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Precautionary Principle: Case Law in Colombia

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Abstract

This article reflects on an approach to the scope of the right to environment in Colombian constitutional jurisprudence and it focuses specifically on the precautionary principle as hermeneutical criterion used by the jurisprudence of the Constitutional Court to determine the need for intervention by public authorities, to potential damage to the environment and public health. Thus, this paper aims at enunciating the map of the jurisprudence of the Court in decisions about this point.

Keyword: Precautionary principle; Potential damage; Environmental protection

Precautionary Principle

The Colombian Constitutional 1991 showed an unprecedented interest in environmental protection. The 1991 Colombian Constitution profoundly changed the rules of society relationship with nature and therefore constitutional jurisprudence noted in repeated pronouncements that environmental protection occupies such a pre-eminent place in the legal system and for that reason the Colombian Charter contains a true organic Constitution., that includes all those provisions that seek to protect the environment and the ecosystem in general. The Court has stated that this "green Constitution" within the Colombian legal system has three dimensions: first, protecting the environment is a principle that radiates all the legal order since it is the duty of the State to protect the natural resources of the Nation. On the other hand, it is shown as the right of all people to enjoy a healthy environment, a constitutional right which is enforceable by various judicial means. Finally, the green Constitution derived a set of obligations on the authorities and individuals. So in accordance with Article 79 of the Constitution, the State shall protect the diversity and integrity of the environment and conserve areas of special ecological importance. Similarly, Article 80 above, constitutionalises one of the most important concepts of modern ecological thinking, namely the idea that ecological development must be sustainable [1].

Since the adoption of the 1991 Constitution, Colombia built a new regulatory ethos whereby the environment is not only a right but also a constitutionally protected legal right, whose preservation should be taken not only by state isolated actions, but also through the collaboration of all authorities and the development of public policies in line with that objective.

Thus, the environmental protection in Colombia stands as a first-order constitutional concern, but the realization of this objective can be problematic when a "suspicion" about potential harm to the environment or public health, lies with elements produced by science or technology that, on the other hand, are considered valuable for their contribution to meet specific human needs, promote trade, private initiative and inventiveness, or seen as attached to the exercise of liberal professions. The tension is focused on the difficulty of predicting, and even to prove, the effects that a given innovation may have on the environment or human health, thus to reach absolute scientific evidence, entails performing a large number of tests of various kinds, which may include extended periods, during which potential damage to the environment and public health could become irreversible.

The topic is rooted in international law, when in the 70s of the last century, it was envisaged to take an approach, partly alternative, partly complementary to scientific certainty, to protect public health and the environment from potential serious effects, of which there is no certainty, but there is some scientific evidence which does not make it possible to rule out the protection. This approach is based on what has been called the precautionary principle, which can be related to several sources (i) to a new pattern of knowledge and power relationships represented at the age of precaution, suggesting a reformulation of the Cartesian requirement about the methodic doubt and (ii) to an ethics of the decision in the context of uncertainty that characterized the late twentieth century [2].

The precautionary principle may be explained more simply appealing to ethical apophthegma that the term "prevention is better than cure" connotes. As a paradigm of international environmental regulation, this principle is then developed from the belief that decisions must be made in the light of the irreducible uncertainty surrounding environment and the threats to it [3]. From an epistemological perspective, the precautionary principle goes beyond the curative approach and is situated in a stage preceding the anticipative approach, that is, it makes visible the preventive approach, and its aim is to prevent damage that is likely to occur, so preventive measures must be taken [4].

The principle suggests essentially an active exercise of the doubt, and originates from the evidence that efforts to combat problems such as climate change , ecosystem degradation and depletion of natural resources are moving at a low pace while environmental problems continue to worsen faster than society can cope with them [5].

The precautionary principle is now understood as an essential tool to prosecute rationality in the application of new technologies and to postulate that States, as the ones that exercise authority over various social sectors that compose them, can fulfill the task of protecting collective security. As understood by Wynne, the precautionary principle is a way to implement prevention in situations of scientific

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uncertainty and therefore "caution is invoked when prevention is not enough" [6].

There are several formulations about the precautionary principle, some that would cover a greater degree of intervention, or a larger scope of the concept, but they all share some basic elements: (i) the threat of a serious danger to the environment or health, of which (ii) there is no scientific certainty , but (iii) if there is some certainty, (iv) the authorities must take protective measures, or they cannot defer them until absolute proof is credited.

It has been said that the precautionary principle entails five specific virtues:

a. Responsability: Who initiates an activity must demonstrate that no safer alternative route to achieve what has been proposed.

b. Respect: In situations of serious risk, preventive action is required to prevent damage, even if there is no full scientific certainty of cause and effect.

c. Prevention: exists a duty to search for ways to avoid potential damage, rather than to seek to control them afterwards.

d. Obligation to know and to inform. There is a duty to inform those with the potential risks of the possible impacts, it should not plead ignorance

e. Obligation to share power. Democratize decisions regarding science and technology.

GM food, the production of certain drugs, nuclear waste, the greenhouse effect, the mad cow disease, blood contaminated with HIV that affected thousands of people, despite their gender difference, are linked to the precautionary principle. It is a technology-saturated society, inhabiting an intervened and altered nature; these risks which are unknown become important. So, this raises concern in society and attention from the law and courts, without waiting for actual harm. In consequence, the precautionary principle is one of the ways of today`s society to deal with this new kind of risks associated with scientific uncertainty, and it increased social sensitivity towards a policy of caution and precaution with these new risks that are generating a new model of response which is not preventive but precautionary.

Indeed, there is a difference between the preventive principle and the precautionary principle. The first one, wants to avoid damage. The precautionary principle introduces a different perspective. It seeks to prevent the creation of a risk with still unknown effects and therefore unpredictable. It operates in the realm of uncertainty, and invokes urgent measures even though there is no scientific evidence on the behavior of nature. Prevention is a rational behavior against an evil that science can measure within scientific certainty. In precaution, on the contrary, the scientific knowledge is still insufficient to respond to a given problem.

Case Law in Colombia

Colombia has not escaped the following dilemma: while public decisions taken within the framework of scientific certainty will always be responsible and beneficial for the private sector and encouraging the development of rigorous scientific studies, an absolute defense of this approach can delay constitutional rights protection, to the point of making it ineffective. From the opposite perspective, an intervention by the authorities in the scientific activities in the absence of certainty of damage to the environment or health implies a stagnation of scientific activities, while sending a negative message to the development of rigorous research, hinders the exercise of certain liberal professions and trade.

The Colombian government, in fact, began to express its interest in taking the precautionary principle in the field of environmental protection, by signing the Rio Declaration on Environment and Development. This document introduced, in its Article 15 the precautionary principle , under the following formula : "In order to protect the environment , the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing costeffective measures to prevent environmental degradation".

Soon after, the precautionary principle acquired a constitutional status in the Colombian legal system with the enactment of Law 99 of 1993 which incorporated the principles of the Rio Declaration into domestic law. The Court studied in case C - 528 (1994), if the referral to the Rio Declaration fitted the Colombian Constitution. In a decision that it is worth mentioning, the scope of the principle is shown:

"For the Court, there is no doubt about the legal force, and the normative character of the questioned article 1 of Act 99 of 1993 [7] , as well as its ability to produce legal effects , but on the understanding that it lays down principles and a legal range of values, which can be applied in an indirect and mediate way, and to interpret the meaning of the provisions of the same rank, and lower ones, when regulations or specific administrative actions are issued; in this sense it can be said that the questioned rule is clearly delimited regarding its above-mentioned indirect and mediate force within the legal system to which it belongs to, without establishing specific behaviors or particular consequences, which are conditioned on the presence of other regulatory complete elements . This type of provisions operate as patterns of interpretation and organization of the State, and they are not used as specific rules for the resolution of cases. "

Subsequently, the work fell to the Constitutional Court and the jurisprudence of the Court began a gradual, but solid line of application of the precautionary principle in various pronouncements [8] with respect to the study of ordinary laws, laws approving treaties, review of actions for protection, to conclude that the precautionary principle, in the context of our "green" Constitution, is fully constitutionalized.

Thus, since the early pronouncements on the subject it can be understood the content of the precautionary principle, its potential as a hermeneutic approach to the application of provisions relating to environmental protection and the limits which administrative and judicial clerks must observe in its application. In the 1995 ruling C-073, the Colombian Constitutional Court, studied the constitutionality of the Law 164 (1994), approving the United Nations Framework Convention on the protection of the environment, which includes the precautionary principle in the third article. After testing the principles of the Convention altogether, the Court found compliance with the political Charter, and emphasized that such principles are consistent with respect to the self-determination of peoples, with the duties of the State in regard to protection of the environment, and with equity, reciprocity and national convenience.

The Court reviewed an acción de tutela [9] (write of certiorari or recurso de amparo as known in other Latin American countries) shortly thereafter, filed by a group of inhabirants of a fishing village, who felt threatened their rights to a healthy environment, in connection with health, life and work, due to a spill of crude in areas close to the beach. The Court stated that, according to the functions of the Ministry of

the environment, within the constitutional mandate of promoting a sustainable development, in the presence of a potentially serious, and uncertain damage, the precautonary approach about the treatment of the effects should be prioritized once completed.

In its 2001 decision C-671 (2001) without referring explicitly to the precautionary principle, the Court highlights the importance of the principles developed in international law for advancing progress in the protection of the environment. Specifically, the ruling considered that the obligation to attend such principles, arises from the mandate contained in article 266 above, prescribing the internationalization of ecological relationships. The position held by the Court in the aforementioned judgment, was used a short time later to make the analysis of constitutionality of the legal provision in which the precautionary principle was incorporated into domestic law, as shown below.

Indeed, the decisión C-293 (2002) focused on studying the constitutionality of the precautionary principle, as introduced by the Colombian law in the Article 1, paragraph 6 of Law 99 of 1993. Following the reaffirmation of some considerations of the decisión C-671 above mentioned, the Court said:

"After carefully reading the questioned article, it concludes that, when the environmental authority must take specific decisions, intended to avoid a threat of serious damage, without possessing absolute scientific certainty, it must do it accordance with the environmental policies developed by the law, according to the Constitution, in motivated form and removed from any possibility of arbitrariness or caprice "[10]

The Court then , delineated the application of the principle, in the administrative realm, to the concurrent, existence the following elements: (i) that there is a danger of the occurrence of damage; (ii) that this damage is irreversible; (iii) that there is some certainty on the danger, even if there is no absolute proof this; (iv) that the decision taken by the authority is intended to prevent environmental degradation; and (v) that the act is motivated and exceptional. It added that the constitutional obligation to apply the due process in all the administrative and judicial actions, and the possibility of a judicial control on the acts of intervention remove the possibility of abusive acts, or the granting of unlimited powers to the environmental officials.

In the same sense, in the decision C-339 (2002), the Court indicated that in the definition of areas for non-mining purposes, foreseen by Law 685 of 2001, the precautionary principle should be followed, this principle can be subsumed under the expression " in dubio pro ambiente". The same prenciple should be applied in reviewing and evaluating the methods and systems for mining, in accordance with principle number 25 of the of Rio de Janeiro Declaration which states: " The Peace, the development and the protection of the environment are interdependent and inseparable". To the matter in hand, this means that if there is a lack of absolute scientific certainty about mining exploration or exploitation within a certain area, the decision must necessarily favour the protection of environment, for if the mining activity goes forward and then it is demonstrated that it caused a severe environmental damage, it would be impossible to revert the consequences of it ".

It is important to note in this decision, the use for the first time of the precautionary principle as a hermeneutic criterion to determine the constitutionality of a regulatory provision.

Of this of jurisprudence there are a number of important decisions missing [11] in which the Colombian Constitutional Court reiterated that the precautionary principle has constitutional validity, and that it is a principle of the international environmental law. In the decision C-071 (2003), analyzing the constitutionality of the Law approving the Protocol of Cartagena on biological safety, the Colombian Constitutional Court considered that the responsibility of " ensuring that development, handling, transport, use, transfer and release of any living modified organisms are undertaken in a manner that prevents or reduces the risks to biological diversity, taking also into count risks to the human health. ", elaborates on the principle of international environmental law known as "precautionary approach", which is fully compatible with the constitutional duty to "prevent and control factors involved in environmental deterioration, ecosystems and biological diversity (art. 80 of the Constitution)".

In the same vein, in the decision C-988 (2004), the Court undertook the review of the constitutionality of a provision which allows the registration of generic chemicals potentially harmful to the environment and public health, when these contain the same active ingredient of an agrochemical already registered and approved by the environmental authorities. The debate was, in particular, if the fact of having the same active ingredient could be sufficient to conclude that the generic product was not harmful. The ruling held that the duty to protect the environment deriving directly from Articles 78,79 and 80 of the 1991Constitution, is embodied largely on the precautionary principle .

In this ruling it is emphasized that the precautionary principle , and in general the prevention duties which the Constitution assigns to the authorities in this field , do not indicate that only when it has been shown that a product or process has no risk it can then be used , as it is impossible to demonstrate the absence of a risk . The precautionary principle implies, in view of this ruling, "that there is scientific evidence that a phenomenon, product or process present potential risks to health or the environment, but these scientific assessments are not sufficient to establish accurately that risk. And if there is no basic evidence for a potential risk, the precautionary principle may not be arbitrarily invoked to inhibit the development of certain commercial or research practices. Conversely, where it has been detected a potential risk, the precautionary principle requires authorities to assess whether the risk is acceptable or not, and on the basis of the assessment they should determine the course of action."

In the decision T-299 (2008), the Colombian Constitutional Court reiterates in extenso all its doctrine on the application of the precautionary principle, following an analysis of a case in which the presence of "Transformers " in an electrical substation suggested a potential risk to the health and physical integrity of a family, due to the potential risk for the equipment to explode at a given time. The ruling reiterated that the precautionary principle may be used where there are serious threats, absence of scientific certainty , and hence the need for analysis of technical issues, practice of scientific tests and the use of international organizations such as the World Health Organization (WHO) to determine the existence of risks for the fundamental rights.

The decision T -360 (2010) examined the case of a lady with acute coronary disease who underwent two operations. In the first surgery, a defibrillator was implanted to her. Two months later, a second operation was required due to the 256 shocks produced by the device in that spam. The petitioner filed a claim in defense of fundamental rights (tutela) arguing that the deficient operation of the device was caused by the electromagnetic waves emitted by a mobile phone base station located 76 meters from her home. The Colombian Constitutional

Court , applying its doctrine that in the absence of scientific certainty it is possible to apply the precautionary principle, considered that, although research and scientific studies conducted worldwide, gave no certainty that the radiofrequency waves generated by the mobile phone base stations will cause negative long-term effects on the health of the population, precautionary measures should be implemented to protect humans from the potentially harmful effects , especially in the case of the most vulnerable, such as children and seniors. Therefore, it found it useful to assess the indications given by the World Health Organization and other international organizations , with regard to establish channels of communication and information with the community about possible adverse health effects that may generate electromagnetic field exposure and appropriate measures that people can take to minimize the effects mentioned . It stated that in the application of the principle of precaution, it should also be designed a project to establish a safe distance between mobile phone towers and educational institutions, hospitals , nursing homes and similar facilities.

Finally, in the decision C-595 (2010) , the Court was to rule on the constitutionality of a provision of the Law 1333, 2009, in which it was questioned whether the presumption of fault or neglect of the environmental lawbreakers and the reversal of the burden of the proof , constituted the breach of the principle of innocence granted in the Article 29 of the Colombian Constitution. The Court noted that in our "green" Constitution, environmental issues and specifically the factors that contribute to environmental degradation cannot be considered in its consequences as matters pertaining exclusively to a country, but incumbent on all States, so the preservation of a healthy environment is a universal interest. Then, the Court reiterated the ruling that the precautionary approach is constitutionalized in our domestic law and the administrative penalties for environmental crimes, as an expression of the power of the State to impose sanctions which are designed to have a preventive, corrective and compensatory impact.

Based on all the cases outlined, we can conclude that the precautionary principle is today in Colombian law, a hermeneutical tool of unsurpassed value to determine the need for intervention by public authorities in case of potential damage to the environment and public health. The use of this tool does not oppose any constitutional principle, but it should be noted that this is an exceptional and alternative approach for the principle of scientific certainty.

Regarding the scope of the principle in domestic law, it is worth mentioning the following conclusions: (i) the Colombian State expressed its interest in applying the precautionary principle when it signed the Rio Declaration on Environment and Development , (ii) the principle is part of the positive law , with legal status , since the issuance of Law 99 of 1993, (iii) the decision of the legislature is not opposed to the Constitution , by contrast is consistent with the principles of self-determination of nations, and the duties of the State relating to the protection of the environment , (iv) the State has signed other international instruments relating to the control of chemical substances which include the precautionary principle as an obligation that must be fulfilled in accordance with the principle of good faith in international law , (v) according to some statements , the precautionary principle has been made part of the Constitution as it is derived from the internationalization of ecological relationships (art. 266 of the Constitution) and the duties to protect and prevent contained in Articles 78 , 79 and 80 of the Charter [12].

Colombian constitutional law has also noted the fears that in some sectors arises the application of the precautionary principle, namely: (i) that the precautionary principle implies a waiver of the scientific certainty, so it affects research and tight scientific activities; (ii) that he measures arising from the precautionary principle are capricious and unjustified, because they have no clarity on the nature of the damage which is intended to guard against; Finally, (iii) that the costs arising from the application of the principle are too high, compared with the benefits obtained, as benefits are alleged or potential.

The first concern has been answered by saying that decisions taken by virtue of the precautionary principle are always temporary in nature, because the precautionary approach does not prevail on the scientific certainty; Accordingly, its application is an indicator of the need for further research, and not a limit to it. Administrative penalties for environmental crimes, as a manifestation of sanctioning powers of the State are also a preventive , corrective and compensatory .

With regard to the second claim, it has been stated that the use of the principle requires the existence of scientific evidence indicating the need for intervention. It is not the absolute lack of information in which the precautionary principle is based on, but the assessment of evidence that shows the potential of damage. The elements that determine the application of the precautionary principle - potential serious and irreversible damage, and a principle of scientific certainty - are, ultimately, criteria of reasonableness to determine the need for intervention.

In short, the precautionary principle, from the perspective of jurisprudence and law in the Colombian context, does not necessarily imply State intervention. When the potential dangers are slight, or when the level of scientific certainty is minimal, or completely inappropriate, the best decision, may be not taking any action. Finally, the costs of the intervention, as well as the interference in the rights and interests of other social groups, should be evaluated by the legal or administrative operator that intends to make use of the precautionary principle. In this sense, the "adoption of measures", must be taken within the framework of the principle of proportionality. That is, decisions must be suitable for the protection of the environment and health; necessary, in the sense that measures that cause a lesser interference are not available; and the benefits from their application, must overcome the (Constitutional) costs of the intervention.

In conclusion, the application of the precautionary principle in the Colombian law is consistent that way with the assertions of the sound science, an almost democratic demand that the uncertainties involved in the judicial proceedings also are solved on the basis of sensible reflections, allowing an interdisciplinary and open discussion about actual and potential environmental hazards and uncertainties that remain in the understanding of the eco-environmental and biological systems.

Thus, the precautionary principle is one of the ways that our society has to deal with the management of new risks associated with scientific uncertainty. It is located in the junction between potential risks and uncertainties and the right, which has the obligation to seek new legal instruments to strengthen the security of citizens in health and environment mainly.

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