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CONTENTS

Editorial

Access to justice in environmental matters has been in the focus of *elni* since the very beginning of the network. Two articles of the *elni Review* 2017/2 address interesting country case reports in this respect:

First off, *Alexandra Aragão* and *Ana Celeste Carvalho* explain the Portuguese system of *actio popularis*: according to the authors the most favourable of all with regard to *locus standi* in environmental matters. They argue that the dichotomy between public and private environmental damage underlying the construction of the right of access to justice is not an accurate representation of the real life social relations concerning the environment. This is where the concept of diffuse interests, adopted in Portuguese constitutional law comes in.

Eva Maschietto then casts some light on the Italian access to justice perspective that appears to be peculiar for its historical and political context. Her article aims at sketching some of the instruments that the Italian legal system has rendered available to individuals, environmental organisations and public agencies representing citizens and residents. These instruments address some of the most important aspects of environmental matters, disputes and barriers that are still present in the system, along with some potential solutions for the way forward.

Next, the current *Review* provides two contributions linked to the issue of chemicals in products.

Alice Bernard's piece seeks to answer, "how EU law needs adjustments for the transition to an environmentally beneficial circular economy". She argues that the current EU legal framework, notably the chemicals regulation REACH, needs adjustments to ensure that recovered materials do not contain hazardous chemicals in concentrations that are no longer considered safe. The article also shows, with a case study, gaps in EU law regarding information on hazardous chemicals in material cycles. According to the author, these gaps are barriers for economic actors willing to switch from primary to secondary production.

Finally, in the *Recent Developments* section, *Katja Kontturi, Hannamaria Yliruusi* and *Martyn Futter* report on how municipalities can control hazardous substances via public procurement. In this respect, they present results from interviews conducted with public procurement representatives of Gdańsk, Kaunas, Pärnu, Riga, Šilalė, Turku, Västerås, and Stockholm as part of the EU InterReg Baltic Sea Region -funded project "Innovative management solutions for minimizing emissions of hazardous substances from urban areas in the Baltic Sea Region" (NonHazCity).

elni will further dive into the issue of chemicals in products in a 2018 event. More information is soon to be provided on www.elni.org.

We hope you enjoy reading.

Julian Schenten/Gerhard Roller

December 2017

Taking access to justice seriously: diffuse interests and actio popularis. Why not?

Alexandra Aragão and Ana Celeste Carvalho

1 Introduction

The European Union has played a major role in pushing forward the implementation of the first two pillars of the Aarhus Convention: access to information and public participation. It is the third pillar — the last desperate resort of environmental protection — that remains yet to be implemented.

Nevertheless, access to justice in environmental matters in the European Union and the Member States has been under the spotlight since the EU signed the Aarhus Convention in 1998. Five years later, in 2003, the EU adopted a proposal of a directive on access to justice in environmental matters[1], according to which the member states should grant their citizens a wide access to justice. In May 2014, under the Commission's own initiative, the draft directive was withdrawn[2] and the legislative process seemed to have lost momentum. Thereafter, there was great anticipation of how the EU was going to fulfil its mission of promoting the facilitation of access to the courts.

On the 28th of April, 2017, the long expected official EU position on access to justice in environmental matters was adopted: the Commission Communication no. 2616 is a 65 page-long document addressing issues like scope of judicial review, effective remedies, timeliness and… legal standing.

In fact, one of the hottest topics on access to justice is legal standing or, in other words, "the entitlement to bring a legal challenge to a court of law or other independent and impartial body in order to protect a right or interest of the claimant".[3]

According to the Commission, the definition of *locus standi* fulfils two missions at the same time:

a) granting protection to rights and interests;
b) ensuring accountability with respect to decisions, acts or omissions of public authorities.

The interpretation of legal standing in light of the principles established by the EU case law leads to a clear rule of thumb: a wide access to justice in environmental matters must be granted to the claimants. The words of the European Commission do not leave much room for interpretation. Quoting the European Court of Justice in the 'Brown Bears' case, the Commission declared that "it is inconceivable that the Art. 9 no. 3 of the Aarhus Convention be interpreted in such a way as to make it in practice impossible or excessively difficult to exercise the rights conferred by the EU law".[4] This is true even if the EU environmental law at stake does not contain specific provisions on access to justice.[5]

In the Communication, the Commission spends more than a dozen pages analysing the conditions of access to justice used in Member State practice, reaffirming three times that the Member States shall grant wide access to justice.

In this context, the purpose of this paper is to explain the Portuguese system of *actio popularis*, surely the most favourable of all with regard to *locus standi* in environmental matters.

The studies carried out by the Task Force of the Aarhus Convention on Access to Justice identified the main barriers on access to environmental justice.[6] In fact, the struggle to obtain a court decision that is timely and effective faces many obstacles: cost, delay, and producing evidence to demonstrate the significance of the damage or imminence of the threat, are just a few examples. But before arriving in court and confronting all the procedural difficulties, citizens and NGOs must strive to overcome the first obstacle of all: demonstrating their interest.

Demonstrating one's interest in defending everyone's environment is not just time and resource consuming. It can hinder access to justice, reducing to zero the last resort of environmental protection: the right to defend a balanced environment in a court of law. All across Europe, European citizens have to face profoundly different conditions on access to justice, some of which frustrate the right to a Judge and to a Court, undermining the very essence of the subjective right to environment.

In many jurisdictions throughout Europe, in order to be allowed to sue, citizens must demonstrate that they are (or are about to be) directly and personally affected as victims in a distinct way. They must prove that their life, health or property is in danger to have the right of access to Court. When there are a large number of victims suffering similar damage, they can appeal as a group (initiating legal proceedings through a class action). But when the contested action only causes damages to the environment itself and no one complains about it, or when the human victims are not

1 Brussels, 24.10.2003 COM (2003) 624 final 2003/0246 (COD) (http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52003PC0624&from=bg).
2 List of proposals withdrawn http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014XC0521(01)&from=EN.
3 Communication C(2017) 2616 final, done in Brussels, 28.4.2017, p. 18.
4 Case C 240/09 L2I, para. 49 (http://curia.europa.eu/juris/document/document.jsf?text=&docid=80235&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=58046).
5 *Supra* note 3, para. 95.
6 Available at http://www.unece.org/env/pp/tfaj/analytical_studies.html.

willing to go to court (when the individual damage is small, and the large collective damage is large), they must wait for the public entities to file a suit — provided that the case is considered of public interest — and hope for the best. In the case of damages caused by public projects, like public infrastructures, waiting for the public powers to prosecute their own project is simply not realistic.

Our argument in this article is that the dichotomy between public and private environmental damage underlying the construction of the right of access to justice is not an accurate representation of the real life social relations concerning the environment. This is where the concept of diffuse interests, adopted in Portuguese constitutional law comes in. As a consequence, *actio popularis* is the answer to the frustration. Portuguese law demonstrates that *actio popularis* is neither a jump in the dark nor a disruptive solution. *Actio popularis* has been present in Portuguese law uninterruptedly since the 80's and is being used with success to protect the environment through the Courts.

As will be shown later, *actio popularis* is not a type of action but rather the recognition that some damages are so diffuse that any person should have the right to request a judge to check the legality and the merit of the case. Diffuse interests are essential instruments to operationalize environmental justice and democracy[7] regarding access to justice. This legal construction is based on the legal recognition of trans-individual interests, a sub-category of interests situated above the individual interests and beyond public interest.

2 The social functions of diffuse interests

The doctrine of diffuse interests in environmental matters is a response to a request for social justice in access to law. Diffuse interests are a legal institution established for the protection of certain social, economic and cultural rights[8] that emerged almost 20 years ago, in Portugal. The legal reasoning behind the concept of diffuse interests is based on the social functions of the judicial procedural rules. Indeed, the Courts are an instrument of peace. Particularly in the case of the environment, social pacification is the major objective of any judicial procedure.[9]

Why is the concept of diffuse interests necessary as an instrument of peace?

Environmental interests are often held in practice by unorganized groups of citizens who are affected by environmental damage in many different ways but who lack cohesion and social power to protest. The willingness of those *weak majorities* for litigation decreases in the direct proportion of the economic benefits obtained with the action.[10] The low value of the environmental damage[11] suffered individually by each person discourages victims from going to court alone. Therefore, only citizens having a strong altruistic motivation will be prepared to face the *polluter* in court. This conflict puts the victim and the *polluter* face to face. This is a dramatic situation because the polluter is often seen as a symbol of economic power creating employment and promoting economic development.

In a restrictive system of access to justice, a model that does not recognize the right of citizens, as individual holders of the interests of the whole community, to bring actions before the courts on behalf of all the community, the economic asymmetry between the parties leads to deficiencies in the capacity of citizens to obtain compensation. The cost of the court's services, the lawyers' fees, the anachronistic rhetoric used during the trial, loss of working days, are just some examples of obstacles preventing ordinary citizens from going to court. For the counterpart, as holders of strong economic power, access to justice is a professionalized routine. The above-mentioned practical barriers are not an obstacle to them. They have legal advisors and are better prepared to put an end to the procedure through plea bargaining and claim settlement.

In theory, parties are equal. But in the real world offenders are better prepared to face justice because of their economic, informative, educational and technological superiority. In an elitist system of access to justice, judicial decisions do not sufficiently reflect either the arguments or the views of the victims.

3 The sui generis nature of the environment

Although the doctrine of diffuse interests can be applied to other social values, the environment is the diffuse interest *par excellence*. In Portugal, the concept of "environment" has a broader meaning, also covering other fields of law such as urban planning, spatial planning, urban architecture, the public domain, the natural heritage, the building heritage or landscape preservation.[12]

7 Alexandra Aragão, "Les intérêts diffus, instruments pour la justice et la démocratie environnementale" "*La représentation de la Nature devant le juge: Approches comparative et prospective",* Camproux-Duffrène, Marie Pierre and Sohnle, Jochen (dir.), Vertigo, la Revue Électronique en Sciences de l'Environnement, 2015 (https://vertigo.revues.org/16284).

8 Odette Domingues, "Intérêt collectif et action en justice en matière d'environnement. Analyse Comparée France-Portugal", *Textos Ambiente e Consumo* Vol. III, Centro de Estudos judiciários, Lisboa, 1996, p. 302.

9 António Carlos de Araújo Cintra, Ada Pellegrini Grinover e Cândido R. Dinamarco, *Teoria Geral do Processo*, Malheiros Editores, São Paulo, 1997, p. 41.

10 Miguel Teixeira de Sousa analyzes in detail the economic justifications for collective procedures such as *actio popularis* (*A Legitimidade Popular na Tutela dos Interesses Difusos*, Lex, Lisboa, 2003, p. 94 and ff.).

11 Exceptionally, there may be cases of intense and sudden damage, such as the one caused by an oil spill, for instance.

12 Portuguese Supreme Administrative Court, case no. 01362/12 of 28 January 2016.

The environment is a common heritage[13], a public good belonging equally to all citizens. It does not belong to any individual, association, or even any government.[14] Who owns the air we breathe? Who owns the natural wonders? Who owns biodiversity? Who owns the ecosystems? Environmental goods according to this doctrine belong collectively to all citizens, including future generations.

In what concerns use, the environment is an asset to be used in common by the whole community, a good allowing non-exclusive uses.[15]

On a global scale, offenses against this heritage affect all individuals, in the short and in the long term, including both present and future generations.

Moreover, considering that most environmental goods are not fungible, they are difficult to repair *in natura*.

This is why the interests in relation to goods having such characteristics, are not limited either in space or in time. They are called diffuse interests. The concept of diffuse interest arose from an inefficient legal representation of some essential interests[16] by the State. Joint representation of all the holders of an interest by one single judicial actor restores the lost equilibrium between the parties.

4 'Socialization' of interest

The recognition of the *sui generis* nature of the environment explains the transition from a legal *status quo* where there is more than private interests opposed to public interests. In the new legal *status quo* there is a third category of interests, the trans-individual interests.[17] The trans-individual interests are placed between the individual and the public interest. The following table presents more clearly the different categories and growing level of collectivization.

Interests			
Individual	Trans-individual		Public
	Collective	Diffuse	

Table 1: Categories and levels of collectivization

The category of trans-individual interests arises from a process of "*socialization of interests*".[18]

The category of trans-individual interests is subdivided into two sub-categories: the collective interests and the diffuse interests.

The fundamental difference between public interests and diffuse interests lies in the fact that public interests concern the State, the citizens and the law, while diffuse interests concern the nation, humankind, and justice.[19]

For an environmental damage to be labeled as a deterioration of public interests it must have an intensity, extension, or degree of seriousness that is by no means required for the diffuse interests. Besides, unlike the case of diffuse interests, formal rules of law must have been broken to trigger action by public authorities. Finally, the victims must be citizens or legally recognized organizations.

But the difference between public interests, collective interests and diffuse interests is also related to the right to act before a court.

The pursuit of the public interest belongs as a monopoly, to public bodies such as the government of the State, of autonomous regions or of local administrative entities. They represent the public interest in court.

On the other hand, collective interests are attributed to members of a non-casual group of people, linked by a permanent legal relationship.[20] Some examples are: trade union members, shareholders of a company, taxpayers of the same tax, insured persons having contracted the same insurance company, or students of a school. But they can also be well-defined groups or associations of persons having a corporate dimension. This is the case for civic associations, neighborhood associations, production cooperatives, trade unions, political parties or subscribers of collective contracts. In this case the group's interest is not the sum of the interest of the group. There is also a "*personal interest*" of the group itself.[21] The holders of collective interests are easy to identify, as there is either a link

13 Massimo Severo Gianninni, La tutela degli interessi colletivi nei procedimenti amministrativi", *Le azioni a tutela di interessi colletivi*, Padova, 1976, *apud* Odette Domingues, "Intérêt collectif et action en justice en matière d'environnement. Analyse Comparée France-Portugal", *Textos Ambiente e Consumo* Vol. III, Centro de Estudos Judiciários, Lisboa, 1996, p. 306.

14 Antonio Gidi, *Las acciones colectivas y la tutela de los derechos difusos, colectivos e individuales en Brasil. Un modelo para países de derecho civil*, Universidad Nacional Autónoma de México, México, 2004, p. 53.

15 The Brazilian Constitution of 1988 provides an exemplary example of this notion. It states in Art. 225 that, "*everyone has the right to an ecologically balanced environment, [which is] a common use good of the people and essential to a healthy quality of life, binding the public authorities and the community, which have a duty to defend and preserve it for present and future generations*".

16 Luis filipe Colaço Antunes, "Colocação Institucional, Tutela Jurisdicional dos Interesses Difusos e 'Acção popular de Massas'", *Textos Ambiente*, Centro de Estudos Judiciários, Lisboa, 1994, p. 93.

17 In this analysis the focus is put mostly in terms of the facts — the interest — rather than in ethical-normative terms — the right. There is, nevertheless, a direct correspondence between interests and rights and it is also possible to speak about 'diffuse rights'. For the distinction, see eg André Gervais, "Quelques réflexions à propos de la distinction des *droits* et des *interêts*", *Mélanges en l'honneur de Paul Roubier*, tome 1, Dalloz et Sirey, Paris, 1971, p. 242.

18 Eduardo Braga Bacal establishes the relationship between the massification of society and the increasing importance of diffuse interests (Acesso à Justiça e tutela dos interesses difusos, *Revista Eletrônica de Direito Processual*, Vol. V, January June 2010 p. 261 and ff.).

19 Rodolfo Camargo Mancuso, *Interesses difusos. Conceito e legitimação para agir*, Editora Revista dos Tribunais, São Paulo, 1997, p. 75.

20 Luis Filipe Colaço Antunes, "Reconstituição Histórica da Tutela dos Interesses Difusos", *O Sagrado e o Profano*, Homenagem a A. J. S. da Silva Dias, *Revista de História e Teoria das Ideias*, Faculdade de Letras, Coimbra, 1987.

21 Rodolfo Camargo Mancuso, *Interesses difusos. Conceito e legitimação para agir*, Editora Revista dos Tribunais, São Paulo, 1997, p. 46.

among them or a link between them and the other opposing party.

Finally, diffuse interests are interests without a defined holder, interests that are related to an extended group of people having some characteristics in common, united by a common interest or sharing a *de facto* communion in the enjoyment of the resource. Holders of diffuse interests are thus indeterminate and in most cases indeterminable. They are united only by factual circumstances and are not holders of a legal relationship: for example, people using the same park, living in the same region, bird watchers or people living in the same socio-economic conditions (for example, without family or house insurance, without running water or sewage, etc.). In diffuse interests there is no legal relationship among the individuals or between individuals and the other party who disturbs or damages the environment of the community. These are larger groups, even potentially all of humanity.

In practice, all these interests may be at stake simultaneously, as declared by the Portuguese Supreme Administrative Court[22]:

"I - By definition, the actio popularis *represents into an extension of the legal right of citizens to act before a court, regardless of their individual interest or of having a specific relationship with the goods or interests involved.*

II - The object of the actio popularis *is, above all, the defence of diffuse interests. The* actio popularis *mainly concerns the protection of diffuse interests that affect the whole community. The right of citizens* – uti cives *and not* uti singuli *– to promote, individually and corporately, the defense of such interests, must be recognized.*

III – A specific object may be the focus of an individual interest, i.e. a specific interest or subjective right of an individual, of a public interest or general interest, subjectivised as an interest of the State itself and other legal persons, or a diffuse interest which is the refraction in each person of community interests and collective interests, when what is at stake is a private interest that is common to certain groups and categories of persons".

Another Judgment of the Portuguese Supreme Administrative Court[23] confirms that "*[s]uch standing is conferred regardless of any specific injury to the applicant, his or her heritage, his or her name or dignity, or even the demonstration of direct and immediate benefits that derive from the invalidation of the administrative act […] or its suspension. Furthermore, if what is at issue are assets, interests or constitutionally protected values, the same standing is granted for the defense of 'diffuse interests'* 'supra *or meta-individual' interests that are not individually appropriated, of general unitary interests of the community 'globally and wholly considered' as regards the legal and regular performance by the Administrative functions*".

5 The complex conflicts emerging from environmental damage

Despite the undeniable human importance of the environment in many cases, most times there is no social consensus on whether or how to protect it. The social relationships that occur *via* the environment — in simple words, the relations established between the polluters and the polluted — are generally very confrontational. They are based on complex social relations[24], characterized by strong intrinsic *multipolar* conflicts[25], opposing both public, private, collective and diffuse interests. In such complex conflicts, there is no legal parameter to guide the decision maker on who is right or who is wrong. But these are mostly impersonal conflicts and the discussion is on values, ideas and ideologies[26], rather than on the *losses* of the applicant or the *profits* of the defendant. The resolution of these conflicts is usually the result of a political choice. This is why they are called *ideological actions*.[27] To illustrate the typical conflicts involving diffuse interests, take a typical case study of a chemical plant near a lake. If an industrial accident happens, causing serious water pollution, there will be damages to the fishermen, the neighbors and nature lovers in general. The damage caused to the fishermen and to the neighbors is identifiable and measurable[28], while the damage caused to the community is more difficult, if not impossible, to discriminate and measure. The total damage is larger than the sum of all the individual damage. Additionally, there are other parties in the conflict: workers, suppliers, business partners, competing producers (i.e. similar factories), banks and insurance companies, public

22 Judgment no. 047 545, of 29.4.2003.

23 Judgment of the Supreme Administrative Court, no. 0469/15 of 18 June 2015.

24 In the words of Gomes Canotilho, called "*polygonal*". (see "Relações jurídicas poligonais, ponderação ecológica de bens e controlo judicial preventivo", *Revista jurídica do Urbanismo e do Ambiente*, no. 1, 1994, p. 58 and ff.).

25 Gomes Canotilho, "Privatismo, Associativismo e Publicismo no Direito do Ambiente", *Textos Ambiente e Consumo* Vol. I, Centro de Estudos judiciários, Lisboa, 1996, p. 145.

26 Rodolfo Camargo Mancuso, *Interesses difusos. Conceito e legitimação para agir*, Editora Revista dos Tribunais, São Paulo, 1997, p. 120.

27 According to Ada Pellegrini Grinover, there are "*new groups, new categories, new classes of individuals, aware of their shared interests, their needs and their individual weakness, who get together and unite against the tyrannies of our time, which are no longer the tyranny of the rulers but the oppression of minorities, the interests of large economic groups, the indifference of the polluters, the inertia, the incompetence or the corruption of bureaucrats*" ("Novas tendências na tutela Jurisdicional dos interesses difusos", *Revista do Curso de Direito da Universidade Federal de Uberlândia*, vol 13, no. 1/2 1984, p. 7).

28 The interest of fishermen can be considered individual and homogeneous because the fact causing damage to them is the same and they will probably present the same type of request. Here, collective action is a tool to protect the sum of individual interests.

authorities, each with different and often conflicting interests.

6 The means of action

The ultimate goal of trans-individual interests is to ensure an easier access to justice for the benefit of individuals and social organizations.[29] Diffuse representation of the environment before the judge through *actio popularis* represents the culmination of a higher level of social justice and greater efficiency in environmental protection, implementing what used to be called macro environmental justice,[30] as shown in the following table.

<table>
<tr><th colspan="4">Interests</th></tr>
<tr><th>Individual</th><th colspan="2">Trans-individual</th><th>Public</th></tr>
<tr><td rowspan="2">Exercised individually</td><td>Collective</td><td>Diffuse</td><td rowspan="2">Exercised publicly</td></tr>
<tr><td colspan="2">Exercised individually or collectively</td></tr>
<tr><td>Micro-justice (isolated and individual litigation)</td><td colspan="3">Macro-justice
(supra-individual litigation)</td></tr>
</table>

Table 2: Types of interests and levels of justice.

The answer to the question of who has an interest to act, always depends on the interests at stake. In the context of the infringement of an individual interest, the holder of the right of action is the victim who has suffered the damage.[31] In the context of environmental damage, the interest belongs to a wide variety of individuals and to the entire community.

Of course, the state also has a duty to protect environmental interests. However, the practice has proven that even the welfare state is unable to resolve all social conflicts. The emergence of actions representing diffuse interests is a response to the inability of governments to effectively protect the new rights. Now, the state is no longer the only one to defend the interests that go beyond the individual frame. The classic structure of the judicial process, as a process of opposing parties, is abandoned and new forms of collective claim emerge. The protection of social rights can occur in two ways:

1. Individuals grouped in associations are the active parties in the dispute.
2. Each isolated individual holds the right to take legal action on behalf of the collective and in the interest of all of society.

Actio popularis, originally intended to safeguard public interests, has been expanded to protect diffuse interests. It can thus be defined as the right of action, granted to every citizen or legal entity that allows the holder to request the intervention of the judicial organs of the state, to ensure the protection of certain interests of the community to which the constitution gives a qualified protection, and to require the reparation of damages.[32]

With *actio popularis*, procedural legitimacy is no longer assessed using concrete criteria relating to the individual or legal person and must, on the contrary, be judged in general and abstract terms.[33]

Indeed, in Portuguese case law, the courts have recognized the active legal standing of an environmental non-governmental organization (NGO) to challenge an administrative act, provided a violation of the 'laws that protect the environment' has taken place. This covers all legal provisions seeking to improve or preserve the environment, in its various components, according to Art. 66 of the Portuguese Constitution and the Environmental Framework Law[34].

The aim of *actio popularis* is to carry out the selection of the persons who are permitted to participate or intervene in any proceedings or disputes before the court, by means of procedural prerequisites on standing. The administrative *actio popularis* allows for the defense of diffuse interests on the grounds of illegality of any harmful administrative acts and grants protection to: the environment, public health, quality of life, consumer goods and services, cultural heritage and the public domain.

7 The laws on the protection of trans-individual interests

In many Lusophone countries, the right to *actio popularis* is enshrined in the national constitution as well as in laws.[35] In Portugal, since 1976 there has been a constitutional provision recognizing the right to *actio popularis* Today, Art. 52 no. 3 of the Basic Law, explains this right in more in detail:

29 For a global perspective of collective or group actions to defend collective interests, see *World Class Actions. A Guide to Group and representative Actions Around the Globe*, de Paul G. Karlsgodt (editor), Oxford University Press, 2012.

30 Macro-justice and micro-justice are common expressions in Brazilian law.

31 The doctrine also identifies a sub-kind of individual interests, the *homogeneous individual interests*, which simply reflect individual subjective rights whose protection is made collectively under the similarity of individual applications that corresponds to the class action in the United States.

32 Nuno Sérgio Marques Antunes, *O Direito de Acção Popular no Contencioso Administrativo Português*, Lex, Lisboa, 1997, p. 27.

33 Robin de Andrade, *O Direito de Acção Popular no Contencioso Administrativo Português*, Coimbra editora, Coimbra, 1967, p. 3.

34 See for instance, the ruling of Portuguese Supreme Administrative Court case no. 01362/12, 28-01-2016.

35 In fact, the concept is common to most Portuguese speaking countries (http://www.cplp.org/). For a systematic comparison of the Portuguese system with the French system, see Odette Domingues, op. cit.

"*Everyone is granted the right of* actio popularis*, including the right to apply for the applicable compensation for an aggrieved party or parties, in the cases and under the terms provided for by law, either personally or via associations that purport to defend the interests in question. The said right may particularly be exercised in order to:*

a) Promote the prevention, cessation or judicial prosecution of offences against public health, consumer rights, the quality of life or the preservation of the environment and the cultural heritage;

b) Safeguard the property of the state, the autonomous regions and local authorities".

8 The Law on actio popularis

In 1995 the Portuguese Parliament finally implemented the Constitution by establishing a law on *actio popularis,* under which the notion is not envisaged as an exception but rather as a rule.

The catalogue of interests protected by the law matches the constitutional list: public health, environment, quality of life, consumer protection (for goods and services), cultural heritage and public property.[36]

The diffuse entitlement of *actio popularis* is recognized specifically: "*Every citizen enjoying their civil and political rights*[37]*, as well as associations and foundations for the protection of the interests mentioned in the previous article, holds the right to participation in administrative procedures and the right of* actio popularis *regardless of having or not a direct interest in the matter*".[38]

As to the content of the legal proceedings, there are two types of popular action: administrative *actio popularis* and civil *actio popularis*. "*The administrative* actio popularis *includes measures to protect the interests referred to in Article 1 and recourse for illegality against administrative actions adverse to the same interests*". According to the Judgment of the Portuguese Supreme Administrative Court, case no. 01362/12 of 28 January 2016, this protection is granted through the procedural means provided, at the time, for administrative proceedings, in particular, the judicial appeal for annulment. But the *actio popularis* does not institute any particular process for 'popular actions' in administrative proceedings, beyond the procedures which were already provided for in law on the procedure before the administrative tribunals".[39]

Finally, civil *actio popularis* may take any form provided by the Civil Procedure Code[40].

The *actio popularis* can have different objectives: preventive, repressive or compensatory and it is not based only on illegality. Activities harmful to the interests mentioned may be challenged regardless of the complainants. Furthermore, *actio popularis* can be exercised both against public persons and private persons.

Of course, to prevent the abuse of the right of access to justice, the judge may dismiss the application when he "*believes that the merit of the claim is clearly unlikely, after hearing the public prosecutor and after an initial inquiry considered as justified by the judge or that the author or public prosecutor require*" (Art. 13).

Besides, the courts have refused access to justice based on *actio popularis* when the citizen (or the association) is not only representing the interests of the whole community but mostly his own personal interests.

In the words of the Southern Central Administrative Court, "*[…] the attribution of actio popularis legitimacy implies a significant reinforcement of the role of the courts in the protection of diffuse rights, because when this legitimacy is attributed to citizens and organizations, the court must verify the adequacy of the popular representation claimed. Diffuse interest cannot be confused with any other interest, such as the public interest. Despite some coincidence, public interests are the general interests of a community and diffuse interests are determined by the actual needs of the members of a community. The mere allegation of the interest of defending urban legality, does not allow for the establishment of the existence of a diffuse interest to be protect through* actio popularis"[41].

In another decision, a different court said: "*the right of popular action is recognized as an essential instrument for the realization of participatory democracy; the right of judicial action, is a specific characteristic of this right, (…) implying a deviation from the general rules of procedural legitimacy, aiming at the pursuit of public and non-personal interests, being a tool for an active participation of citizens in the political life of the community where they belong; in other words, the right of* actio popularis *is a right to judicial action in which legitimacy is not measured in a concrete and casuistic way, but is rather measured in general terms, moving away from the notion of direct and personal interest.*

36 Art. 1, §2 Law no. 83/95.

37 The legal reference to the enjoyment of civil and political rights is considered by the doctrine as irrelevant and inapplicable in practice because nowadays no administrative penalty can deny civil or political rights. Besides, the Constitution does not limit this right to citizens but, on the contrary, extends it to every person. In the wording of Art. 52 No. 3 Law no. 83/95, "*everyone has the right [...]*".

38 Art. 2 No. 1 Law no. 83/95.

39 See the Judgment by the Full Supreme Court of 29 June 2004 - case. no. 01334/03.

40 Art. 12 Law no. 83/95.

41 Decision of 23 January 2013, case no. 10452 of the Southern Central Administrative Court [line breaks omitted].

[…] [This right] Is not abstract and devoid of purpose, but is rather the guarantee of a certain material substantive law".[42]

The most interesting aspect of the law relating to *actio popularis* is the quest for effectiveness. The law created five features specifically designed to ensure the success of the action:

1. On representation: "*the author represents in his own initiative, and with no need for a mandate or express consent, all other holders of rights or interests who have not exercised the right to self-exclusion*" (Art. 14).[43]

2. On *res judicata*: "*The judgments pronounced as having* res judicata *in administrative actions or appeals or in civil actions (except in cases of rejection of the application for lack of evidence, or where the judge has to decide differently depending on motivations related to the case), have an overall efficiency, although not having any effect on the holders of rights or interests that have exercised their right to withdraw from representation*" (Art. 19 no. 1).

3. On the evidence: "*In the popular action and in the key issues identified by the parties, evidence collection is made at the initiative of the judge, regardless of the parties' initiative*" (Art. 17).

4. On the effects of appeal: "*Even if a particular appeal does not have a suspensive effect, in general terms, the judge may, in the* actio popularis*, grant that effect to avoid irreparable damage or damage difficult to repair*" (Art. 18).

5. On the effects of the decision: "*Final decisions are published at the expense of the losing party and under penalty of disobedience, mentioning* res judicata*, in two newspapers read by most stakeholders at the discretion of the judge, who may determine that the publication is limited to an extract of the essential aspects, when the length of the decision does not justify the publication in full*" (Art. 19 no. 2).

6. On court costs and expenses: The rules with respect to court costs and expenses are particularly favourable, transforming *actio popularis* into a truly effective instrument of equity in access to justice: "(*1) The exercise of the right to* actio popularis *does not require the payment of any prior court costs. (2) The author is exempt from the payment of fees in case of partial acceptance of the application. (3) In case of total rejection of the application, the author shall be liable to pay the sum fixed by the judge between a tenth and half of the costs that would normally be payable, taking into account the economic situation of the author and the formal or substantive reasons for rejection. (4) Bad faith litigation is ruled by the general law. (5) The legal costs are the joint responsibility of all authors, under the law*" (Art. 20).[44]

9 Conclusion

The system of *actio popularis* for the protection of diffuse interests is essential in a contemporary and egalitarian legal order to ensure, rather than to proclaim, environmental rights. It is not enough to recognize solidarity rights. The legal system must adapt to protect solidarity rights properly, ensuring their effective enjoyment by the whole community.[45]

The main achievement of this legal development has been to overcome the "*individualist paradigm of the judicial procedures*"[46] replacing it with a social model based on the concept of diffuse interests, a trans-individual type of interest between the public and private and different from the collective interest. This evolution seems particularly suited to the protection of the environment considering that the concept of diffuse interests is characterized by the nature of the protected goods and not by the parties in court. Lastly, the legal recognition of diffuse interests and *actio popularis* is firmly related to the challenges posed by the principle of participation and the social demand for "*new forms of democracy*".[47]

42 Decision of 31 May 2013, case no. 132 of the Northern Central Administrative Court.

43 The detailed description of the regime for self-exclusion is contained in Art. 15 Law no. 83/95: "*1. After receiving popular action, the holders of interests involved in the action and not participating in it, will be cited to appear and intervene in the case as authors, within the time limit prescribed by the court […] 2. The citation is made either through announcements published in the means of communication or by edict […]*".

44 In 2014 the Portuguese Supreme Administrative Court issued a decision (case 926/14 of 9 October) clarifying that "*I. The plaintiff in legal proceedings deducted under the right of popular action benefits from an exemption of court fees […] which does not apply if the application is dismissed as manifestly unfounded […]. This judgment will only take place at the end of the procedure and requires an "aggravated" dismissal of the claim, based on its manifest factual and legal inadmissibility[…]*".

45 Ada Pellegrini Grinover, "Significado Social, Político e Jurídico da Tutela dos Interesses Difusos", *Revista de Processo* no. 97, year 25, January March 2000, p. 10.

46 According to the expression of Mauro Cappelletti and Bryant Garth, "The Protection of Diffuse, Fragmented and Collective Interests in Civil Litigation", W. Habscheid (editor), *Effectiveness of judicial protection and constitutional order* (Gieseking-Verlag, Bielefeld, 1983), p. 158.

47 Ada Pellegrini Grinover, "Novas tendências na tutela Jurisdicional dos interesses difusos", *Revista do Curso de Direito da Universidade Federal de Uberlândia*, vol. 13, no. 1/2 1984, p. 3.

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sofia

The Society for Institutional Analysis was established in 1998. It is located at the University of Applied Sciences in Darmstadt and the University of Göttingen, both Germany.
The sofia research group aims to support regulatory choice at every level of public legislative bodies (EC, national or regional). It also analyses and improves the strategy of public and private organizations.
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elni

In many countries lawyers are working on aspects of environmental law, often as part of environmental initiatives and organisations or as legislators. However, they generally have limited contact with other lawyers abroad, in spite of the fact that such contact and communication is vital for the successful and effective implementation of environmental law.

Therefore, a group of lawyers from various countries decided to initiate the Environmental Law Network International (elni) in 1990 to promote international communication and cooperation worldwide. elni is a registered non-profit association under German Law.

elni coordinates a number of different activities in order to facilitate the communication and connections of those interested in environmental law around the world.

Coordinating Bureau

Three organisations currently share the organisational work of the network: Öko-Institut, IESAR at the University of Applied Sciences in Bingen and sofia, the Society for Institutional Analysis, located at the University of Darmstadt. The person of contact is Prof. Dr. Roller at IESAR, Bingen.

elni Review

The elni Review is a bi-annual, English language law review. It publishes articles on environmental law, focussing on European and international environmental law as well as recent developments in the EU Member States. elni encourages its members to submit articles to the elni Review in order to support and further the exchange and sharing of experiences with other members.

The first issue of the elni Review was published in 2001. It replaced the elni Newsletter, which was released in 1995 for the first time.

The elni Review is published by Öko-Institut (the Institute for Applied Ecology), IESAR (the Institute for Environmental Studies and Applied Research, hosted by the University of Applied Sciences in Bingen) and sofia (the Society for Institutional Analysis, located at the University of Darmstadt).

elni Conferences and Fora

elni conferences and fora are a core element of the network. They provide scientific input and the possibility for discussion on a relevant subject of environmental law and policy for international experts. The aim is to gather together scientists, policy makers and young researches, providing them with the opportunity to exchange views and information as well as to develop new perspectives.

The aim of the elni fora initiative is to bring together, on a convivial basis and in a seminar-sized group, environmental lawyers living or working in the Brussels area, who are interested in sharing and discussing views on specific topics related to environmental law and policies.

Publications series

elni publishes a series of books entitled "Publications of the Environmental Law Network International". Each volume contains papers by various authors on a particular theme in environmental law and in some cases is based on the proceedings of the annual conference.

elni Website: elni.org

The elni website www.elni.org contains news about the network. The members have the opportunity to submit information on interesting events and recent studies on environmental law issues. An index of articles provides an overview of the elni Review publications. Past issues are downloadable online free of charge.

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