

## [Brazil:] Notes on Diffuse Interests

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1. Diffuse or collective interests ("interesses difusos ou coletivos") have been increasingly highlighted in Brazil's post-1985 political and legal crosscurrents. It is a well-known fact that the old notion of "interest" has undergone deep transformations. Its progressive enlargement has led to a militant conception that there are vital values which belong primarily to the whole of the community or to large parts thereof - as distinct from strictly individual rights - and have accordingly to be dealt with by means of specific judicial remedies.

For instance, Law 8078/90 defines "diffuse interests or rights" as those such as are transindividual and indivisible and belong to indeterminate persons who happen to be linked together by circumstances of a factual character; and "collective interests or rights" the transindividual and indivisible ones to which are entitled such groups, categories or classes of persons that are bound to each other or to the opposing party by a basic legal connexion.

2. The idea is not exactly new. Roman Law had the "actiones populares" as an instrument to enforce compliance with general interests (Dig., 47, 23, 1), e.g. the "actio effusis et dejectis"; as far back as four hundred years ago Sweden contributed its celebrated ombudsman, first as the "drotsen" and from 1809 on in his present form as a nonjudicial organ to watch over public administration acts and to settle disputes on diffuse interest questions. Today other countries have adopted similar institutions, with a view to protecting said high priority collective interests.

3. What is properly new about diffuse interests (apart from specific questions of procedural legitimacy) such as they are understood nowadays is both the broader field covered by them and, for obvious reasons, the particular urgency that has been attached to their protection in the eighties and nineties. As a corollary, the concept of such interests has been drawn out to comprehend the wholesomeness of the atmosphere and of watercourses, the right to an unpolluted environment, to the safe disposal of waste materials, to the preservation of forests and fauna, to the protection of the oceans, to the forestalling of predatory exploitation of natural

resources by individuals and corporations, to consumers' rights and product liability, etc; summing up, the collective right to a good social and physical environment.

4. Politically, ecologists and other concerned citizens have been increasingly vocal on every social level. Legally, protection rules have been enacted to correspond to this new awareness. Protection activities have traditionally been entrusted a) to private citizens and organizations, mainly by means of class actions; b) to the "Ministério Público", roughly the state attorneys and prosecutors specifically in charge of environmental and human rights issues, as well as of defending the legal order and the basic social and individual inalienable rights, and c) to the ombudsman or his functional equivalent, an elected official generally answerable to the country's parliament. (See Camargo Ferraz et al., "*A ação civil pública e a tutela jurisdicional dos interesses difusos*" - Saraiva Publishers - S. Paulo - Brazil - 1984).

5. In Brazil, according to the relevant provisions of the 1988 Federal Constitution, tutelage of diffuse/collective interests has been accorded to the Ministério Público and to private citizens and associations as well.

In a somewhat cursory view:

- Article 5, LXXIII grants the private citizen the right of filing the so-called "popular action" in order, among other aims, to annul acts found to be environmentally damaging;

- Article 129 - The Ministério Público have among their duties, that of promoting the *civil public action*, aiming at protecting the social and public patrimony, the environment and other diffuse/collective interests;

- Article 225 - (On the environment) - This article provides that everyone is entitled to an ecologically balanced environment, which is deemed to be a common property of all and essential to a healthy life; accordingly, public authorities and the community are bound to defend and preserve it for the present and the future generations. Its paragraphs set down the obligations incumbent upon government organs in order to secure those rights, such as:

I - preserving and restoring all basic ecological systems and providing for an ecologically sound handling of species and eco-systems;

II - ...

III - defining in all the states those territorial spaces and their resources which are in need of special protection, all alterations to be made exclusively according to the law, and banning whatever exploitation activities that might jeopardize the integrity of the elements that were originally the reason of that protection;

IV - performing mandatory previous studies on environmental impact whenever the setting-up of a potentially hazardous enterprise is intended;

V - controlling production, trade and the employment of techniques, methods and materials hazardous to life, quality of life and environment;

VI - promoting ecologically-oriented education on every level;

VII - protecting fauna and flora, etc.

It should be emphasized that environmentally noxious activities make offenders (whether individuals or corporations) liable to criminal, administrative and civil sanctions (§ 3rd.); that the Amazon Rain Forest, the Atlantic Forest and their resources are under special protection as national assets (§ 4th.), etc.

Aboriginals have a special chapter (Ch. VIII) for their rights both as individuals and as communities.

#### 6. *The public civil action*

The "ação civil pública" (public civil action) has noticeably been on the increase in Brazil, ever since its inception with Law 7347, of July, 1985 (with some alterations due to Law 8078, September 09, 1990).

This law provides for civil-liability actions resulting from disregard of consumers' rights and from damages inflicted on the environment and on assets and rights of artistic, aesthetic, historical, touristic and scenic, value.

The action's venue is the place where the damage has occurred.

The Ministério Público, the Union, the states and townships ("municípios") are entitled to bring the action against offenders.

The same right is extended to autarchies, public corporations, foundations, mixed economy companies (quasi-public corporations), and civil associations, provided the latter have been in existence for at least one year and have among its institutional aims the protection of the environment, of consumers' rights, artistic and cultural resources, or any other diffuse/collective interests. In some cases (manifest social interest issuing either from the characteristics of the damages or from the importance of the interests in need of protection) the one-year prerequisite may be dispensed with by the judge.

Defendants (offenders) may be collectivities, communities, unincorporated partnerships, physical or legal persons, whether public or private, foreign or national, which may be responsible for actual or potential damage to the interests protected.

Any person can bring notice to the Ministério Público of facts falling under the scope of the civil action. The Ministério Público can also preside over the "inquérito civil" (civil inquiry).

As a brief reference to procedural norms: the judge may issue a preliminary injunction to the effect that the defendant shall abstain from practising the allegedly damaging act. The final ruling may impose both financial compensations for damages sustained and specific obligations to be carried out by the defendant (who in this case must either refrain from acting or take active steps in order to restore

the pristine conditions of the damaged assets) or by third parties, should the defendant fail to comply with the judicial order. In this case the latter shall meet all costs and expenditures. The sentence has "erga omnes" effects, and in some cases "ultra partes" effects (alterations brought about by article 117 of Law 8078/90). The monies to be paid by the defendants are to be delivered to a special government fund for the restoration of the damaged resources.

Law 7347 is therefore an important instrument to curtail the excesses of economic units and groups unmindful of their public and environmental responsibilities.

7. The present report is, of course, a very abridged overview of the available legal instruments for the advancement of inalienable collective/diffuse rights.

However, there is still left some appreciable ground to be covered in order to make them generally effective. To help taking those further and necessary steps, NGOs, are sorely in need of financial support and expertise to enable them to attain their aims. For instance, legal and practical improvements are urgently needed to face the most urgent collective rights task of all in contemporary Brazil, namely the immediate assistance to destitute children, in the form of adequate sheltering, food, health assistance, education and protection from bodily, emotional and moral harm. A growing number of citizens have been engaging themselves in finding practical answers to the children's predicament.