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Dispute Resolution

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PEOPLE'S ACTION: BALANCING EFFICIENCY AND JUSTICE

In a globalized world such as the one we live in, the expression "legal transplants", as proposed by Alan Watson, has been often used to designate the transfer of institutes which are characteristic of certain legal systems to other legal systems. Though sometimes one feels that the expression is used on pejorative terms, the truth is that it seems perfectly adequate to describe the transposition of an institute from its original legal system to another system to which it is alien but nevertheless needs it to find the more adequate legal solutions to a certain problem.

During long time, in the systems belonging to the roman-german family, the judicial protection was confined to the rights with a single holder or with specified holders. Following such pattern, the model which grounded the civil procedural laws was either the one of one or some holders of a right litigating against one or some passive holders or defending such right against one or more third parties. This was not the result of the choice of one jurisdiction amongst various options but happened instead because the legal systems did not recognize other subjective situations in need of protection which were not characterized by this individual or limited plural aspect.

This scenario started to change in the second post-war period. The western civilizations have experienced during such times an unprecedented and unknown development. One of the consequences of such development was the trend of massive consumption. Such trend led to look at the consumer not as someone on individual terms but as an anonymous and fungible entity. In fact, if a consumed product shows to be defective, it is immaterial whether it has been acquired by A, B or C since all such entities require the same protection. Equally immaterial is to protect A, B or C from such consumption as all of them also require the same preventive protection.

Another sub-product of the industrial development which occurred after the Second World War was the environmental aggression. The environmental protection was neglected for long time in exchange of a material well-being, but the progressive awareness that the environmental devastation and the dilapidation of scarce resources would ruin such well-being and put in jeopardy the future generations has led to an array of legal instruments aiming to prevent – or at least slow down – the baneful actions to the environment.

The consumption and the environment have revealed the insufficiency of a traditional analysis, based on individual rights or with identified holders. If each and every consumer needs similar protection and if all are harmed by environmental aggressions, then we have an undefined plurality of holders of one same right or, at least, of one same interest. To designate such interests having as holders members of one class or one group but which are incapable of individual appropriation by anyone of such members, Mauro Cappelletti (a disciple of Piero Calamandrei) proposed the designation of diffuse interests.

It was in this context, that one of the so-called "legal transplants" occurred, giving expression to a tradition which some consider to go back to the English Middle Age, rule 23 of the V.S. Federal Rules of Civil Procedure establishes, since 1937, a class action, through which – as the name indicates – the interests of the members of a class are protected.

Such class action has waked the interest of some Italian scholars, in particular Mauro Cappelletti, well-known supporter of a social (or "above-individual") conception of the procedure.

As it happens in the transplants done in medical surgical intervention, it is necessary to avoid the rejection of the institute

imported from the donor legal system. There is a characteristic aspect of the U.S. class actions which render them difficult to harmonize with the roman-german tradition: it is the admissibility of remuneration of a lawyer through a "quota-litis", or contingency fee system, which renders such lawyer particularly interested in the outcome of a class action and in the amounts which may be obtained through such action by the damaged parties.

Without the impulse normally exercised by the U.S. lawyer, one runs the risk of not finding any holders of a diffuse interest willing to start an action to the protection of one of such interests. Perhaps for such reason, European legislations were generally very cautious in granting legitimacy for the protection of diffuse interests. Following a trend already adopted in some legal systems – namely in the labour and intellectual property fields – most legislations have chosen to grant such legitimacy only to associations, representing holders of a diffuse interests.

Portuguese Law, however, has diverted from such trend. Under art. 52 nº 3 of the Portuguese Constitutional Law, legitimacy to the protection of diffuse interests through a so-called "people's action" is granted not only to associations but also to individual citizens. This aspect makes the Portuguese people's action close to the U.S. class actions. Another aspect which renders similar those forms of collective action is the faculty granted to the holder of the diffuse interest to opt for not accepting his representation by the plaintiffs of the people's action: it is the opting out regime established in article 15 nº 1 of Law 83/95 of 31/8/95. However, the fact of the legitimacy being given, in addition to the holders of diffuse rights, to collective persons having as purpose the protection of such interests, establishes an important difference in relation to the U.S. class actions.

The collective actions – that is, the actions such as the class actions or the people's actions – aiming to the protection of above-individual interests, are often the sole means available to each one of the interested parties to remedy or prevent its situation. In fact, the little dimension of the interest of each one of the holders of the diffuse interest does not motivate him to introduce an action in court; the dimension of the offense is only significant in a collective perspective, in a perspective which considers all holders of a threatened or violated diffuse interest. In such case, the people's action is a means in which the efficiency is conjugated with justice; such action is the only efficient means to ensure the justice due to each one of the holders of the diffuse interest.

However, it is not always like that. Situations may occur in which the holder of the diffuse interest is harmed in his interests in a so significant way that he has a true option either to defend them in an individual action or accept the defence in a collective action. It happens, for instance, in damage caused to health deriving from the consumption of a product or from environmental pollution. In such case, the relation between efficiency and justice is not anymore the same. Because justice would demand the consideration of the situation of each one of the holders of the diffuse interest but the efficiency of the collective action cannot be harmonized with such individual examination. Thus, the collective action, because it must be efficient, cannot ensure all justice due to each one of the holders of the diffuse interest.

That is the reason why the people's action is still looking for a paradigm closer to efficiency or justice. In any case, it has become already a successful "legal transplant".

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