

THESES OF A DOCTORAL DISSERTATION

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PRIVATE ENFORCEMENT OF ENVIRONMENTAL INTERESTS

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I. Brief summary of the proposed research project

1. Choice of topic

The most recent civil law literature – particularly when compared to the works of the 1970s and 1980s – devotes strikingly little attention to environmental issues: it largely leaves their examination and analysis to scholars of international and administrative law. This reluctance is hardly surprising, and certainly not accidental, given that the task of preventing the further squandering of environmental resources, managing emerging risks and restoring the disrupted ecological balance now falls, which today effectively encompasses the whole of humanity – as Attila József puts it, ‘the community that lives as the male counterpart of this drunken, deceitful Mother Nature’ – typically expects these actions from the state and international cooperation. Moreover, the relationship between environmental protection and civil rights is fundamentally defined by three types of tension.

The first and broadest tension lies between environmental and economic interests: whilst the capitalist market economy is built on constant and continuous growth,¹ this cannot be achieved without the increasingly disastrous plundering and transformation of the natural environment and the biosphere. It is clear that, whilst leaving the boundary conditions untouched, civil law can do very little, *ceteris paribus*, to resolve this tension. The second tension stems from the traditional allocation of roles among the legal instruments available to curb the ecological crisis, which is closely linked to civil lawyers’ moderate interest in the subject and to societal expectations. According to the generally accepted view in public policy and law, the protection of the environment is primarily: a task for the state; and, as László Sólyom noted in his seminal work, which remains authoritative to this day, civil law can play at most a secondary role here.² This role appears to be further reinforced by a third tension that complicates the scope of civil law in environmental protection. Namely, the state’s growing involvement in environmental protection – just as in other areas of social coexistence – has been necessitated, since the late 1960s, precisely by the gradual erosion and inadequacy of civil law mechanisms for enforcing claims.

Today, however, it is clear that humanity, now on a global scale, not only influences environmental processes but, through its activities, has become their primary shaper compared to other geological factors, exerting a decisive influence on the Earth’s major systems. Almost forty years after the Meadows couple presented their famous report on the limits to growth,³ Johan Rockström and his colleagues published widely acclaimed studies focusing directly on the planet’s limits.⁴ In these, they identified eleven Earth systems whose stable, secure functioning is a fundamental prerequisite for the current forms of human coexistence. For each

¹ Immanuel WALLERSTEIN: *An Introduction to World-System Theory*. Budapest, L’Harmattan, 2010. p. 54.

² László SÓLYOM: *Environmental Protection and Civil Law*. Budapest, Akadémiai, 1980. p. 7.

³ Donella MEADOWS – Dennis MEADOWS – Jorgen RANDERS – William BEHRENS III: *The Limits to Growth: A Report to the Club of Rome’s Project on the Predicament of Mankind*. New York, Universe Books, 1972.

⁴ Johann ROCKSTRÖM et al: Planetary Boundaries: Exploring the Safe Operating Space for Humanity. 15 *Ecology and Society* (2009); Will STEFFEN – Katherine RICHARDSON – Johann ROCKSTRÖM et al: Planetary Boundaries: Guiding Human Development on a Changing Planet. 347 *Science* (2015) 736.; Linn PERSSON, Bethanie M CARNEY ALMROTH, Christopher D COLLINS et al: ‘Outside the Safe Operating Space of the Planetary Boundary for Novel Entities’. 56 *Environmental Science & Technology* (2022) 1510.

system, they also quantified the thresholds beyond which the system in question first becomes unpredictable and then poses an existential risk. Of the eleven systems examined by the authors, at least four have, as things stand, already crossed a tipping point and have thus entered the high-risk zone. The symptoms of the global ecological crisis are manifold: a dramatic decline in biodiversity, the accumulation of waste and synthetic compounds, soil erosion, the depletion of freshwater supplies and raw material resources, etc.,⁵ On top of all this comes global climate change, which, despite being merely part of the overall process, is perhaps the threat of which the public is most aware due to its tangible effects and media coverage, viewing it as a ‘super-villain problem’⁶.

The scale of the crisis is unprecedented, and there is much to be done; consequently, even civil lawyers can no longer avoid addressing and examining environmental issues.

2. The issues examined

As Judit Pump also points out in her work evaluating our Civil Code from the perspective of an environmental lawyer,⁷ the relationship between environmental protection and civil law can be examined from at least two angles. On the one hand, how civil law can play a role in achieving environmental objectives and in expressing and protecting ecological interests. Following David Howarth, this approach can also be termed ‘civil law as environmental protection’.⁸ On the other hand, there is the question of how environmental considerations can be integrated into the application of civil law norms in line with fundamental environmental law objectives. Following Howarth once again, this approach could be termed ‘environmental protection in civil law’. Alongside these two approaches, however, a third is also conceivable: this focuses on the major themes of civil law: the binding force of contracts, the conditions for compensation and restitution, the horizontal scope of human rights, etc., as well as the changes that the ecological crisis brings about in the interpretation and continued existence of these themes.

In my thesis, I followed the line of inquiry first identified by Judit Pump and, in Howarth’s terms, described as ‘civil law as environmental protection’. Very briefly, therefore, I examined how civil law can be placed at the service of environmental protection.

As a first step, I had to find an answer to the question of why traditional legal and public policy thinking marginalises civil law within the legal toolkit of environmental protection, and whether, under current circumstances, this view provides an accurate picture at all of the role played by state intervention and civil law in the fulfilment of environmental protection tasks. In assessing this question, it was impossible to ignore the structural, adaptive and regulatory methodological characteristics of both legal regimes.

⁵ András TAKÁCS-SÁNTA: *The Comedy of Common Pastures – Rediscovering Communities as a Way Out of the Ecological Crisis*. Budapest, L’Harmattan, 2017. p. 14.

⁶ Fruzsina BÖGÖS: *The Sword of Damocles, or the Administrative Law Implications of Climate Protection Litigation*. Budapest, ORAC, 2025. p. 44.

⁷ Judit PUMP: *The Civil Code through the eyes of an environmental lawyer*. Budapest, Pázmány Press, 2019. p. 14.

⁸ David HOWARTH: Environmental Law and Private Law. In: Emma Lees – Jorge E. Viñuales (eds): *The Oxford Handbook of Comparative Environmental Law*. Oxford, Oxford Academic, 2019. p. 1096.

It was only then that it became possible to identify those civil law instruments which, when used creatively, purposefully and, not least, courageously, may be suitable for enforcing ecological interests. At the same time, exploring the internal interrelationships between these tools highlighted the difficulties involved in applying them in this way, as well as the contradictions inherent in them. It was also necessary to attempt, at least to some extent, to identify and resolve these issues.

Since an examination of the relationship between environmental protection and civil law cannot dispense with an external focus alongside the internal one, the second half of this thesis also had to address the question of what consequences arise from the use of civil law instruments for environmental protection purposes; that is, when environmental protection efforts are enforced by the courts rather than by the government or the public administration. This is particularly the case where the defendant in an environmental claim is a private individual who is either significant to public policy or who, by virtue of their economic clout, exerts a decisive influence on the life of the community or society in question, or where the defendant in proceedings brought under civil law with the intention of enforcing environmental interests is the state itself: the government or the legislature.

II. Brief description of the research and analyses carried out, and the methods of analysis

1. Structure of the thesis

Apart from the introduction and the concluding, summarising sections, the thesis is divided into three main structural units.

In the first section – Chapter II – I examine the interrelationships between the ecological crisis, state intervention and civil law. In doing so, I analyse the role of state intervention in the organisation of civil society and the economy. This issue can also be understood as a possible interpretation of the distinction between public and private law; however, I do not wish to delve into this dilemma myself. Instead, I draw attention to the functional differences between state and market coordination, with a view to understanding why environmental protection is primarily a state responsibility. I discuss the reasons for this in detail in this chapter, as well as the shortcomings of civil law, which is why traditional thinking assigns it, at most, a supplementary role in environmental protection. I then examine whether the state actually meets the social expectations placed upon it in the field of environmental protection. As I conclude: no, and therefore, according to the chapter's conclusion, the importance of enforcing environmental interests through civil law is heightened.

In the second section – which, according to the numbering, is Chapter III – I present the internal aspects of the application of civil law for environmental protection purposes: namely, those civil law instruments that may be suitable for achieving environmental protection objectives and expressing ecological interests. These include the instruments in civil law that ensure the protection of legal persons and legal objects: personality rights and the remedies available in the event of their infringement; the legal institutions enabling an owner to prevent unauthorised interference affecting them; and liability for damages. In this chapter, I discuss in detail the

interactions between the legal bases and legal consequences arising from these institutions, as well as the structural, doctrinal and economic difficulties associated with their application to environmental protection objectives. In the concluding section of the chapter, I propose measures to strengthen the preventive effect of civil law so that it may serve environmental protection objectives with sufficient persuasive force.

In the third section – Chapter IV – I examine the role of the courts in environmental protection, the criticisms levelled against this role, and possible rebuttals to these criticisms. In this chapter, I focus primarily on two sets of questions in this context: whether the courts implement or shape environmental policy, or whether they run counter to or override it. I illustrate the contradictions that arise using two recent high-profile cases: *Milieudefensie v. Royal Dutch Shell* and *Urgenda Foundation v. State of the Netherlands*. As I explain, the emergence of these contradictions suggests that there is a genuine demand within society for action against the ecological crisis; having observed the shortcomings of state policy, people are seeking to have this demand upheld through the courts. This aspect of the enforcement of environmental interests under civil law adds nuance to, and presents in a far more dynamic light, our traditional conception of the separation of powers; in my view, this is not a problem in itself, as it serves as a signal to the actors within the political subsystem.

2. Methodological issues

Given the choice of topic, this thesis is characterised by methodological diversity. As Professor Attila Harmathy emphasised, and as I learnt from my supervisor, Professor Attila Menyhárd, law does not stand alone; it is not a value in itself;⁹ therefore, when examining legal phenomena, one must always take into account the social and economic factors and changes that ‘determine’ – to refer once again to Attila József – the ‘split log’ of the abstract world of law. For my part, in presenting my research findings, I have endeavoured to bear this in mind throughout, as I believe that, without it, legal practice would be no more than Hermann Hesse’s famous glass bead game. Thus, in this thesis, alongside the methods of classical civil law analysis—which also incorporate perspectives from legal history and comparative law—I have also included elements of law and economics, economic history and legal philosophy.

III. A brief summary of the research findings, their application and potential applications

1. Environmental protection as a state responsibility, with civil law playing a secondary role

The traditional division of roles among legal instruments in environmental protection is now little more than a simple convention; nevertheless, an internal examination of civil law instruments suitable for environmental protection purposes usually starts from this pre-established baseline. Precisely to ensure that the fundamental questions are not left unaddressed, it was therefore essential to clarify, first and foremost, the economic, political and structural

⁹ Attila MENYHÁRD: Does Society Need Lawyers? In: Emőd VERESS (ed.): *Ad salutem civium inventas esse leges: A Festschrift in Honour of Lajos Vékás on his 80th Birthday*. Cluj-Napoca, Forum Iuris, 2019. p. 71.

characteristics that necessitate – or should necessitate – the state taking the lead in tackling the ecological crisis. In doing so, I arrived at the following conclusions.

The traditional division of substantive law on the continent into public law and private law, which has existed since the emergence of the modern state, effectively means that a given social action is either coordinated by the state through top-down regulation issued as a sovereign command, or by market mechanisms, the legal framework for which is provided by civil law developed from the bottom up through the courts, centred on private property, freedom of contract and liability for damages. Depending on the social objectives to be achieved or needs to be met, one form of coordination may be more suitable than the other. Moreover, for a number of reasons, tackling environmental problems is a typical area for state coordination.

According to classical mainstream economics, these problems stem from market failures, which the state can effectively intervene to correct. In this approach, environmental pollution is an externality which the state can pass on to the polluter through environmental policy instruments such as taxes, levies or by making the use of the environment more expensive. Similarly, by regulating ownership or defining the rules of use, the state can also eliminate market failures associated with public goods. All this is closely linked to the state's role, attributed to it since antiquity, of upholding the public interest. To put it somewhat crudely, environmental protection is a public matter and a matter of public interest, which the state must thus ensure is upheld by restricting private interests. The modern state derives its mandate to do so from political competition.

According to another approach, environmental problems require state intervention due to their polycentric nature. Polycentric problems cannot be solved by taking a single factor into account, as they themselves consist of sub-problems that form a complex system, and any decision affecting one sub-problem will inevitably have an impact on the others.¹⁰ When addressing polycentric environmental problems, it is therefore necessary to keep the bigger picture in mind and take into account all its possible implications and consequences; this can only be achieved through state coordination of an administrative nature and approach.

As I have pointed out in connection with the tensions that shape the relationship between environmental protection and civil law, amidst the social and economic conditions of the second half of the 20th century – which, as is commonly said, and indeed rather tritely, became increasingly complex – mass production, mass contracting and the boom in consumption, the mechanism of civil law enforcement—based on compensating the aggrieved party—became increasingly incapable of satisfactorily resolving the emerging conflicts and meeting the demands that arose.¹¹ This shortcoming, in turn, dramatically heightened the importance of state intervention.

In comparison, attempting to shift the burden of externalities back onto their cause using the individual tools of civil law is indeed a little like – to borrow a metaphor from the English

¹⁰ Michael POLANYI: **The Logic of Liberty**. Chicago, The University of Chicago Press, 1980. (Midway Reprint) pp. 171–172.

¹¹ Cass R. SUNSTEIN: The Limits of Compensatory Justice. In John W. Chapman: *Compensatory Justice. Nomos XXXIII, Yearbook of the American Society for Political and Legal Philosophy*. New York, New York University Press, 1991. pp. 281–282.

science fiction writer Douglas Adams – someone ‘trying to barbecue a piece of meat by inviting people into the room one by one and having them breathe on it’.¹² As Professor Lajos Vékás points out: “[...] the effectiveness of private law in the areas of achieving social justice and protecting the public interest is very limited. When other spheres of society (above all, the mechanisms that curb moral conduct) are completely weakened, and the branches of the legal system intended for this purpose [...] fail, the instruments of private law cannot be applied effectively.”¹³ Moreover, as I have mentioned, civil law is constructed from the bottom up within the courts, which are, by their very nature, only capable of allocating social costs effectively to a very limited extent,¹⁴ and consequently cannot adequately address polycentric problems either.

It would therefore follow that the prevailing public policy and legal thinking is correct in allocating roles in this way. At the same time, however, the question immediately arises as to why, in this case, rather than moving away from the problem, the ecological crisis afflicting the Earth is worsening year on year, and why representatives of the natural sciences are reporting on the planet’s increasingly alarming condition.

2. Because the state is failing

The traditional division of roles is based on the assumption that the state fulfils its environmental obligations. However, as the advanced stage of the ecological crisis demonstrates, this is far from the case; and given today’s social, economic and political circumstances, it is at the very least questionable whether this would even be possible.

Welfare economics assumes that, when tackling environmental problems – or indeed any problems arising in society or the economy – the state always resorts to the appropriate means.¹⁵ Although, for my part, I find it very difficult to identify with the strongly market-fundamentalist stance of the ‘model of government failure’¹⁶, the model itself can undoubtedly provide certain lessons. On a societal scale, a particular state or government measure can indeed give rise to unforeseen side-effects which, in certain cases, may entail social costs exceeding even those of market failures. For example, if the government decides to clear publicly owned forests, or if restrictions on environmental use, imposed through direct administrative intervention, encourage other forms of behaviour—which are also ecologically harmful—as a means of avoidance or substitution, this may even lead to the replacement of the government that enacted the environmental regulations. Therefore, just because market coordination is imperfect, it is not certain that regulation alone will create a perfect situation.

¹² Douglas ADAMS: *The Hitchhiker’s Guide to the Galaxy – A Final Hitchhike Through the Galaxy*. Budapest, GABO, 2002. Back cover.

¹³ Lajos VÉKÁS: The Challenges of Private Law – A Historical Retrospective and Assessment. *Magyar Jog*, 2023/7–8, p. 399.

¹⁴ Attila MENYHÁRD: Hungary. In Barbara C STEININGER (ed): *Landmark Cases on European Tort Law 2001–2025*. Austrian Academy of Sciences, Vienna, 2026. p. 187.

¹⁵ Harold DEMSETZ: ‘Information and Efficiency: Another Viewpoint’, 12 *The Journal of Law & Economics* (1969), p. 1.

¹⁶ Julien LE GRAND: The Theory of Governmental Failures. In CSABA Iván and István György TÓTH: *The Political Economy of the Welfare State*. Budapest, Osiris, 1999. pp. 146–164.

In public interest theories, the state appears as an impartial, objective and efficient actor, whose task – and indeed its very purpose – is to promote the public interest, and never particular individual interests; political processes, meanwhile, are about finding and selecting the alternative most favourable to the community. In these theories, politicians are not influenced by electoral prospects, and influential interest groups do not seek loopholes to circumvent state regulation.¹⁷ Economic theories of regulation, however, highlight that interest groups compete to influence government decision-making, with the aim of ensuring that decisions favour not the political community as a whole, but the group in question. The stakes in government decision-making and regulation thus become, rather than the representation of the public interest, the extent to which a given group can exert pressure on decision-makers, who, in turn, pursue their own self-interest just as much as the interest groups seeking to influence them: they use public authority for their own benefit and manage public assets in their own interests.

As I mentioned, the state derives its authority to restrict private interests as a result of political competition. At the same time, the actors in society's political subsystem think in terms of four-year electoral cycles; they are interested in maximising their vote share, and they can achieve this by formulating the most attractive proposal for voters regarding the 'modus vivendi'. Ecological proposals, on the other hand, are rarely of this nature, as they predominantly involve measures that adversely affect the standard of living to which members of society are accustomed. However, even if an environmental proposal were to appear on the supply side of political competition, it is precisely for this reason that it is unlikely the political group making the proposal would ultimately actually attain a decision-making position.¹⁸

The failure of public policy on environmental protection is a direct consequence of a lack of political will. The targets set out in the UN's international environmental agreements are not sufficiently ambitious, are vague, cannot be enforced, and in most cases barely go beyond the level of high-sounding declarations. When it comes to tackling the ecological crisis, the international community as a whole shows scarcely more agility than the Ents in **The Lord of the Rings**, who, on the brink of a war for their very survival, took two days of deliberation before finally determining that their protégés did not belong to the enemy's ranks. Moreover, in the 2020s, international law as a tool for coordination between states began a spectacular decline, meaning that the fulfilment of environmental commitments became entirely dependent on the political winds blowing in the participating states; in this regard, one need only refer to the turbulent relationship between the United States and the Paris Climate Agreement. Moreover, several key players in geopolitics routinely and deliberately disregard ecological considerations for ideological reasons. Environmental law thus largely remains confined to legislation; its enforceability is low, and environmental administration, where it exists, is fragmented and struggles with a lack of resources. These shortcomings, in turn, highlight the importance of individual action and civil law.

3. Civil law as a means of enforcing environmental interests

¹⁷ Robert BALDWIN – Martin CAVE – Martin LODGE: *Understanding Regulation – Theory, Strategy, and Practice*. Oxford, Oxford University Press, 2012 (2nd ed.). pp. 40–41.

¹⁸ Andrew DOBSON: *Strategies for Green Change*. In Gábor SCHEIRING and Bendek JÁVOR: *Oikos and Polis. A Collection of Texts on Green Political Philosophy*. Budapest, L'Harmattan, 2009. pp. 602–605.

The examples of competition law and consumer protection in the second half of the 20th century demonstrated that, in order to carry out certain tasks that would otherwise require state coordination, society does not necessarily have to rely exclusively on the state. Indeed, there has in fact always been a kind of division of labour between the state apparatus and members of society, since, for example, the state usually grants citizens the right to initiate criminal or administrative proceedings. Civil law, moreover, possesses certain characteristics which, despite its well-known shortcomings, may render it suitable for enforcing environmental interests.

In contrast to ‘command-and-control’ approaches by public authorities, individuals subject to civil law also have a personal interest in asserting their claims. In the context of environmental protection, this interest is not necessarily of a financial nature: it may also manifest itself in a personal commitment to the cause. Furthermore, with regard to the existence, nature and extent of their claims, individuals have more information at their disposal than the authorities, and this naturally encourages the effective assertion of those claims. Not only can they initiate state action, but they can also see it through to the end themselves; the outcome of any environmental claims thus does not depend solely on the workings of the bureaucracy, and the state consequently has to spend less on detecting damage and environmental offences. A further, and perhaps the most important, feature is that the enforcement of environmental interests through civil law does not require specific environmental legislation, the breach of which would otherwise be a prerequisite for asserting such claims. The fundamental institutions of civil law in themselves protect subjective rights, which, as I have mentioned, may also encompass ecological considerations, provided there is a sufficiently creative, purposeful and, not least, courageous intent and interpretation on the part of those applying the law.

Among the tools of civil law for enforcing environmental interests, the institutions protecting the owner against unauthorised interference affecting them, liability for damages, as well as personality rights and the legal remedies available in the event of their infringement, may be the most suitable. It is important to recognise that these instruments essentially constitute legal grounds, and entail corresponding legal consequences or remedies. Legal thinking sees their ecological potential primarily in the latter, although the most appropriate legal basis must be found in order to apply the legal consequences most consistent with environmental interests – this, just as before state intervention became the norm, may depend largely on the ingenuity of legal representatives.

The legal consequences may take two forms: a prohibition on conduct that infringes property rights or personal rights – and, in our case, is also harmful to the environment – or financial compensation for the personal or financial harm caused. These legal consequences may be arrived at on the basis of any legal ground, albeit – obviously – using a different line of argument. In the event of unnecessary disturbance, the owner may request that the disturber be prohibited from causing further disturbance, and numerous legal systems, including the Hungarian one, permit this within the framework of the protection of personal rights. However, financial compensation – whether in the form of damages or compensation for non-pecuniary loss – may also be claimed on the basis of these same legal grounds, provided that the infringement of the owner’s rights or personal rights has resulted in damage, or if the party

whose personal rights have been infringed claims financial compensation as a result. It has very little practical significance, if any, but in the event of a threat of damage, an injunction may also be obtained as a preventive measure within the framework of liability for damages. As the results of the legal-economic analysis highlight, the courts are increasingly applying legal consequences by taking economic considerations into account, and the end result is thus usually an order to pay damages.

However, the use of these legal grounds and legal consequences for environmental protection purposes is hampered by certain structural and functional characteristics. A prerequisite for bringing a claim is, in all cases, an interest as an owner or an injured party, and this significantly narrows the ecological scope of the civil law instruments in question. Whilst a breach of personal rights may be invoked as a legal basis with a view to broadening the right to bring an action, taking this too far could easily render the content of personal rights elusive, even in legal systems where their protection is not guaranteed by a general clause. The category of environmental damage is also difficult to interpret in the context of civil law, since, in addition to being environmental, the damage must necessarily occur to a person's property in order for a claim to be valid. Beyond issues of causation, the establishment of damage and other legal technicalities, one of the most serious difficulties in enforcing environmental interests through civil law is that civil law instruments, and in particular liability for damages—which is regarded as their flagship—have a relatively weak preventive effect with regard to polluting activities.

4. Levels of strengthening the preventive effect for the protection of the environment

The results achieved or achievable through the application of civil law instruments to enforce environmental interests must, firstly, be consistent with the environmental interests themselves and, secondly, with the fundamental objectives of environmental policy and the principles of environmental law. These include, first and foremost, the principle of prevention, followed by the 'polluter pays' principle and the precautionary principle. The emphasis among these is clearly on prevention. Compensating or providing redress to those who have suffered harm or whose personal rights have been infringed is, in itself, a legitimate legal policy objective; however, it does not serve the protection of ecological interests. To do so, we would have to accept that the environmental capital lost as a result of environmental destruction or pollution can be replaced at any time by economic capital, or in other words, that the exchange value of environmental and economic capital is perfectly equivalent.¹⁹ This is certainly not the case; otherwise, environmental problems would not arise in the first place. Therefore, for civil law to genuinely promote the protection of environmental interests, we must first strengthen its preventive effect, which legal thinking typically associates with liability for damages.

The aim of the preventive function of liability for damages is to prevent further harm by holding out the prospect of the obligation to compensate for damage caused as a legal sanction; in other words, to encourage legal persons to avoid causing harm and to deter them from doing so. By establishing liability for a specific instance of harm, the court sends a message to members of

¹⁹ Carl C. MCDANIEL and John M. GOWDY: *The Selling of the Garden of Eden. A Parable of the Destruction of Nature*. Budapest, Typotex, 2002. Chapter 7 (available online) <http://humanokologia.tatk.elte.hu/wp-content/uploads/Carl-N-McDaniel-John-M-Gowdy-Az-edenkert-kiarusitasa.pdf?fbclid=IwAR2sV8itPrmTuq0t6Wmj1umC1V-GRaIxpSuR5p0cArbuXyyFhjmkkgFCdKeY>

society and economic operators, who can thereby ascertain the social assessment of their conduct, and can draw conclusions as to the legal consequences they must expect should they engage in conduct that fails to meet this standard.²⁰ However, as Attila Menyhárd points out, ‘liability for damages is nothing more than a calculable cost factor in modern economic decision-making. [...] If the risk of liability for causing damage is cheaper than avoiding such damage, then from the organisation’s perspective, opting to cause damage and choosing the greater profit that this brings is rational behaviour.’²¹

However, this does not mean that the preventive effect of either liability for damages or, more generally, other civil law instruments cannot be enhanced. In my view, this would not even entail forcing civil law into the Procrustean bed of environmental problems, thereby distorting its very nature. There are various possible degrees to which the preventive effect can be strengthened, ranging from approaches that are fully compatible with traditional schools of legal thought to those that might currently appear extreme from that perspective.

The first and most obvious step would be a shift towards disqualification rather than compensation. As I have outlined above, there are several legal bases available for this. To realise their potential, however – as I have mentioned – legal representatives and the courts would need to play a creative, purposeful and, not least, courageous role, and a method of calculation would need to be developed that takes into account the long-term, ecological costs associated with disqualification. The focus of judicial decision-making would thus shift from resolving individual legal disputes to balancing social interests and resolving conflicts, for which the courts possess the necessary flexibility.

The next stage in strengthening the preventive effect is the imposition of liability in excess of the damage, that is, the decoupling of the amount of financial compensation payable by the party causing the damage or the party suffering the damage, in the event of damage occurring, from the actual extent of the damage caused or incurred. This can be achieved through punitive damages, a calculation of damages based on unjust enrichment, or unjust enrichment without legal basis. Whilst punitive damages are entirely alien to continental legal thinking, the other two could be seamlessly integrated into the existing doctrinal and institutional frameworks with a slight shift in perspective. This could even be achieved by stipulating that an order to pay damages in excess of the actual loss would only be available in the context of claims brought for environmental protection purposes.

The third tier could be the environmental ‘popularis actio’ (²²), under which, in the event of environmental damage or the existence of a risk of such damage, anyone – that is, *absolutely anyone* – could turn to the courts for legal protection in order to enforce ecological claims. In other words, such a ‘popularis actio’ would definitively sever the right to bring a claim from individual interest. At the level of regulatory technique, in my view, this solution differs only

²⁰ Attila MENYHÁRD: Compensation, prevention and unjust enrichment. In Zoltán CSEHI – András KOLTAY – Balázs LANDI – Anett POGÁCSÁS: (L)ex Cathedra et Praxis: Festschrift in honour of Tamás Lábady’s 70th birthday. Budapest, Pázmány Press, 2014. p. 188.

²¹ Ibid.

²² László SÓLYOM: The theoretical possibility of a popular action for environmental protection in our civil law. *Journal of Legal Science*, 1978/11; György TARR: A popular action proposed for introduction in the enforcement of environmental claims. *Journal of Legal Science*, 1988/10.

in nuances from the concept of ‘rights of nature’ – which is, however, culturally very difficult to accept in Western countries – the essence of which is that the state confers legal personality on certain elements of the natural environment, thereby converting ecological interests into civil law interests, and thereby make them defensible even against the state.²³ The tools for harnessing the preventive effect of civil law and liability for damages are therefore available, and trends over the past decade show that these tools are increasingly being accompanied by a genuine commitment.

5. The role of the courts in environmental protection

Civil law is judge-made law, even in those countries which have a civil code comprehensively regulating the property and personal relationships of individuals. The content of its norms, which are formulated at a high level of abstraction, is determined by the courts through legal interpretation, which, in this sense, is difficult to distinguish from law-making.²⁴ In connection with the enforcement of environmental interests under civil law, it is therefore necessary to examine the role played by the courts in this regard, which is, in effect, the external aspect of the issue. As László Fodor emphasises, for the right to the environment to be upheld, ‘it is also necessary for every branch of government, including the judiciary, to fulfil its respective role.’ Owing to the institutional characteristics of civil law, the enforcement of claims for environmental protection opens the way for the courts precisely in this direction.

However, the courts’ involvement in environmental protection may give rise to contradictions. For if a court delivers a judgement in a civil action brought for environmental protection purposes, it either (i) implements environmental policy objectives or formulates environmental policy, or (ii) it directly runs counter to other public policy objectives set by the government – in particular economic policy objectives – or, *horribile dictu*, even overrides them. In my view, the contradictions that arise really centre on two main categories of cases: where the defendant in proceedings brought under civil law is a private individual who is either significant to public policy or who, by virtue of their economic weight, exerts a decisive influence on the life of the community or society in question; or where the defendant is the state itself: the government, or the legislature. In this paper, I have cited the case of *Milieudefensie v. Royal Dutch Shell* as an example of the first category, and the case of *Urgenda Foundation v. State of the Netherlands* as an example of the second.

The contradictions are manifold, but the majority of them can be convincingly refuted. One criticism levelled at judicial intervention is that citizens and economic actors expect the government and the public administration to formulate and implement environmental policy, whilst the activities of the courts fall outside the scope of top-down state coordination. Furthermore, the latter possess the specialist knowledge and apparatus that enable them to address polycentric problems. However, in light of the arguments set out in section III/2 of this thesis, it does not appear that environmental policy or public administration is functioning particularly well; the courts, on the other hand, must rule on the claims brought before them. Nor is it readily apparent why the adjudication of an environmental issue would require more

²³ Atila MENYHÁRD: On Public Law and Private Law. In: Balázs BODZÁSI (ed.): *Papers of the Hungarian Lawyers' Association – Public Law and Private Law*. Budapest, Hungarian Lawyers' Association, 2025, p. 267.

²⁴ MENYHÁRD, op. cit. (note 9), pp. 69–70.

specialised expertise than that of a case of medical malpractice. A further criticism is that, as judges are not elected, the courts' democratic mandate is not strong enough to enable them to make decisions affecting even the broader sections of society; furthermore, by making such decisions, they assume a political role. It is unclear, however, who selects the officials within the public administration who impose environmental fines. These objections are likely linked to the erosion of the rule of law paradigm observed in recent years, and to the fact that the issue of environmental protection is politically highly divisive.

However, suing the state – acting in its capacity as a public authority and legislator – on civil law grounds – as first occurred in the Urgenda case – raises genuine contradictions. It is now clear that, acting in its capacity as an owner or as a contracting party, the state participates in the economy as a subject of civil law, whilst in such cases it leaves its powers of public authority outside the scope of civil law relationships.²⁵ It is also clear that the state is liable for damage caused in the exercise of certain public powers (see, for example, Sections 5:548–549 of the Civil Code). However, there is no relationship between the public-law state and the subjects of civil law that would provide the latter with a legal basis for asserting civil-law claims against the former.²⁶ Consequently, as long as the legal personality of the sovereign, public-law state under civil law remains unclarified at the level of specific legislation, the enforcement of civil law claims against the state in this capacity cannot be satisfactorily resolved. Furthermore, the handing down of a judgment binding on another branch of government on civil law grounds would not be compatible with traditional views on the separation of powers.

These contradictions undoubtedly need to be addressed in some form; however, I believe that their existence alone cannot serve as an argument against either the enforcement of environmental interests through civil law or the courts' involvement in environmental protection. In fact, these contradictions indicate that there is a demand within society for action against the ecological crisis; however, because – whether due to shortcomings in government and administrative functioning or a lack of political will – people are bound to be disappointed in their expectations of the state, they turn to the courts for legal protection. This may even serve as a message to the legislature and the government; and if the outcomes of judicial action are not in line with their public policy objectives, they will be able to adjust those objectives accordingly.

IV. List of publications on the subject of this work

Soma Török-Tóth: The protection of ecological interests under civil law – environmental policy and compensation. Civil Law, 2025/7–8.

Soma Török-Tóth: Private Law and the Baselines of Ecological Thinking: Another Legal Means of Protecting the Environment. In **Bonus intra melior exi**. Budapest, MCC Press, 2024.

²⁵ László KECSKÉS: *Can the State Be Sued? Immunity and Liability for Damages*. Budapest, Administrative and Legal Publishing House, 1988. p. 26.

²⁶ Attila MENYHÁRD: Can the legislator be held liable under civil law? In: Beatrix BORBÁS (ed.): *Manifestations of immunity in the context of public authority liability*. Budapest, Dialóg Campus, 2018. p. 35.