sup> Eventually, *Szilágyi* worked towards a partial reform and he entrusted *Plósz*<sup>22</sup> to work out the part of legal remedies of the summary procedure, which was fulfilled in 1889. *Plósz* reworked the draft at the beginning of the 1890s in detail and extended it to the whole summary procedure. Finally, it was announced as Act XVIII of 1893 in the Hungarian Collection of Acts. In parallel, Act XIX of 1893 on the order of payment procedure was also enacted. As a result, the reform was partial, but not according to the original concept of *Szilágyi*, since not a part of the procedure was reformed but the whole. It was partial because it was realised only at the level of the district courts.

These steps were important stages in the creation of the code of civil procedure because the future code was based on those provisions which were introduced in the summary procedure. Thus, the courts had had a possibility to get accustomed with the oral and immediate procedure in cases with smaller significance before the reform of the ordinary procedure was realised. On the other hand, this solution was advantageous because the legislator could receive important practical feedbacks as well. Based on these, *Plósz* could revise the rules of the future code of civil procedure if necessary. *Plósz* brought in ingeniously the principle of the free evaluation of evidence not just to the summary procedure but to the ordinary procedure as well since a provision of the summary procedure (Section 215) ordered that the rule of free evaluation should be applied in the ordinary procedure as well.<sup>23</sup> In parallel with the codification of the

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<sup>15</sup> KN 1878 Vol. XV. 242.

<sup>16</sup> Ibid.

<sup>17</sup> PLÓSZ 1885. (hereinafter referred to as Draft).

<sup>18</sup> TÉRFY 1902, 393.

<sup>19</sup> EMMER 1911, 3–77.

<sup>20</sup> The ministerial work of *Szilágyi* is reviewed by ANTAL 2016, 64–73. in details.

<sup>21</sup> TÉRFY 1902, 566.

<sup>22</sup> *Plósz* was second secretary from 1894, then first secretary of state of the minister after. *Plósz Sándor életrajza [Bibliography of Sándor Plósz]*. A Jog 1899/10. 81.

<sup>23</sup> KENGYEL 2014, 29–30.

summary procedure, *Plósz* published the draft of the code of civil procedure as well.<sup>24</sup> The work of the professor at that time was characterised by *Stiller* with an artistic example: “he provided the material for many excellent acts, he gave a form to it and his master [*Szilágyi*] only consented to these artistic works.”<sup>25</sup>

## 2. The ministership of Sándor Plósz

After the resignation of Sándor *Erdély* (Minister of Justice after *Szilágyi*), there was general agreement that *Plósz* would be the Minister of Justice in the government of Kálmán *Széll* but of course other names were mentioned as well, for example the appointment of Ignác *Darányi*<sup>26</sup> or the return of *Szilágyi* as well.<sup>27</sup> The monarch appointed *Plósz* to Minister of Justice on 26 February 1899 who served in the office until 1905. In connection with his appointment, *Stiller* wrote that “he [...] will take that fermenting force whose seeds were planted by the fertilising activity of *Szilágyi* to every aspect of our policy of justice.”<sup>28</sup>

One of the first tasks of the minister was to propose the bill on the electoral jurisdiction according to the pact among the parties. Regarding this, “he did not have other job than to revise the former text of *Szilágyi* in the House of Representatives and to modify it to meet the new demands.”<sup>29</sup> As a result, the Act XV of 1899 was enacted.

The new minister held his introductory speech on 12 April 1899 in the House of Representatives during the negotiation of budget of justice, just like *Szilágyi*.<sup>30</sup> He emphasised that he could not provide any novelties to the House since “the bigger but most of the smaller legislative questions of justice waiting for solution have been set for a long time. Moreover, their solution is already in an advanced stage.”<sup>31</sup> Regarding this, he especially emphasised the work of *Szilágyi*, which was not a coincidence since the former minister had been the first since 1875 who had specific, coherent plans.<sup>32</sup> *Plósz* mentioned several legislative topics waiting for solution.<sup>33</sup>

1. He mentioned the case of the general Civil Code, the most important task. In the 1880s, several legal scholars prepared drafts regarding each part of the code (among which only the bill of *Teleszky* on the law of succession was proposed to the House of Representatives).<sup>34</sup> However, only the law of marriage had been regulated in an act (Act XXXI of 1894). *Erdély* had formed an editorial committee in 1894 to create a draft for which he was given a promise that it would be ready in the first half of 1899. *Plósz*

<sup>24</sup> PLÓSZ 1893.

<sup>25</sup> STILLER 1899, 77.

<sup>26</sup> Alkotmány 1899/48. 2.

<sup>27</sup> Kis Ujság 1899/57. 2.

<sup>28</sup> STILLER 1899, 77.

<sup>29</sup> RUSZOLY 2015, 636.

<sup>30</sup> ANTAL 2016, 64.

<sup>31</sup> KN 1896 Vol. XXI. 407.

<sup>32</sup> ANTAL 2016, 64.

<sup>33</sup> Here I mention the tasks of “big codification” only due to the extent of the study. However, he mentioned other questions like the settlement of the land register or the inspection of insurance companies. KN 1896 Vol. XXI. 410–411.

<sup>34</sup> SZLADITS 1941, 98.

supported this effort.<sup>35</sup> The first draft of the general Civil Code was published in 1900 which had extensive influence on the development of private law.<sup>36</sup> Eventually, the bill on the Civil Code was proposed to the Parliament in 1914.

2. He also suggested that one of our first codes, the commercial act (Act XXXVII of 1875) should be revised. Regarding this, he thought that this task could not be postponed until the Civil Code had been enacted. He thought that although the first draft of the Civil Code should be waited for, but when it becomes public, the reform of the commercial act had to begin immediately. The two should progress then parallelly. Moreover, there were such questions (for example the rules regarding companies limited by shares and cooperation) which were independent from the Civil Code, therefore some parts of the reform could be realised.<sup>37</sup> The amendment of the commercial act did not occur during the ministership of *Plósz*.

3. The partial reform of the civil procedure was realised in 1893 which worked well in practice: “those who do not consider things to be in mint condition and who do not want to avoid the existing deficiencies, will be forced to confess, that this act is suitable for our relations. The reform of the civil procedure therefore shall continue in this direction.”<sup>38</sup> The draft of the whole procedure was sent to the chamber of lawyers, courts of appeal and the municipal courts for review. They submitted their opinions and as a result, at the beginning of the ministership of *Plósz*, the draft was being revised based upon the reviews.<sup>39</sup>

Regarding his *ars poetica*, *Plósz* failed to achieve the most important goal: he could not get the act enacted. The draft had been ready since 1893 to “be taken to the Parliament when the situation becomes more favourable.”<sup>40</sup> After the revision having been mentioned in the ministerial introductory speech, *Plósz* submitted<sup>41</sup> the bill on the code of civil procedure<sup>42</sup> to the Parliament on 29 January 1902, which was recommended for acceptance by the judicial committee with amendments.<sup>43</sup> The interior political scandals of the first decade of the 20<sup>th</sup> century (eg. the so called ‘handkerchief-voting’, after which István *Tisza* and the Liberal Party were overthrown at the election) resulted in the Parliament only enacting the act in November-December 1910 (Act I of 1911).<sup>44</sup>

4. He mentioned other procedural questions in his speech. He wished to enrol the order of payment procedure, the procedures concerning marriage and mining in the code of civil procedure. He intended to care about procedures of land consolidation as well, but he did not know whether it should be done in the code of civil procedure, in the act which would regulate how the code would come into force or in a different act. Regarding the executions (especially the procedures with smaller value), he found it important to make them cheaper. However, he did not find the revision of the act on

<sup>35</sup> KN 1896 Vol. XXI. 407–408.

<sup>36</sup> SZLADITS 1941, 99. The draft of 1900 and the bill of 1914 was influenced by the German BGB more than the ABGB. See HOMOKI-NAGY 2013, 92. in details.

<sup>37</sup> KN 1896 Vol. XXI. 408.

<sup>38</sup> Ibid.

<sup>39</sup> Ibid.

<sup>40</sup> *Plósz Sándor életrajza [Bibliography of Sándor Plósz]*. A Jog 1899/10. 81.

<sup>41</sup> KN 1901 vol. II. 128.

<sup>42</sup> Documents of the House of Representatives (KI) 1901 Vol. III. Doc. No. 102.

<sup>43</sup> KI 1901 Vol. III. Doc. No. 412.

<sup>44</sup> Concerning the final years of the codification see KENGYEL 2014, 30–32.

executions (Act LX of 1881) relevant. Furthermore, the revision of the act would have only been necessary if the Civil Code had been enacted because there were several connections between the two.<sup>45</sup>

5. In his opinion, a more relevant was the revision of the order of lawyers since their problems would not have been solved if both the criminal and the civil procedure had proceeded according to the principle of orality. The chambers had to be strengthened so that “*they could realise the conditions of their vitality and prosperity and remedy their own problems if possible.*”<sup>46</sup>

6. He found it an important task that the code of criminal procedure (Act XXXIII of 1896) come into force. Act XXXIV of 1897 prescribed that it should occur on 1 January 1900 at the latest (Section 1), but it would have been possible earlier as well if the Minister of Justice had ordered it. According to *Plósz*, however, many obstacles remained before the act could come into force. He emphasised *inter alia* the infrastructural questions regarding the introduction of jury-system (only 23 of the 65 municipal courts had an appropriate room for this purpose)<sup>47</sup> and other regulatory obligations as well (so three bigger and several smaller decrees were also necessary).<sup>48</sup> It was a success for him that the code of criminal procedure could come into force on the day which had been prescribed in Act XXXIV of 1897.<sup>49</sup>

7. Finally, he mentioned the necessity of the enactment of a novel to the Criminal Code (Act V of 1878) which became necessary because of the Code of Criminal Procedure. According to *Plósz*, the system of legal remedies of the Code of Criminal Procedure will place a great burden upon the higher courts, so the amendment became justified. *Plósz* waited so that these amendments would decrease the burdens of higher courts. The requalification of some felonies to misdemeanour (and transferring them to district courts instead of municipal courts) or the introduction of conditional condemnation belonged here.<sup>50</sup> Several drafts were made for the amendment of the Criminal Code during the ministership of *Plósz* based on his request: *Illés* (1901), *Angyal* and *Finkey* (1903) prepared a draft each, and eventually *Angyal* wrote the draft of the final text (1904).<sup>51</sup> The novel was finally enacted in 1908 (Act XXXVI of 1908).

### 3. What is not mentioned in the biographies: *Plósz* as a communist professor of law?

The frames of the extent of this study make it possible to refer to the period, when Géza *Magyary*, *Plósz* and five other professors<sup>52</sup> were accused of being communists at the Faculty of Law of the University of Budapest only in brief.

<sup>45</sup> KN 1896 Vol. XXI. 408–409.

<sup>46</sup> KN 1896 Vol. XXI. 409.

<sup>47</sup> Regarding the jurors the found it positive that census of the jurors was completed at every municipal court. About the organisation of the juries see in ANTAL 2006, 245–251. in details.

<sup>48</sup> KN 1896 Vol. XXI. 409–410.

<sup>49</sup> Decree No. 3200. of the Hungarian Royal Minister of Justice on the taking of the Code of Criminal Procedure (Act XXXIII of 1896) into force.

<sup>50</sup> KN 1896 Vol. XXI. 410.

<sup>51</sup> ANGYAL 1909, 38.

<sup>52</sup> *Béni Grosschmid*, *József Illés*, *Károly Kmety*, *Gyula Pikler* and *Károly Szladits*.

After the First World War, the revolutionary government wanted to extend its influence upon the University of Budapest which was one of the centres of intellectual life. The efforts to reform concentrated mainly on the Faculty of Law since a new, young, and re-educated professionals were necessary instead of the inherited state apparatus inherited in administration and jurisdiction to perform the diverse and new tasks of the social transformation.<sup>53</sup> It arised, among others, that the professors being above seventy years of age, like Győző *Concha* and *Plósz*, should retire.<sup>54</sup>

After the initial steps, the real hostility between the government and the university began when Zsigmond *Kunfi* became the Minister of Education.<sup>55</sup> The appointments became a question of prestige for the government<sup>56</sup> which had been practised by the university as a custom. *Kunfi* broke with this practice and he appointed seven professors to the Faculty of Law and organised departments without asking the council of the university. “The indignation of the professors knew no boundaries”<sup>57</sup> because of this, and on 3 February 1919, they refused to inaugurate the new professors completely. The reaction of the government was that they suspended the autonomy of the university on 4 February and appointed Oszkár *Jászi* as a government commissioner. His duty was to prepare the reforms and to lead the administration of the university. *Kunfi* notified the council of the university in a transcript “for the record.”<sup>58</sup>

The aforementioned is important in the *Plósz*’s work since on 27 February 1919 a committee was formed for the realisation of the reforms, whose chair was *Plósz*, its members consisted of some of the “old” and the new professors (except for *Jászi*). Between 15 and 20 March (directly before the proclamation of the Socialist Republic), the committee had four sessions,<sup>59</sup> but they did not have any meetings during the Socialist Republic.<sup>60</sup> The committee became the object of fierce discussions on the sessions of the council of the faculty.<sup>61</sup>

Some articles had been published in the press and because of that, *Magyary* and *Plósz* made allegation of defamation by the press, altogether against six persons.<sup>62</sup> They highlighted those articles, which committed crime in their opinion and emphasised that “every single word of all of the statements in the aforementioned publishments are, without any exceptions, fictitious; none of the written characters are true. We have never had even the slightest connection with communism and its representatives. We did not

<sup>53</sup> *Litván* gave three reasons why the government started the reform of universities. LITVÁN 1968, 401–402.

<sup>54</sup> *Az Ujság* [The Newspaper] 1919/14, 2–3.

<sup>55</sup> At the beginning, the university pursued a waiting, dilatory tactics. LITVÁN 1968, 402–403.

<sup>56</sup> HAJDU 1968, 295.

<sup>57</sup> LITVÁN 1968, 404.

<sup>58</sup> *Ibid.* 407.

<sup>59</sup> Minutes of the Council of the Faculty of Law of Eötvös Loránd University [ELTE Lt. 7/a. ÁJTK tanácsüléseinek jegyzőkönyvei] Vol. 20. (1919/20) 33/919.20.

<sup>60</sup> *Pesti Hírlap* [Pester Journal] 1919/142, 4.

<sup>61</sup> Minutes of the Council of the Faculty of Law of Eötvös Loránd University [ELTE Lt. 7/a. ÁJTK tanácsüléseinek jegyzőkönyvei] Vol. 20. (1919/20) 33/919.20. 353/919-20. Supplements of the Minutes [ELTE Lt. 7/a-II. Jegyzőkönyvek mellékletei]: the minutes of the extraordinary sessions of 28 October, 30 October, 5 November, 7 November and 12 November 1919.

<sup>62</sup> The defendants (with the title of the newspaper in brackets): János *Bogyó* (*Az Ujság*), István *Geréb* and Bence *Pártos* (*Pesti Hírlap*) Tamás *Stettner* (*8 Órai Újság*), István *Szegedi Schenk* (*Szózat*) and Ödön *Szirmay* (*Új Nemzedék*).

take part in any movements not only in the favour of the communism, but [...] we had stood apart from the direction of the Károlyi cabinet prior to that. [...] We had confined ourselves only to the fulfilment of our official duties, which derived from our position, until the communism terminated the operation of the Faculty of Law.”<sup>63</sup>

The prosecutor’s office indicted against the defendants on 8 March 1920, since they “stated such facts about professors Sándor *Plósz* and Géza *Magyary*, so about public officers related to the practice of their public offices which could be a basis of a criminal or disciplinary procedure against them if the stated facts were true. These facts would expose them to public condemnation.”<sup>64</sup>

The procedure of the municipal courts cannot be found in the archive sources, so we do not have any information about the outcome of the case. We know from daily newspapers that the first main hearing was held on 2 July 1920 where *Magyary* and *Plósz* appeared in person. The defendants asked for the establishment of the truth. They alluded to the resolutions of the council of the university and asked that some professors, who were members of the so-called certifying committee, should be heard as witnesses. The court approved this request, ordered the procurement of the data and the hearing of the witnesses, and postponed the main hearing to 19 July.<sup>65</sup>

The lawyer representing the *Pesti Hírlap* [*Newspaper of Pest*] made a statement on the second main hearing that the “Pester Newspaper always seeks the truth and whenever it fails so (even if it happens really rarely), then it faithfully corrects it. When it registered the news accusing professors *Plósz* and *Magyary*, it declared the true facts the next day after it made sure about the illegitimacy of the original news. To provide the victims a full compensation, it declares before the court that the two scholars showed irreproachable and patriotic behaviour during both the Károlyi Era and the dictatorship.”<sup>66</sup> The defendants of the *Newspaper of Pest* then revoked their statements which were accepted by the victims and the prosecutor’s office dropped the charge against them. The other defendants, however, rejected making such a statement. The municipal court then decided based on the proposal of the prosecution and the defence that “it supplements the taking of evidence on the requests of the parties and postpones the main hearing for an uncertain time”<sup>67</sup> to ensure the taking of evidence is complete. Since we do not have any description of the professors that would state their communist activities, so they must have cleared their names.

#### 4. *The abstract theory of the right of bringing an action into court of Plósz*

*Magyary* characterised the scientific work of *Plósz* in a way that “he does not belong to the fertile writers. He rarely writes but his every literary utterance is an event.”<sup>68</sup> Although *Plósz* said in 1922 that he esteemed his works *A bizonyítási teherről* [*On the*

<sup>63</sup> Archives of Budapest (hereinafter referred to as: BFL) VII.18.d. 5. d. 13/1920.

<sup>64</sup> Ibid.

<sup>65</sup> 8 Órai Újság 1920/157. 3.

<sup>66</sup> Pesti Hírlap 1920/171. 3.

<sup>67</sup> 8 Órai Újság 1920/171. 3.

<sup>68</sup> MAGYARY 1914, 185.

*burden of proof*)<sup>69</sup> and *A törvényes vélelem természete* [*The nature of the legal presumption*]<sup>70</sup> the most,<sup>71</sup> regarding its influence, his work *A keresetjogról* [*On the right of bringing an action into court*]<sup>72</sup> of 1876 is worth highlighting. The Plósz'ian spirit stands out from this study the most, which characterised the future Code of Civil Procedure.<sup>73</sup> Plósz did not extend his examination to the whole procedure, just to one of its most important aspects, the action. This work can be considered to be the fundamentum of his academic conviction. He did not write about this subject anymore, however, it occupied him until the end of his life.<sup>74</sup> The author divided his work into three parts: firstly, he examined the different opinions, then he dealt with the procedural definition of the right of bringing an action into court, and finally, he examined this legal institution from the aspect of procedural and substantive laws.

#### 4. 1. The mistakes of the material theory

Plósz analysed the opinions of different authors at length, from which I highlight the most important ones due to the limits of the length of the study. Plósz saw the mistakes of existing theories mainly, that they wrote about the right of bringing an action into court not from the point of view of the procedural but from the substantive law.<sup>75</sup> He highlighted its most important representative, *Savigny*, who looked at this right as not being “other” but a new form of the law. The law changes due to its infringement, so the right of bringing an action into court is “just a momentum in the life of the law.”<sup>76</sup> However, Plósz acknowledged the merit of *Savigny*'s doctrine since it gave a clear and sharply finite definition.<sup>77</sup>

Plósz rejected *Wetzell*'s theory, who also derived the right of bringing an action into court from the infringement,<sup>78</sup> because it would have resulted in the rejection of the plaintiff's action if the infringement were not proven before the court. The deduction can be made from the study that “proving before the judge” means that the infringement had to be proven before the caesura (in Roman law: *litis contestation*), so during the foundation of the procedure. He found that problematic because while the rejection referred to “this time” in Hungarian law (which did not result in *res iudicata*), it was “final in the old Roman law since the *consumtio* was not weakened” (it resulted in *res iudicata*).<sup>79</sup> He thought that the main mistake of the theory was that it counted the material belonging to the foundation of the procedure only to be the conditions of winning the litigation.<sup>80</sup>

<sup>69</sup> PLÓSZ 1916, 517–533.

<sup>70</sup> PLÓSZ 1912, 75–99.

<sup>71</sup> LOVIK 1922, 4.

<sup>72</sup> PLÓSZ 1876, 167–187. and 231–259. For the German translation, see PLÓSZ 1880.

<sup>73</sup> *Magyary* considered this to be his greatest work apart from the procedural reforms. MAGYARY 1927, 5.

<sup>74</sup> *Ibid.*

<sup>75</sup> PLÓSZ 1876, 167. *Tóth* also said that “the right of bringing an action into court is different from the subjective private law.” TÓTH 1912, 586.

<sup>76</sup> About the theory of *Savigny* see SAVIGNY 1841, 4–149. especially p. 4–17.

<sup>77</sup> PLÓSZ 1876, 169.

<sup>78</sup> WETZELL 1878, 149–156.

<sup>79</sup> PLÓSZ 1876, 172–173.

<sup>80</sup> *Ibid.* 173.

#### 4. 2. Plósz's concepts and their realisation

##### *About the action – the preparation of the foundation of the procedure*

The action is independent from the private law, it belongs to the procedural law since the existence of the private law is uncertain until the judgment, so the private law and the right of bringing an action into court are two different things (abstract right).<sup>81</sup> The perception of this was obviously that the civil procedure shall be considered to be an act of the public law.<sup>82</sup> We have other theories in the Hungarian procedural jurisprudence, like the so-called exact theory of *Bacsó*<sup>83</sup> or the dual theory of *Magyary*.<sup>84</sup> It is very interesting that *Farkas* identified the abstract right of bringing an action into court as the right to access the court a century later.<sup>85</sup>

The ministerial grounds of the Code of Civil Procedure named the subpoena as the first preparatory act which could be misleading. The act called the statement of claim as the document initiating the procedure since “this title has been accepted”,<sup>86</sup> the act “*respects the traditions formally.*”<sup>87</sup> Therefore, it is a better phrasing if we consider the request for subpoena (or letter of subpoena) to be the first preparatory act.<sup>88</sup> It is worth mentioning that *Plósz* called the first preparatory act the subpoena because according to the original text “the subpoena occurs to a date set by that party who wishes to negotiate” (Section 184 of the Draft). However, it would have been the duty of the chair of the panel to schedule a due date in a way that the party would have requested the letter of subpoena at the recorder for scheduling the due date. The liberal concept of the German ZPO may be seen through the draft of 1885. Although the basic concept of *Plósz* remained the same regarding the trial in the Code of Civil Procedure, the liberalism of it became “more gentle” due to the influence of the Austrian ZPO of 1895. Luckily, it never lost its liberal character completely.

The plaintiff was not bound to the content of the statement of claim. What is more, it could be stated for the Code of Civil Procedure generally that written statement could have relevancy only if they were presented by the parties at the oral hearing as well. As *Magyary* wrote: “what was submitted in the request for subpoena by the plaintiff had only effects upon the condition it was presented as an action in the oral hearing.”<sup>89</sup>

Regarding the elements of the statement of claim, it was important from the point of view of this study that it had to contain the action which the plaintiff wanted to present at the preparatory hearing, so the submission of the right which he wished to enforce and an explicit claim (Section 129 paragraph 1 point 3 of the Code of Civil Procedure).

<sup>81</sup> Ibid. 173. BACSÓ 1907, 17.

<sup>82</sup> *Plósz* also took this view, although it was elaborated by *Magyary*, and *Bacsó* joined this view later as well. BALOGH 2019, 20.

<sup>83</sup> BACSÓ 1910. The work is analysed by BALOGH 2019, 21–23. in details.

<sup>84</sup> MAGYARY 1924, 357–358.

<sup>85</sup> FARKAS 1985, 559.

<sup>86</sup> KI 1910 vol. IV. Doc. No. 73. 272.

<sup>87</sup> PLÓSZ 1911, 6.

<sup>88</sup> MAGYARY 1899, 337.

<sup>89</sup> KI 1910 Vol. IV. Doc. No. 73. ir. 272.

One of the most important results of the theory of *Plósz* can be observed here because he wished to take the principle of contingent cumulation out of the Hungarian civil procedure with this rule. The impact of this principle resulted in the most important element of the action becoming the factual basis, the statement of the right and the claim next to it were pushed into the background.<sup>90</sup> The principle of contingent cumulation meant that a part of the stage of *in iudicio* (meritorious hearing) was transferred before the caesura (*litis contestatio*), so the foundation of the procedure could speed up proceedings.<sup>91</sup>

It is worth highlighting Section 129 point 3 here *Plósz* demanded the statement of the right only because in his opinion, the subject of the matter was the statement of the right, not the factual basis or the deduction deriving from them. The aim of the procedure is that the court shall make a judgment regarding the statement of the right.<sup>92</sup> The difference between individualisation (*Individualisierung*) and the particulars of the claim (*Substantiierung*) divided the procedural jurisprudence of the era. Since *Plósz* put the statement of the right forward in opposition with the factual basis (in order to exclude the principle of contingent cumulation), the Code of Civil Procedure demanded the statement of facts to such an extent only which was absolutely necessary to make the right of the defendant different from other rights. It made it possible for him to individualise his claim. Several contemporary scholars criticised this. According to *Magyary*, “the action consists of the submission of the facts which make the basis of the legal protective claim – the factual basis – and the claim for a legal protection. It is regrettable that the first element of these two, the submission of the facts, is not emphasised enough in the Code of Civil Procedure.<sup>93</sup> *Jancsó* also expressed his concern because of this: “regarding our relations, was it right to leave the old familiar (the particulars of the claim) to espouse to the position of individualisation?”<sup>94</sup>

The submission of the facts had a preparatory role in the Code of Civil Procedure which was embodied in the rule that should the party omit his obligation to prepare the trial resulting in a postponement, he shall bear the burden of the costs caused by his omission (Sections 179 and 203 of the Code).<sup>95</sup> It reveals that while the statement of the right prepared the foundation of the procedure, the submission of facts and proof prepared the meritorious hearing. Thereby, the deduction of *Magyary* becomes understandable: “the principle of individualisation is not exclusive in the Code of Civil Procedure but a minimal requirement only that can be supplemented with the rest: the particulars of the claim”,<sup>96</sup> with the risk that if it resulted in postponement, then the plaintiff would burden its costs (regardless of whether he would be the winning party).

Since the Act LIV of 1868 (our previous Judicial Ordinance) was built on the particulars of the claim, it could be said it was natural after the Code of Civil Procedure came into force that the complete submission of the facts remained in the legal practice. I found very few

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<sup>90</sup> PLÓSZ 1876, 244–245.

<sup>91</sup> *Ibid.* 245.

<sup>92</sup> PLÓSZ 1927, 235.

<sup>93</sup> MAGYARY 1924, 354.

<sup>94</sup> JANCÓS 1912, 375.

<sup>95</sup> KI 1910 Vol. IV. Doc. No. 73. ir. 273.

<sup>96</sup> MAGYARY 1924, 355.

procedures in the archive sources where the plaintiff had submitted a preparatory document after the preparatory hearing, which supports the aforementioned.<sup>97</sup> Consequently, *a contrario*, it was unnecessary because the plaintiff had already prepared the meritorious hearing in the statement of claim. The certain propagation of the Judicial Ordinance emerged in the usage of terminology as well, for example the plaintiff submitted an “ordinary action”,<sup>98</sup> or in another case, the plaintiff requested that the defendant should be invoked to “an ordinary procedure”<sup>99</sup> (the Code of Civil Procedure abolished the dual system of ordinary and summary procedures).

It was criticised, however, that the Code did not demand the request for subpoena to be incorporated into the statement of claim since the act obfuscated its feature to be a letter of subpoena, although it was obvious from the spirit of the act.<sup>100</sup> The statements of claim always consisted of the request of invocation, so did the following one as well: “I request through my lawyer certified under A./ that the court: set a due date for the trial and invoke the defendant to it through the council of village of Inárcs-Kakucs and require him after the procedure to pay within 15 days under the burden of execution 5300 crowns and its interest rate of 5% from 1 May 1918. I also request the court to require him to pay the charged, the sought to claim and the future costs of the procedure.”<sup>101</sup>

If the statement of claim did not meet the requirements, it had to be rejected. However, another phrasing emerged both in jurisprudence and legal practice that the court “rejects it without issuing an invocation.”<sup>102</sup> It was the phrase from which the deficiency of our current regulation can be observed. The statement of the legislator that they returned to the terminology of rejection because of the revival of our procedural traditions (Act I of 1911) must be dealt with because the the terminology of “without issuing an invocation” of Act III 1952 [Section 130 paragraph (1)] has become obsolete and problematic. In the system of the current Code of Civil Procedure, the defendant shall submit his defence in a written form before the hearing. Thus, the rejection as phrasing has returned, only one of the aspects of its content remained, namely that the court denies the foundation of the procedure from the plaintiff. However, the rejection of Act I of 1911 (and Act III of 1952) had another implicit element that can be found through answering a question: what was the aim of issuing the invocation? It was that the defendant be present at the (preparatory) hearing and submit his defence in an oral form (from this point of view it does not matter whether it was an acknowledgement). To summarise, the real content of the procedural traditions has unfortunately disappeared after a century.

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<sup>97</sup> For example, the plaintiff proposed a preparatory document in a case in order to “finish the hearing in the set due date.” Archives of Pest County (hereinafter referred to as: MNL PML) VII.1.b. 7. d. 313/1916/3. The preparation of the defendant was *de facto* compulsory since he could not give any reasons of his defence during the preparation.

<sup>98</sup> MNL PML VII.1.b. 2. d. 15/1916/1.

<sup>99</sup> MNL PML VII.1.b. 3. d. 159/1916/1.

<sup>100</sup> MAGYARY 1898, 149.

<sup>101</sup> MNL PML VII.1.b. 243. d. 3141/1918/1.

<sup>102</sup> Archives of Csongrád-Csanád County (hereinafter referred to as: MNL CsML) VII.1.b. 692. d. 478/1922. TÓTH 1923, 495.

*On the foundation of the procedure*

According to *Plósz*, whether the procedure comes into existence or not “*is a separate question which has only such a connection with winning or losing the procedure that it is a condition of both possibilities.*”<sup>103</sup> In his opinion, the action is just a part of the acts founding the procedure, its aim is to convince the defendant and the court about the necessity of the procedure (“*[...] it is against the court and the opposing party*”).<sup>104</sup> Consequently, he divided the first instance proceeding during the codification into two parts: preparation and meritorious hearing.<sup>105</sup> The only aim of the preparation was that the defendant submit a defence, to be more exact, a defence on the merit (he asks at least partially dismissal of the action). It is important to highlight, however, that although the Code of Civil Procedure used the word hearing for the preparation as well, the preparatory due date (or simply preparation)<sup>106</sup> became used in practice, which derives from that doctrinal conception of *Plósz* that the “*trial is [...] a uniform whole*”<sup>107</sup> which shall be used for the meritorious hearing.

One of the components of the stage of preparation was the action, so *Plósz* attributed – as we saw – not just a preparatory role to it,<sup>108</sup> but it was an initiative of the foundation of the procedure as well. The aforementioned has a connection with the independence of the right of bringing an action to court from the private law because the latter did not have to exist during the foundation of the procedure, it was enough to state it.<sup>109</sup>

Regarding the acts founding the procedure, *Plósz* differentiated between two essential moments: the communication of the claim and the submission of the defence on the merit.<sup>110</sup> In opposition to this, *Magyary* distinguished three acts: the communication of the claim, the request of the court for the defendant to submit his defence and the defence of the defendant.<sup>111</sup> It is more fortunate if we look at the foundation of the procedure as a progress. Based on this, the following definition can be given: the foundation of the procedure is the sum of the procedural acts between the communication of the claim and the defence on the merit. It could happen that more preparatory hearings were necessary to reach the defence of the defendant.

It is also worth looking at the foundation of the procedure as a progress since many acts could happen between the communication of the claim and the defence of the defendant, which had an influence on the defence. To sum up, I divide the acts founding the procedure into two parts: on one hand, according to the ranking of *Magyary/Plósz*, direct acts were the communication of the claim, the request of the court for the defendant to submit his defence and the defence itself (direct form of the foundation).

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<sup>103</sup> *Plósz* 1876, 233.

<sup>104</sup> *Ibid.* 235.

<sup>105</sup> *Plósz* 1917, 47.

<sup>106</sup> Eg., “We request the court to set a due date to the preparation based on our statement of claim” and not for preparatory hearing. MNL PML VII.1.b. 7. d. 313/1916/1. It is worth mentioning, however, that the minutes of the preparatory and the meritorious hearing were unified formally (“minutes of oral hearing”).

<sup>107</sup> KI 1910. Vol. IV. Doc. No. 73. 310.

<sup>108</sup> *Plósz* 1876, 235.

<sup>109</sup> *Ibid.*

<sup>110</sup> *Plósz* 1927, 122.

<sup>111</sup> *Magyary* 1924, 346.

On the other hand, indirect acts were the amendment of the claim and the raising dilatory defence (indirect form of the foundation), provided that they were raised before the peremptory defence of the defendant since the foundation reached its goal and finished after that.

According to another grouping possibility, the communication of the claim and the peremptory defence were indispensable acts (like *Plósz* highlighted it) because the foundation of the procedure was not possible without them. On the other hand, the amendment of the claim and the dilatory defence were eventual acts since they were not necessary for the peremptory defence.

These theoretical explanations must be supplemented with three additives. Firstly, although the abandonment of the action could happen during the preparatory hearing as well, it shall not be considered to be even an indirect preparatory act since if that happened, then a peremptory defence could not be proposed since all of these became irrelevant (there was no action). The dilatory defence could be an indirect preparatory act only if the court rejected them because if an obstacle of the procedure stood, the court had to terminate the procedure, so a definite obstacle abounded for the procedure. The indirect character arised from if the court rejected the dilatory defence, then the defendant did not have another choice than to propose a defence on the merit<sup>112</sup> so a peremptory defence.

Secondly, both the indirect preparatory acts and the abandonment of the action were mixed acts since they – in certain boundaries – could be proposed not only in the preparatory hearing (opposite to the communication of the claim and the peremptory defence). Thirdly, the legal practice and the jurisprudence considered not only the defence to be a peremptory defence but the acknowledgement as well. The act, however, meant the defence on the merit of the defendant (the denial of the statement of the right)<sup>113</sup> under the peremptory defence in a technical sense. This derives from that *Plósz* put the statement of the right in the foreground. Thus, the phrasing of the Code of Civil Procedure is not completely precise that after the peremptory defence, the consent of the defendant was necessary for an amendment of abandonment of the action (Section 187 paragraph 1 and Section 188 paragraph 1). In case of an acknowledgement, thus, the defendant had to be forced to perform a service (e. g. pay a determined sum) immediately in the form of a judgment, so the abandonment of the action or the amendment of the claim became irrelevant.

One final question shall be answered: was the critique correct in stating that because the Code of Civil Procedure was afraid of falling into the realm of the written procedure<sup>114</sup> the principles of orality and immediacy were not overemphasised by the act? Let us takes as an example, the settlement at the trial. To abandon the action after the defence on the merit, the consent of the defendant was necessary. The settlement was a private law contract of the parties, a disposal of the subject matter of the action before the judge on the oral hearing or a joint request of the parties before a delegate judge or requested court with the aim of the termination of the procedure.<sup>115</sup> On the contrary, if the parties did not settle the issue before a judge (or requested the termination without a reasoning), that should be

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<sup>112</sup> MESZLÉNY 1911, 193.

<sup>113</sup> BACSÓ 1917, 116.

<sup>114</sup> OBERSCHALL 1896, 4.

<sup>115</sup> MAGYARY 1924, 508–512.

considered be an amendment of the action and a consent to it. Therefore, the court had to terminate the procedure, it did not have to decide about the litigation costs (otherwise requested by the plaintiff)<sup>116</sup> and the eventual order setting the due date of the preparation had to be set aside.<sup>117</sup>

A settlement is concluded in both cases but in the first one it was concluded before a judge according to the principle of immediacy. The act, however, associated different legal consequences to them because if the settlement were approved by the court with an order, it had the same effect as a judgment (so it could be executed). Moreover, since it was concluded before the judge, it was part of the minute, so the contract was a public deed.<sup>118</sup> The settlement out of court resulted in an order terminating the procedure and the legal effects of submitting a statement of claim were upheld. These differences derive from the principle of immediacy, it was, however, gratuitous, and unsuitable to associate a smaller legal effect to an act based on the will of the parties that was concluded out of court (especially if they inform the court about it in a common submission).

### Summary

It is undeniable that *Plósz* attributed a great significance to the principles of orality and immediacy, and he wished to distance himself from Act LIV of 1868 (e.g., the statement of the right was put at the forefront and the facts in the background; the assessment of acts taken out of court) in his *ars poetica* that could be said to be exaggeration. It is important to highlight, however, that the system of foundation and preparation of the procedure, the wide case managerial powers of the court and the means of sanctions of acting in bad faith (preterition and the obligation of telling the truth: Section 222 of the Code of Civil Procedure) established such a medium that was returned to by the procedural legislation several times, despite the noxious effects of the socialism. Although *Plósz* was the member of the Liberal Party,<sup>119</sup> his work was universally acclaimed in politics. The representatives of the jurisprudence all praised the achievements of the professor whether they supported the solutions of the Code of Civil Procedure or not. This is almost an unrepeatable success regarding the current status of the procedural jurisprudence.

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<sup>116</sup> Curia 1917 ápr. 2. VII. 1346. sz. PD III. (1918) 130. (PD marks the collection of high court decisions edited by Marcel Kovács. PD is followed by the number of the volume, the year of publish in brackets and the number of the decision).

<sup>117</sup> Point 1. of the matters of principles of the agreements by meeting of the chairs of panels of the Municipal Court of Budapest on 1 December 1915. PD II. (1917) 53.

<sup>118</sup> MNL PML VII.1.b. 8. d. 364/1916/4.

<sup>119</sup> See *Plósz Sándor prorammbeszéde* [*Programme speech of Sándor Plósz*], 2.

### III. His selected works<sup>120</sup>

*A bizonyítási teherről [On the burden of proof].* In: Jogi dolgozatok a Jogtudományi Közlöny ötven éves fennállásának emlékére: 1865–1915. Budapest, 1916. 517–533.

*A keresetjogról [On the right of bringing an action to the court].* Magyar Igazságügy 1876/3 and 4. 167–187. és 231–259.

*A magyar polgári perrendtartás tervezete [The draft of the Hungarian Code of Civil Procedure].* Magyar Királyi Egyetemi Könyvnyomda. Budapest, 1885.

*A magyar váltójog kézikönyve [The handbook of the law of bills].* Pesti Könyvnyomda. Budapest, 1877.

*A per szerkezete az új perrendtartásban [The structure of the procedure in the new Code of Civil Procedure].* Magyar Jogászegyleti Értekezések 1911/14. 3–22.

*A törvényes vélelem természete [The nature of the legal presumption].* Jogállam 1912/1-2. 75–99.

*Magyar polgári törvénykezési jog [Hungarian law of civil procedure].* Szent István Társulat. Budapest, 1906.

*Törvényjavaslat a magyar polgári perrendtartásról. Előadói tervezet [Bill of the Hungarian Code of Civil Procedure. Draft of the rapporteur].* A m. kir. igazságügy-miniszter megbízásából. Budapest, 1893.

*Zwei Vorträge aus dem ungarischen Zivilprozessrecht [Two lectures from the Hungarian law of civil procedure].* Liebmann. Berlin, 1917.

*Tanulmány a ptk. 95. §-ának értelmezéséhez [A study on the interpretation of Section 95 of the Code of Civil Procedure].* Jogtudományi Közlöny 1871/47. 360–363.

*Birhat-e az új ügyvédi rendtartás az elméleti és gyakorlati képzettség kimutatását illetőleg visszaható erővel? [Regarding the demonstration of the theoretical and the practical qualification, can the new lawyers' order have a retroactive application?]* Jogtudományi Közlöny 1871/52. 399–403.

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*Der Bau des Prozesses in erster Instanz nach der ungarischen ZPO [The structure of the procedure of first instance after the Hungarian Code of Civil Procedure].* In: *Zwei Vorträge aus dem ungarischen Zivilprozessrecht.* Liebmann. Berlin, 1917. 47–80.

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<sup>120</sup> The Academy published in 1927 those studies of Plósz being not monographs under the title of *Plósz Sándor ig. és t. t. tag összegyűjtött dolgozatai* [The collected works of directory and honorary member Sándor Plósz].

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