

# The Individual and the Environment: the New Hungarian Civil Code

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**Abstract:** This publication is devoted to various means of ensuring the collective rights of individuals to a healthy environment, and in particular to a special instrument of law, the *actio popularis*. The history of this dates back to ancient times, though its current forms are not identical with those of Roman law. This legal institution is used in many countries of the world, and not solely for environment protection. Consumer protection and environment protection are correlated both in law and in other social domains. The public prosecutor and the green ombudsman have special rights in the area of environment protection, and the ordinary citizen too should have the right to take steps to defend the natural and civilizational environments. The new Hungarian Civil Code, due to come into effect on May 1, 2010, is designed to be an environmentalist civil code which considers the ancient dilemma of collectivist and/or individualist treatment of social problems. The tools of private law will be adapted to the level of public law in the service of environment protection. The goals are given: the existing and the forthcoming regulations are to be adequately implemented under the auspices of environment-consciousness.

**Keywords:** Environmental law, partaking democracy, environmental civil activity, environmental private law, social changes, environmental sociology.

## THE OUTLINES OF A (BRAVE?) NEW WORLD

Can we see the outlines of a really brave and new world order in which environmentalist aspects are predominate? Would a new environmentalist world order truly fulfil the expectations of the individual and the state? Can an acceptable compromise be found for all concerned? September 22, 2009 saw the start in New York, under the auspices of the United Nations Organization, of an 80-day countdown leading up to the Copenhagen summit meeting on climate change (December 7-18, 2009). The leaders of the major countries have expressed their deep commitment to environment protection. In Europe, greenhouse gas emission was reduced by 3.06 per cent in 2008 as compared with a year earlier, though 50-60 per cent would be required to halt global warming. Year by year, the ice surface of the Arctic is shrinking dramatically. The facts are given. The international community expects regulations that can be implemented worldwide. A really brave new world is needed to ward off the nightmare of a Huxleyan new world.

Many experts believe that the *cap and trade* model of emissions trading has not resulted in any decrease of greenhouse gas emission. From the aspect of environmental philosophy, environment protection cannot be based on the pragmatism of commerce. A new solution is required to prevent pollution and the irreversible destruction of the natural environment. A new solution should not be restricted to the level of states and huge companies, but should involve the everyday man and woman and bring the cause of environment protection much closer to the citizen than ever before. Emissions trading may be fruitful only after citizens have

had their voices heard and the leaders of states and global companies see their personal environmental rights at stake, or at least see their private interests meet the public interest of protecting the natural environment.

Nowadays, the private interests of the few collide with the public interests of the masses, whose weakness lies in their poor access to legal weapons with which to fight for their human rights, and their right to a healthy environment. The latter is a special new form of human rights. The collision of private and public interests shows up clearly in the domain of environment protection. A minority with economic power should not exercise immoral or illegal pressure on a majority not properly protected by law, and a majority should not thrust aside the interests of minority groups, especially when these interests are based on public law.

Environmental justice must be seriously considered and enacted by national parliaments; such justice on behalf of minorities is inherent in a democracy of plural values. It is the duty of the public at large to demonstrate respect and it is the moral obligation of the minorities to coact in symbiosis with the majority. Public interest is not always above private interest, but it is nonetheless up to the public to define the scope of functioning of private law. An appropriate legal system must be in place to solve problems faced by individuals or social groups feeling a need for a common remedy, or retributive justice. Acting for the people and acting by the people are not in contrast. Individuals have both public and private needs which at times may be in conflict with each other; the public needs should generally have preference over needs of personal or economic well-being. Though private comfort is important, the legally and morally correct requirements of a whole society should have priority in being protected by the law and before the law. The *actio popularis* is a special instrument with the aim of improvement of the general interest.

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## THERE IS STILL SOMETHING NEW UNDER THE SUN: THE DEVELOPMENT OF THE RULE OF LAW

Ancient Roman Law reflects some of the origins of today's popular actions. In cases of violation of a tomb, for instance, actions could be initiated by any person without proof of personal interest in the concrete case. The person was thereby acting in the interest of the public, i. e. all those who would find it necessary to impede violations of the accepted ethics. Such an action has almost never been used to defend new laws, but rather to defend the public peace and other public values that have evolved during the centuries. But what the people of the Roman Empire found publicly relevant is surely not of the same importance today. We have new social systems, and therefore new social interests to be shielded. The ancient Romans did not view the natural environment as in need of protection by the action of any individual, though they protected the natural environment as an object of value of private proprietors. This attitude has subsequently changed somewhat, and the natural environment is now considered to deserve protection not only as an object of private property, but also as a common value. The value of the environment can not be purely expressed in financial terms: the ethical value too must be taken into account, expressed in the levels of health, well-being and good feelings. Such good feelings may be greatly influenced by such factors as climate change, the rapid loss of biodiversity, the urgent need for ecological economics and the solicitude felt for the coming generations.

Involvement of the people in their public affairs stems from the dawning of humanity. It has always been important for the governing power to be vested to some extent in the governed, a situation that may well exist throughout the animal kingdom too, though mankind often assumes special rights. Humans largely take for granted their superiority in the overall biosystem, with animals and plants subject to private and public human interests. The key-word should be harmonization. In consequence of human nature, however, the harmonization of human existence with the universe is probably not as difficult as the harmonization of private and public interests.

Throughout history, little success has emerged from efforts to achieve an acceptable balance of the two interests. We are now witnessing the rebirth of the institution of *actio popularis*, in the form of actions aimed at benefitting the public by a civil organization or the public prosecutor in the name of the people. In Hungary, the environmental *actio popularis* was created by Act 53 of 1995 on Environment Protection, Act 53 of 1996 on the Protection of Nature, and Act 28 of 1998 on the Protection of Animals. Hungary is awaiting the introduction of a new Civil Code in 2010 which will relate to these institutions. The notion of *damage caused by violating the rules of nature protection*, defined by Subsection (2) of Section 81 of the Act on the Protection of Nature, allows the public prosecutor to request symbolic compensation in the name of groups of people, or the whole of society when such damage arises.

It was a journey of almost two and a half millennia from the *Laws* by Plato, through the *Digests* by Justinian and *The Spirit of the Laws* by Montesquieu, to the authors of the 19th century, when legal philosophy was first incorporated in acts of parliaments and acts of constitutional monarchs. Disturb-

ing factors often emerged in the first half of the 20th century, during the formulation of more modern laws. Finally, however, after decades of fruitless waiting and expectations, the 1990s saw a new era of law-making. And what will the future bring? We may read it in *Ecclesiastes* (1,9): *The thing that hath been, it is that which shall be; and that which is done is that which shall be done: and there is no new thing under the sun*. Should we agree with the speech of Solomon? Is it true that *there is no remembrance of former things, neither shall there be any remembrance of things that are to come with those that shall come after* (*ibid.* 1,11)? The reader may not think so. The human memory is perhaps unique as compared with that of other living beings. We can recall events after not only a matter of seconds, but even thousands of years. We can perceive the difference between past and present, and understand the development of law and human rights.

Hungary today has a modern law system, in the spirit of postmaterialism, though the legacies of Marxism and Leninism have not been forgotten. The respiritualization of Hungary's legal atmosphere has in part seen a return to an earlier way of thinking, not in law-making itself, but in everyday practice. Numerous examples have been recounted from such bodies as the National Election Office, and even the Constitutional Court. It is not the lawyer, but the petitioner who tends to express a certain manner of thinking when, for example, inquiring whether speaking impolitely in public about the folkloric falcon could be punished by imprisonment, whether speaking in a humiliating way in public about the crown of the first king of Hungary, which is supposed to emanate supernatural energy, should be punished by up to one year of imprisonment, forced labor or a fine, whether Hungary should be governed by a priest, etc.

Of course, these are all relatively minor (though instructive) side-questions and the real successes of the new-born Hungarian democracy far outweigh them. This democracy (defined in the Constitution of Hungary) is based on a social market economy. Its achievements have been mostly positive, this holding true for environment protection too. Hungary's first national Civil Code was passed in 1959 (and came into effect on May 1, 1960) and the second Civil Code is planned for enactment in 2010, likewise May 1. This will be a green civil code. Animals will be defined as more than objects (following the examples of the German, the Austrian, and the Swiss civil codes), and the whole spirit of the new Hungarian Civil Code will foster protection of all features of the environment: not only such as plants and animals, but also abiotic environmental elements, such as the soil, air and waters.

## ON THE COLLECTIVE RIGHT TO A HEALTHY ENVIRONMENT

In the 17th century, Spinoza expressed in his *Ethics* that it was impossible for man not to behave as a component of Nature (Spinoza 1979, p. 342). Mankind comprises part of the natural environment, and the sociosphere established by mankind is only a microcosmos within Nature. Humans started to think in an environmentalist way only when they realized that their existence is closely integrated into the natural environment and that they are unable to be independent of Nature. The deep ecological *Weltanschauung* of Spino-

zan ethics is clear. The collective whole of a community is always closer to mother Nature than an individual alone.

The new Hungarian Civil Code defines the notion of environmental damage in terms of death, injury, impaired health, *damnum emergens* and *lucrum cessans*, the costs of restoration and prevention, and the deteriorated quality of life of individuals, groups of persons or society as a whole. In the event of a deterioration of the quality of life of groups of persons or of the whole of society, caused by unlawfulness, the public prosecutor is authorized to request a symbolic sum of money for the Environment Protection Fund of the Central State Budget (Subsection (2) of Section 2:96 of the new Hungarian Civil Code).

Ensurance of the public interest remains a task of the appropriate civil organizations and also the public prosecutor. The public prosecutor may demand damages or an injunction, whereas the civil organizations may request only injunction. In Hungary, unlike the situation in English law, an injunction precedes damages (Subsection (2) of Section 5:541 of the new Hungarian Civil Code).

We must go back in history in order to see why mankind felt the need to allow one individual to act in the interest of another. It is quite simple to understand why people needed to mandate someone else to represent them before a court or other public legal bodies (e.g. a representative parliamentary body, etc.). Overcoming geographical distances was not always as easy as today, though people still need to be represented. Not merely because of the physical distance, but also in view of the shortage of time. Individuals often cannot react quickly enough, because they are too far from where they should be, or because they do not have sufficient free time to appear before a court. Groups need to be represented by a public prosecutor or by a civil organization when their common interests are in danger. The right to represent the interests of others is precisely specified by law and restricted to special cases when social values such as the environment, Nature, and animals or consumers as a whole are to be protected.

The Hungarian people have achieved a European level of legal functioning and of operating the *rule of law*. A country with a plural democracy cannot afford too much digression from the ethically founded norms of its legal system. Those ethical and juristic rules derive from case law. Changes to the acts of law are usually provoked by cases brought before the Hungarian courts. This has long been so, from the time of the kings, through the period of currying favor with the Third *Reich*, under the forty years of Hungarian communism, and the most recent twenty years of reforms (from 1989 to 2009). In contrast with the situation only a relatively short time ago, a Hungarian judge, who bases his decision on lawfulness (*de iuribus*) and facts (*de factis*) alike, now takes into account the common interests of citizens. As an example, in case No. 43 Pf. 28 768/1998, the Court of Budapest found the operator of a highway liable for the harm caused to the quality of life of the neighboring inhabitants by the operation of the highway. Despite the fact that no concrete legal norm was presumed to have been violated, indemnity was requested. It is now sufficient to prove that an interest protected by law (in this case, the plaintiff's right to a healthy environment) had been violated. The damages to be paid depend on the loss of value of the plaintiff's real estate.

Thus, liability may be based on a constitutional right, but determination of the exact sum for compensation comes after. The violation of a law can be declared by the court, but it is mainly the task of the plaintiff to prove the extent of the losses.

In case No. Pf. I. 20 187/2006 before the Regional Court of Szeged, the public prosecutor asked for damages on behalf of the Hungarian State, because logging in a nature conservation area had resulted in a deterioration of the living conditions of a number of people. In case No. 2. Pf. 20 290/2000/5 before the County Court of Zala, the defendant questioned whether the public prosecutor had the right to ask for general damages to be transferred to the State Budget. The court stated that the payment of this latter kind of damages does not exclude the right of an individual suffering personal harm to request indemnity. People are gradually being accustomed to the possible cumulation of indemnities, once based on private interests and then on public interests. Judges must be appropriately tolerant, though always within the given limits of the law.

Communities have special rights over and above those of an individual, relating to the common features characterizing a community. The right of a community to undisturbed existence is sociologically much more important than that of one individual. Article 28 of the Universal Declaration of Human Rights (1948) states that *everyone is entitled to a social and international order in which his human rights and freedoms can be fully realized*. However, not only the rights of groups or of whole societies are involved. The inverse of a right is a duty. Article 29 of the Declaration (1948) declares that *everyone has duties to the community in which alone the full and free development of his personality is possible. In the exercise of his rights and freedoms, everyone shall be subject to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society*. In Hungary, the rights of groups of persons are still undergoing definition (an example is the current debate over the civil law regulation of expressions of hatred against a racial or ethnic community). The Hungarian legislators feel that democracy is based on the well-being of the masses. In Hungary, the right to a healthy environment is constitutionalized under Sections 18 and 70/D of the Constitution. The text of the Constitution tends to mention collective rather than individual rights. The collective right to a healthy environment can be ensured by the representatives of those collectivities. If it is not the people who directly choose their representatives, then it is the elected Parliament's task to appoint these representatives. Parliament has codified that the public prosecutor is a general protector of the people's rights at various levels of society: in the fields of jurisdiction, public administration, labor law and condominium home ownership. The relevant civil organizations also have rights: not to request indemnity in the name of the people, but rather preventive measures and, in certain cases, injunctions.

The basis here is the rule of *vis in multitudine*. The rule of law is correct only when based on respect for human rights and on respect for the common right of the people to Nature and the environment. Section 2 of Article 1 of the

International Covenant on Economic, Social and Cultural Rights (1966) points out that *all peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law*. In Hungary, as a general rule, the majority of the natural resources, forests, waters, agricultural land, etc. has long been public properties. Before the political changes around 1989, Article 6 of the Hungarian Constitution declared this *lex generalis*, by virtue of international law. At present, Section (2) of Article 10 of the Constitution declares that the exclusive sphere of state property and the economic functions of the state is determined by law. The relative regulations have not remained within the Constitution, but, in accordance with pragmatic teleology, are detailed by acts of Parliament, ranging from the Civil Code to lower laws.

### **CHANGING THE ATTITUDE OF THE PEOPLE IS A GREEN ACTIVITY**

The general public often regard a public prosecutor as someone in the service of criminal procedure law. This idea must be changed. A public prosecutor is not necessarily occupied only with the prosecution of criminals, but also prosecutes enemies of the people in the form of enemies of the environment who are not necessarily perpetrators of crimes. According to Act 5 of 1972, the public prosecutor is the main safeguarder of the people's rights. The people's rights are not always identical with human rights, although we tend to equate the notions of humans and people, and people have human rights. The public prosecutor is thus protector of human rights, among them the rights concerning the natural environment. The portrait of the public prosecutor is undergoing reconstruction, but a long period may be required to change the views of people.

In the earlier Hungarian society directed by the workers' class, people became accustomed to conceiving public prosecutors as figures to be feared. In present day Hungary, the people are no longer directed exclusively by the workers' class or any other social class, and the public prosecutors have now acquired the very important role of safeguarding and validating the people's rights, including a number of human rights. Their positive image must be restored in the eyes of the people, who must come to understand that they are entitled to protection by the rule of law, rather than exposed to the perils and vicissitudes of the legal system.

As time passes, the public prosecutors' legal possibilities to act as protectors of the people's rights are expanding. By virtue of Act 133 of 2003, from January 1, 2010, the public prosecutor will become the protector of the rights of condominium home owners, as an illustration of the ever-increasing success of this legal body. Esteemed by the law-using society, they have attained the level of their sitting colleagues, the judges. Their salary scale – now equal to that of the judges – is determined by the Act on the Central State Budget.

The environment is protected by the public prosecutor in the areas of both private and public law, including criminal law, constitutional law and administrative law. The public prosecutor proposes amendments to acts of law and also partakes in the science of law, lecturing at the law faculties of

the universities, and performing both theoretical and case research to promote the development of the science of law. The public prosecutor pursues those who do harm to the environment, acts in accord with the constitutional requirements, and brings help to the everyday people in their cases. An environment-conscious manner of thinking concords with respect for the rule of law as a basic principle of human rights (see the Preamble to the Universal Declaration of Human Rights).

Changing the attitude of the people is a real green activity, creating both ecological and economic profit for the whole society, and also for the international community. It should not be forgotten that the public prosecutor has similar rights for the protection of general interests in consumer protection. Green ethics and ethical consumerism are rooted in the same fabric of social thinking and social consciousness. It was a necessary step for the state to provide the public prosecutor with rights similar to those of the civil organizations. In this way, the state demonstrates its respect for its people and their primary interests, promoting the healthiness of their surroundings.

### **THE GREEN OMBUDSMAN AS PROTECTOR OF PUBLIC INTERESTS**

Subsection (5) of Section 27/B of Act 59 of 1993 authorizes the green ombudsman to request damages to be transferred to the State Budget (in the Environment Protection Fund), unless the operator of the state property demands damages from the perpetrator of the environmental damage within 60 days after notification by the ombudsman.

Subsection (1) of Section 27/C of the same Act allows the green ombudsman to demand that the perpetrator of environmental damage should terminate that activity and restore the previous state of the environment. Subsection (3) of Section 27/H authorizes the environmental ombudsman to enter premises where environmental damage is expected to occur.

The green ombudsman has rights relating to environment protection that are similar to those of the public prosecutor. It is an interesting point that the first green ombudsman of the Hungarian Republic started his career as a public prosecutor, then became a civil rights lawyer, and attorney at law in environmental cases, before being elected ombudsman. The environmental ombudsman's role in a criminal procedure, of course, differs from that of the public prosecutor. The institution of the green ombudsman is primarily a civil institution created to protect the citizens' rights through civil and public measures. The environmental ombudsman does not compete with the relevant civil organizations, but is furnished with the appropriate tools of law.

The protection of the environment for the future generations is in the interest of all individuals and the people as a whole. It is never sufficient to make use of solely private law tools, or to invoke exclusively public law regulations: both are needed simultaneously. The public prosecutor and the environmental ombudsman are important actors on the stage of environment protection, but the whole of Hungarian society is invited to protect the environment by all possible means afforded by the law.

To a certain extent, the legislators were led by factors of social ecology when creating the legal framework of the in-

stitution of environmental ombudsman as the *people's friend*.

## INDIVIDUALS IN THE PROTECTION OF THE ENVIRONMENT AND OTHER PUBLIC VALUES

Francis Bacon wrote that the sagaciousness of the nature always circumvents the human senses, so it is important to take into consideration the deficiency of the human brain (Bacon 2001, pp. 56-57). It is still easy to agree with the Baconian conception of natural law, but it should be extended to cover the field of positive law too. The humble humanism of the Baconian philosophy, though conceived in the first half of the 17<sup>th</sup> century, remains an example to be followed in the 21<sup>st</sup> century, accepting the greatness and significance of the surrounding environment. It also means the acceptance of mankind's realistic place within the natural environment that comprises the sociosphere, i.e. the human microworld. The role of the individual is emphasized by the individualist functioning of social relationships.

In addition to all institutions mentioned above, an individual can also do much as a protector of public interests. Any inhabitant, either domestic or foreign, may request a criminal procedure, or may draw the attention of the public authorities to neuralgic points in the field of environment protection. An individual further has the right to do something on behalf of the natural or the civilizational environment at his or her own expenses, i. e. devote any possession for protection of the environment. Such actions must be based on personal and uninfluenced decisions, though the benefit for the common weal may be highlighted by means of publicity, attention being called to such substantial values as protection of the biosphere and preservation of the natural resources for the generations to come.

The future of our environment, including mankind itself, is vested in those who are sufficiently brave (though not in the Huxleyan meaning of the word) to attempt to create a better future and to preserve the Earth. The existence of the Earth may be merely a passing moment in cosmic time, but this moment must be extended for our descendants. Inheriting chattels and real estate is nothing as compared to inheriting a healthy environment, rich natural resources, and a political vocabulary filled with environmentalist congruence and the compatibility of green ideas. Green thinking is quite simply an act of civilization.

In *The Spirit of the Laws* in 1748, Montesquieu expressed his opinion that as soon as people start to live in a society, they stop feeling weak. There is no longer equality among them, and war is commenced. Each and every society feels its own power, and this results in battles between the nations. Each individual begins to feel his own power and strives to obtain the most possible profit from the social existence, which likewise leads to war among them. The laws are produced thanks to these two kinds of wars (Montesquieu 2000, pp. 51-52).

## SUMMARY

The *actio popularis*, an internationally accepted legal institution, is a characteristic feature (but not an absolute criterion) of a properly functioning society.

It may differ from country to country, but its background philosophy is that certain people act on behalf of their compatriots. Dating from historical times, this legal device is still undergoing development, with the constant incorporation of new aspects. The development of law results in the development of environmental law, and the developments in environmental law generate the need for more developed tools of law. The *actio popularis* included in the new Hungarian Civil Code comes into effect on May 1, 2010. This will be the second step, following codification of the environmental *actiones populares* in the 1990s. The Civil Code is of especial importance as regards this legal possibility. What started at the level of simple acts of the Parliament will now occupy its place in a higher law product. We still await constitutionalization of this instrument in Hungary.

The essence is to find practical and pragmatical legal solutions to the burning problems of renewable energy, environment-consciousness, maintenance of the quality of the waters, soil, and air, the preservation of Nature and the attempts to make improvements in the field of environment and nature protection.

The fundamental expression of this legal device is the collectivization of the rights of individuals to a healthy environment. Morally, it is not the result, but rather the will to create that is to be considered. In law, the results are preferred. The application of this instrument has been a success story in Hungary, as elsewhere, and similar institutions should perhaps be introduced into all legal systems.

The right of individuals to protect the environmental rights of communities and the collectivization of the environmental rights of individuals are the two sides of the same medal. This success story must be continued. The granting of such democratic rights does not weaken the collective power of the people as a whole. The old dilemma of individualism and/or collectivism appears to be dissolved by the bravery of individuals who disregard outdated notions and introduce a new mode of environment-conscious thinking into the present social system. The possibility of bringing an *actio popularis* before a court should be the right of all, through individualization of the right of civil organizations and raising everyday people to the level of public protectors of environmental rights.

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