
POPULAR ACTIONS AND THE DEFENSE OF THE ENVIRONMENT IN COLOMBIA

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SUMMARY

Four years ago in Colombia the defense of the environment was carried out through administrative procedures by specialized national or local entities. On rare occasions, Judges have dealt with matters of this nature, in spite of the fact that a number of years ago the Criminal Code established that contamination was a criminal matter, Civil Judges have not tried many of these actions. Some actions involving tort liabilities have been raised between private individuals have been known., which have resulted in condemnatory decisions pronounced by the Supreme Court of Justice, following the principles of the traditional concept of liability.

Environmental damage and protection have been a matter exclusively dealt with between environmental policing entities and the contaminators. The community and private persons have been absent from the conflict. The environmental policing authorities have also been reluctant to permit the community and individuals to participate in administrative actions. The Ministry of Health, which is the most powerful environmental authority in Colombia, has gone so far as to refuse a small municipality its right to intervene in an action originated by the contamination of the municipal water supply. Likewise, it responded negatively to a claim by FUNDEPUBLICO to be recognized as a party in an administrative action initiated by a state company to obtain a provisional permit for an operation causing emission of pollutants, sources of air contamination. It even prevented the implementation Plan from being divulged, the development and presentation of which is required in order for Colombian law to grant the said provisional permit.

Such decisions issued in open violation of the general principles of the administrative process and legal provisions which govern the right to information are being questioned by FUNDEPUBLICO before the competent courts.

The absence of a civil society for the legal defense of the environment has led to a generalized failure to comply with the Natural Resources Code, and the repeated failure to observe the grace period which the law has long conceded for the contaminators to adhere to the environmental regulations.

The air contaminating companies and agents, obliged to prepare and develop implementation plan in a maximum of four years, have not, since 1982, taken the trouble to submit the said plans to the Government and much less to develop them and implement them. The biggest environmental accident which has occurred in Colombia on the occasion of the spill of a pesticide in the Bay of Cartagena resulted in the ridiculous fine of US\$ 1.000.

Government officials are not usually the most efficient in their task of enforcing laws of general interest. The public interest belongs to no one in particular, and therefore has no one to defend it. These officials are politicians, or depend on politicians, and only respond to concrete reasons and pressures. Their reactions to the media are obsequious, but only as long as the event is a new item.

The scarce effectiveness and the failure of the entities and officials of the Executive branch in the defense of common interests, such as the environment, is not an exclusively Colombian phenomenon.

As an alternative, the United States Congress responded to this situation with adoption of legal instruments, which can be used by any citizen to demand compliance with the environmental laws. The so-called *citizens actions* have been laid down in each of the environment laws made by Congress in recent years. What is wanted is that they should operate as an additional and simultaneous control to that exercised by the U.S. EPA. In the declaration of motives, it is stated that the intention of Congress is to act as a goad to the Government and as an alternative to its policing powers.

A similar alternative has appeared in Colombia, without its having been necessary to issue new laws, in the form of a book on this matter entitled POPULAR ACTIONS IN PRIVATE COLOMBIAN LAW.

The main purpose of this legal essay was that of rescuing from oblivion the classical procedural institution of people's actions laid down in the Civil Code which, in more advanced countries, is constituting the greatest of all time. They have proved themselves to be an effective means in the solving of many of the tensions and conflicts of industrialization and mastication: an element of unity and democratic participation in the process of the administration of justice.

1 THE CONCEPT OF POPULAR ACTIONS

POPULAR ACTIONS are the collective procedural remedies for public injury and damage. Though POPULAR ACTIONS, any person belonging to a group in the community is legally entitled to defend the group effected by certain facts or acts, by which he/she simultaneously protects his/her own interest, obtaining in certain cases the additional benefit of recompense which under some circumstances is provided for by law. This last element of recompense is the stimulus given by the law for the citizen to come forward in defense of the public interest.

2 BACKGROUND

The origin of these actions goes back to Roman Law. In Rome, a popular action constituted a generalized procedural figure. The citizen, who was nothing more than an integral element of the populous, defended the interests of the latter, and his own interests, through a popular action. For the Romans, the recompense was one of its essential aspects.

In legal systems different from the Anglo-American, the use of popular actions began to spread. In Spain they were expressly laid down in the Spanish Constitution of 1968, and have been especially developed in the field of urban order. It was also laid down in the Brazilian Constitution in the defense of public esthetic, economic and historic patrimony.

3 POPULAR ACTIONS IN COLOMBIA

Popular actions in Colombia are contained in the Civil Code, as well as in several of the Latin American Codes of Don Andrés Bello, who saved them from Roman Lawmaking an exception to the individualism which inspired it. They were completely ignored in Colombia for more than a century by jurisprudence, by legal scholars and by new legislative developments, and even by the most resourceful litigating attorneys.

The Civil Code institutes several popular actions in the course of its articles, but conceived two in the broadest of terms, with notable projections in the world of today: popular action in benefit of goods used by the public and popular actions for contingent injury.

Popular actions in benefit of goods used by the public are prescribed by the Civil Code in Article 1005 in the following terms:

"The municipality and any of its inhabitants shall have the same rights to use its roads, squares or other public places, and to pass along or through them in safety, as those enjoyed by the owners of states, properties or private buildings."

And always when as a consequence of an action of the people it should be necessary to demolish or repair a construction or to compensate for an injury suffered, the actor shall be recompensed, at the cost of the defendant, by a sum of not less than a tenth, nor more than a third part of what the demolition or repair or compensation for the injury cost; this is without prejudice to

the fact that, if pecuniary punishment of the infraction or negligence is imposed, one half of such payment shall be made to the actor.

The popular action for contingent damage is prescribed in Article 2359 as follows:

"As a general rule action is conceded in all cases of contingent damage which, as a result of any imprudent act or negligence on the part of some person constitutes a threat to unspecified persons; but if the damage threatens specific persons, only one of these may file the action."

4 POPULAR ACTIONS AND THE ENVIRONMENT

Both the action described in Article 1005 and that of Article 2359 are suitable for the legal defense and protection of the environment. Law 9 of 1989 (Urban Reform) expressly extended the scope of popular actions in benefit of goods used by the public to cover the environment, embracing the doctrinal interpretation which had been set out in the book popular ACTIONS IN PRIVATE COLOMBIAN LAW, clarifying any controversy which might have arisen in this respect.

Equally, the action for contingent damage is applicable to environmental damage. These acts generally produce effects which are not single or final; they occur continually and consistently, producing potential or eventual injury, although not to specific persons or groups of persons, but to anonymous and unspecified ones.

Following the issue of the Urban Reform, the popular action covered in Article 1005, which could be called IN BENEFIT OF GOODS USED BY PUBLIC AND THE ENVIRONMENT. The action under this Reform has greater scope than that of Article 2359. Its nature is not solely preventive, but also compensatory. The action for contingent injury is limited to prevention. The indemnatory and preventive character of the action under Article 1005 is indicated by the second paragraph of the provision: And always when as a consequence of an action of the people it should be necessary to demolish or repair a construction or to COMPENSATE for an injury suffered...." The scope of the reparation is clarified and reiterated in the reform of the civil procedures which came into force in Colombia last June, when a special procedure was established for the processing of popular actions in defense of natural resources and rural environmental elements. The indemnity is defined as collective and indicates State entities as receiver of it. "The Judge may impose on the defendant, in the decision... the compensation of damages caused to the COMMUNITY and all measures which are appropriate to prevent the damage or repair it" (Article 129 of Decree 2303 of 1989). Later it states: "In the that the decrees the payment of indemnities in accordance with the provisions of Articles 16 Law 23 of 1973, 1005 of the Civil Code, pertinent in this case to renewable natural resources used for public use, and Article 129 of this Decree, its value shall be given to the corresponding entity in accordance with the substantial norm..." (Article 131, *idem*).

Both the action under Article 1005 and that Article 2359 generate an indemnity in benefit of the actor, which for the Romans was a characteristic and essential element of a popular action. It is the element which moves the citizen to defend the public interest and to assume the character of civic prosecutor of the rights of the community. It makes possible the appearance of a new public interest attorney in conditions of equality with the attorney representing the private interest. The compensation of the action under Article 1005 is fully specified. It fluctuates between a tenth and part of the work the defendant must carry out or of the indemnity which the latter must pay. In the case of the indemnity of the action under Article 2359, the Code leaves it to the discretion of the Judge, indicating as a criterion: "The worth of the time and the diligence employed for that purpose..."

In legal practice these actions have been carried out in eleven suits filed by FUNDEPUBLICO, several of which are in defense of the environment, among which is the procedure against Dow Quimica for the spill of a considerable quantity of pesticide in the Bay of Cartagena; and that against Alcalis de Colombia, a state owned chemical company, for contamination of the waters of the River Bogota. None of these processes is complete, since they are relatively recent, of not more than 18

months. Four processes, however, were the object of an Agreement which is at present being satisfactorily implemented. In four years, popular actions have advanced rapidly in Colombia, not only as a means of environmental defense, but also of collective rights in general. They no longer belong to the dead file of Colombian law: the modern legislative developments have embraced them as an innovative and encouraging tool for the protection of the community; they have been consolidated as an alternative to the inefficiency of administrative actions and as an element of citizen participation in the solution to conflicts caused by environmental and public damage. The community and civil society organized outside state mechanisms are no longer silent witnesses in the solution to these conflicts, but have become live actors with the capacity to make themselves heard and respected. New possibilities have been opened up for nongovernmental organizations to intervene in the process of the solution to environmental problems. Judges have become the guardians who define collective rights, recovering the stature which correspond to them rights in society.

The institution of popular actions, as provided for in the Colombian Civil Code, transcends frontiers. Its source is in the Code of Don Andrés Bello, which Bolivar conceived as one of the unifying elements of Latin American nations. As in Colombia, they are included in the Civil Codes of Chile, Ecuador, El Salvador and Nicaragua, and written in identical language. Their extension into the aspect of environmental defense provides a singular opportunity for Latin American Law in its response to the universal Challenge presented by OUR COMMON FUTURE.