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Gamarra-Amaya, Laura Cecilia; Venegas-Segura, Andrés Arturo; Fino-Puerto, Nelson Ricardo

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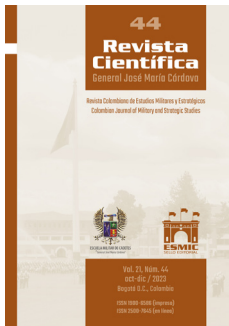
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## Protecting collective rights in Colombia: group actions implementation, and an approximation to U.S. class actions concept

**Laura Cecilia Gamarra-Amaya**

<https://orcid.org/0000-0002-0823-6224>  
[lcgamarra@ucatolica.edu.co](mailto:lcgamarra@ucatolica.edu.co)  
Universidad Católica de Colombia, Bogotá, Colombia

**Andrés Arturo Venegas-Segura**

<https://orcid.org/0000-0001-8065-5696>  
[aavenegas@ucatolica.edu.co](mailto:aavenegas@ucatolica.edu.co)  
Universidad Católica de Colombia, Bogotá, Colombia

**Nelson Ricardo Fino-Puerto**

<https://orcid.org/0000-0003-4057-8758>  
[nrfino@ucatolica.edu.co](mailto:nrfino@ucatolica.edu.co)  
Universidad Católica de Colombia, Bogotá, Colombia

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## Protecting collective rights in Colombia: group actions implementation, and an approximation to U.S. class actions concept

La protección de los derechos colectivos en Colombia: implementación de acciones de grupo y aproximación al concepto de acciones de clase en E.E.U.U

**Laura Cecilia Gamarra-Amaya, Andrés Arturo Venegas-Segura y Nelson Ricardo Fino-Puerto**  
Universidad Católica de Colombia, Bogotá, Colombia

**ABSTRACT.** The defense of collective rights, and the appropriate reparation of damages to victims is a recent development issue in the Colombian legal system. Although some legal provisions mentioned damages to an indeterminate group of people in cases of negligence, it was not until the 1991 Constitution that Colombia established the types of actions all individuals or groups can initiate to advocate for the integrity of their rights in the face of illegal actions or omissions by the State. There is currently no mechanism for groups to sue private entities efficiently that guarantees all individual and collective rights, akin to class actions. This scientific article delves into the multifaceted landscape of collective rights protection in Colombia, focusing specifically on the mechanisms and implications surrounding the deployment of group actions.

**KEYWORDS:** Class action; collective human rights; comparative law; group action; individual human rights

**RESUMEN.** La defensa de los derechos colectivos y la adecuada reparación de los daños a las víctimas es un tema de reciente desarrollo en el ordenamiento jurídico colombiano. Aunque algunas disposiciones legales mencionaban perjuicios a un grupo indeterminado de personas en casos de negligencia, no fue sino hasta la Constitución de 1991 que Colombia estableció los tipos de acciones que todo individuo o grupo puede iniciar para defender la integridad de sus derechos frente a acciones u omisiones ilegales por parte del Estado. En la actualidad no existe un mecanismo para que los grupos demanden a entidades privadas de manera eficiente que garantice todos los derechos individuales y colectivos, similar a las acciones de clase. Este artículo científico se adentra en el multifacético panorama de la protección de los derechos colectivos en Colombia, centrándose específicamente en los mecanismos e implicaciones que rodean el despliegue de las acciones de grupo.

**PALABRAS CLAVE:** Acción de clase; acción de grupo; derecho comparado; derechos colectivos; derechos individuales

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**CONTACT:** Laura Cecilia Gamarra-Amaya ✉ [lcgamarra@ucatolica.edu.co](mailto:lcgamarra@ucatolica.edu.co)

## Introduction

In legal systems worldwide, the protection of collective rights has become an imperative facet of achieving social equity and justice. This is particularly evident in the evolving legal landscape of Colombia, where the implementation of group actions represents a pivotal stride towards safeguarding the interests of large segments of the population. Colombia's legal framework has witnessed significant developments aimed at fortifying the collective rights of its citizens. The emergence of group actions as a legal instrument reflects a conscious effort to address issues that transcend individual grievances, acknowledging the social impact of certain wrongs. As we explore the intricacies of these group actions, we aim to unravel the underlying principles, procedural intricacies, and the broader implications for the protection of collective rights in the Colombian legal landscape.

This article ventures into a comparative analysis by drawing upon the extensive jurisprudential and procedural foundations of class actions in the United States. The U.S. legal system, with its rich history of class actions, provides a compelling reference point for understanding the potential challenges, benefits, and nuances associated with the collective pursuit of justice. By juxtaposing these two legal paradigms, we seek to elucidate key insights that may inform the ongoing evolution of group actions in Colombia and contribute to the broader discourse on the protection of collective rights globally.

Through a methodological approach rooted in comparative law (Vivas, 2017), the article reviews the historical antecedents, the legislative frameworks, and the jurisprudential landmarks that have shaped the trajectory of collective rights protection in Colombia. Simultaneously, it will draw upon the extensive experiences of class actions in the United States, specifically against private entities, to offer a comparative lens through which we can better comprehend the challenges and opportunities inherent in the Colombian approach. Through this exploration, we aspire to contribute to the scholarly dialogue surrounding the safeguarding of collective rights, offering perspectives that may inform both domestic and international legal discourse (Jara, 2015).

The Colombian Constitution (1991) in article 88 says:

The law shall regulate collective redress actions to protect collective rights and interests concerning public patrimony, public space, safety, and health; administrative morality, the environment, free economic competition; and analogous rights and interests that the law defines. The law shall also regulate class actions stemming from harm caused to a large number of individuals, without prejudice of pertinent complaints by specific individuals. Finally, the law shall define the cases of civil liability for damage to collective rights and interests. (Constitución política de Colombia, 1991, p.15)

This provision is developed by the legislator through Law 472 of 1998, which effectively regulated collective actions, as referred to in Article 88 of the Colombian Constitution, grouping them into two categories: popular actions for “the defense and protection of collective rights and interests” and group actions for the defense and protec-

tion of interests “of a group or of a plural number of people”. Articles 3 and 46 of Law 472 define group actions as: “legal actions started by several people who meet uniform conditions regarding the cause of individual damages for each of these group members. The aim of group actions is the recovery of monetary compensation for damages caused to a group of people” (Ley 472 de 1998, p.16) Article 47 regulates procedural aspects such as standing, statute of limitations, jurisdiction, and causes for judicial recusal and removal.

Constitutional jurisprudence has broadened the sphere of application of group actions, when the court determined that group actions do not extend exclusively to the protection of fundamental or collective constitutional rights, but also include subjective rights of constitutional or legal origin and necessarily imply, unlike in the case of popular actions, the existence of an injury or damage subject to reparation. However, it is required that the damage be caused to a plurality of persons in need of effective and immediate judicial redress that cannot be achieved through multiple individual actions.

Moreover, Colombian group actions are only available when fundamental rights are violated by the State, leaving criminal prosecution as the only open avenue to obtain redress when private corporations are responsible for damages. As Silva and Barreto (2022) point out, when Poly Implant Prothèse (PIP), founded in 1990, adulterated the breast prostheses it manufactured and sold to the world, over 400,000 Colombian women were affected, but aside than the penalties imposed by French and German tribunals, there was no direct damage assessment to the victims by the Colombian judicial system.

The foregoing shows that there is a fundamental lack of protection, in the form of remedies, for those who fall victims of torts committed by private actors. Modern conceptions see the role of the State, in its neoliberal evolution, as less of a guarantor role, and more “maternal”, or centered on caring for its citizens (Del Percio, 2020). Awarding monetary damages is a way to ensure the re-enfranchisement of these victims.

In Latin America, the Andean Community (CAN) has allowed a coalition between the states of Bolivia, Colombia, Ecuador, and Peru to achieve the formation of an economic system to guarantee better financial, commercial, and social interaction among the countries that make up this organization (Blanco, 2022). This coalition has amongst its fundamental pillars, the protection of fundamental rights to equality, equity, and freedom of expression. However, little has been done to implement international and regional mechanisms to upheld collective rights.

In most common law jurisdictions, particularly in the United States, the courts have recognized that class relief is “peculiarly appropriate” in cases in which the “issues involved are common to the class as a whole” and “turn on questions of law applicable in the same manner to each member of the class” (Van Shaack, 2003, p.18).

This article begins with a brief background of Colombian group actions, with an emphasis on the legal provisions that existed prior to the 1991 Constitution for the defense of collective rights. Class actions in the American legal system within the context Federal Rule 23 are then analyzed. The third chapter of this note attempts to make a

comparative study between both legal figures, focusing on the need to implement the mechanism of group actions against private entities, and concludes that while group actions were initially conceived to be a similar juridical figure as class actions, their practical application differs in several key aspects.

Researching mechanisms for the effective protection of people's rights is especially relevant in Latin America, where, as Silva (2019) has pointed out, the existence of legal instruments doesn't always reflect their efficacy, and scholars in the region have been concerned about verifying the effectiveness of legal provisions in social practices.

## **Background of Colombian group actions**

Human dignity is the supreme value that underpins the content of modern human rights instruments. Blanco (2021) affirms this essential content sustains the existence of a core area of fundamental rights, and without it, these lose their nature and reason to exist. The importance of this research lies in finding mechanisms to extend the re-establishment of rights to those injured by public, as well as private parties. Meanwhile, Silva García (2022) has claimed that there is an innate institutional hierarchy in Colombia that puts government agents in a position of power before regular citizens.

The issue of human rights has been the subject of deliberation since their inception during the liberal revolutions of the late eighteenth century in Europe and the United States. These deliberations have led to the transformation of its conception. Initially, human rights were linked to the most basic elements needed to survive, such as the right to life and liberty. Later, with the advent of civil rights activism in the United States, and the 1991 Colombian Constitution that established a social legal state, the conception of social rights appeared. Constitutional doctrine also deemed these rights as fundamental (Velasco-Cano et.al., 2016).

To better protect the collective rights of indigenous communities, it must be acknowledged that the first advances in the recognition of ethnic and cultural diversity have been made from the sphere of international law. One of the halting forces for this recognition has been the ignorance or invisibility of the communities or peoples considered different from mainstream society.

In Latin America, especially, cultural differences were hidden or marginalized at best. Therefore, scholars and policymakers must rely on international treaties, conventions, and agreements, that highlight these differences and how to include and protect ethnic minorities. These documents have managed to broaden their impact at the nation-state level, due to their binding nature. This transformation finds in the supra-state organizations and transnational human rights NGOs the promoters of cultural rights and diversity in the international sphere (Llano-Franco, 2021).

In Colombia, the Final Peace Agreement with the FARC-EP, signed in 2016, and the current National Security and Defense Policy lean towards the respect and guar-

antee of human rights in the framework of the end of an internal armed conflict and, therefore, everyone is urged to work towards building a stable and lasting peace, framed within the parameters enshrined in the Universal Declaration of Human Rights (Garay & Perez, 2018).

Group actions are a relatively new concept in the Colombian legal system, and certainly one that has been developed in recent memory with the merging of traditional common law notions. In Colombia, even before the 1991 Constitution, the legislator saw the need to repair a large group of plaintiffs in cases where the damage was similar, and it would have been more effective to link all plaintiffs together for the sake of judicial efficiency. However, the legal principle that calls for the effects of a judicial sentence applied only to the plaintiffs who actively took part in the litigation is of strict application in common law jurisdictions and posed a problem in the face of group actions (Lopez-Cardenas, 2011).

The Colombian Civil code (2000), in article 2359 establishes:

“CLAIMS FOR CONTINGENT DAMAGE. As a rule, standing is granted in all cases of contingent damage, which due to negligence or lack of care threatens an indeterminate number of persons. However, if the damage threatens a determinable group of people, only those from the group shall have an actionable claim”. (Código Civil Colombiano, 2000, p.227)

This article, written before the 1991 Constitution, establishes the right of those affected by negligence or lack of care to sue for damages if they are part of the affected group. This approximates the common law concept of class actions as it attempts to define a class of plaintiffs. Later in 1982, the “Decreto 3466 (1982) gave consumers the possibility to file a claim for collective damages.

Article 36 of the statute says:

In all events in which compensation for damages is appropriate, consumers may start the pertinent actions with observance of the following additional rules: 1. The plaintiff can be legally represented by the League or Consumers Association that corresponds to the place where the suit is filed. (p.21)

The statute also establishes a 15-day period from the publication of the admission of the lawsuit for any interested plaintiff to join the claim. This provision, although revolutionary at the time, proved to be a failure in the opinion of legal scholars, including Bañol Betancourt (1996), who has argued that the plaintiffs would have had to prove the damages they suffered, which put an unreasonable burden on those already affected by negligent damage.

The issue of the protection of collective rights was, before 1991, one that many tried to address unsuccessfully. The National Constituent Assembly was given the task of guaranteeing the enforceability of collective rights without detriment to the viabil-

ity of individual lawsuits that could arise in each case. The Assembly took the U.S. concept of class action, used in most common law jurisdictions, and adapted it to the Colombian legal system, with some breakdowns along the way, as tends to happen when adapting a common law concept to a civil law jurisdiction. There was some confusion as to whether the constitutional causes of action for the protection of collective rights aim to protect an abstract or diffuse interest, or whether they aim to protect individual victims of damages with a common interest and identifying qualities, as in the case of common law class actions (Lopez-Cardenas, 2011). The Assembly saw the need for two different causes of actions to preserve and protect the collective rights imprinted in the Colombian Constitution (1991) and established them in article 88, as follows:

“The law shall regulate collective redress actions to protect collective rights and interests concerning public patrimony, public space, safety, and health; administrative morality, the environment, free economic competition; and analogous rights and interests that the law defines. The law shall also regulate class actions stemming from harm caused to a large number of individuals, without prejudice of pertinent complaints by specific individuals. Finally, the law shall define the cases of civil liability for damage to collective rights and interests”. (Constitución política de Colombia, 1991 p.15)

The 1991 Constitution enshrined group actions to allow several people who have been injured by the same act to file a joint lawsuit and thus obtain a ruling that favors them all equally. By constitutional mandate, the law oversees actions arising out of injury to a plural number of persons, without prejudice to individual claims. Therefore, if any of the injured parties does not wish to be part of the group or class affected by the same cause that affected the other members under uniform conditions, they are not obliged to claim joint compensation for the injury. The group action will be exercised exclusively to obtain recognition and payment of compensation for damages (Monroy, 2016). Article 88 of the Constitution tasked the legislator with regulating popular and group actions. It took until 1998 for Law 472 of 1998 to be passed in Congress and become effective in developing a legal framework for group actions.

## **Overview of class actions in The United States**

In the United States, class actions are governed by the Federal Rules of Civil Procedure, particularly Rule 23 (Gutman, 2011), which describes the essential conditions for the certification of a case as a class action, its four types, as well as certain additional criteria for the processing of class action lawsuits. Class actions gained legitimacy and momentum through the early 1980s, as judges became increasingly comfortable with Rule 23's flexibility and potential efficiencies. However, as class actions became more common, and their application more widespread, courts and scholars began to question the ways in which class actions warp the traditional incentive structures of litigation. (Coleman, 2017).

Rule 23 was created to avoid the need to carry out multiple parallel litigations to answer questions of fact and law in those cases in which many plaintiffs have suffered the same or similar type of damage, regardless of the public or private nature of the wrongdoer (U.S. Supreme Court, 1983). In this regard, class actions differ from Colombian group actions, in which the defendant is always a public entity. Rule 23(a) of the Federal Rules of Civil Procedure sets four requirements for class certification. This means that each one must be met for the class action to proceed:

- (1) the class is so numerous that joinder of class members is impracticable (numerosity)

To meet this requirement, the group representative must demonstrate that the individual joinder is impracticable. The courts have generally accepted the case-by-case examination of the circumstances of the group and have established that geographical, vital, or financial aspects may generate impracticability of the individual joinder. Despite the above, the certification of this requirement before the courts has not been peaceful, since in some cases the number of people who make up the group has questioned the criterion of impasse. The courts have also established that if the class representative is unable to determine the exact number of members of the class, the judge can form subclasses, exclude members, or even join future plaintiff (*Eisen v. Carlisle & Jacquelin*, 1974). In the case of *Pederson v. Louisiana State University* (2000), the court concluded “that LSU violated Title IX by failing to accommodate effectively the interests and abilities of certain female students and that its discrimination against these students was intentional” and allowed the judge to set the class to be conformed by actual and future affected students.

- (2) there are questions of law or fact common to the class (commonality); this requirement constitutes the nature of the collective claim because plaintiff's claims must share a question of law or fact (U.S. Federal Rules of Civil Procedure 23 (a) (2)). For the judge to certify the class, it is required that all members, at least, have one element in common (Verbic, 2007).

In *Wal-Mart v. Dukes* (2011) the Supreme Court, by a 5-4 decision, reversed the district court's decision to certify a class action lawsuit in which the plaintiff class included 1.6 million women who worked for Wal-Mart stores. The court's reasoning was that to meet the commonality requirement, the plaintiffs would all have to have been subjected to the same type of discriminatory behavior. The Law Firm of Sidley Austin LLP, in its 2012 Insurance and Reinsurance Law Report made special mention of how the requisite of commonality has evolved over time: “In Wal-Mart, the Supreme Court held that ‘[c]ommonality requires the plaintiff to demonstrate that the class members ‘have suffered the same injury’. This does not mean merely that they have all suffered a vi-

*olation of the same provision of law.*” Their claims must depend upon a common contention. Moreover, that common contention must be of such a nature that it is capable of class wide resolution — which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one the claims in one stroke. (Sidley Austin, 2012). This sets a new precedent, since it is no longer enough for the question of fact or law to be the same for each class member, but the answer to this question must be the same in each individual case.

- (3) the claims or defenses of the class representatives are typical of those of the class (typicality); initially one might think that the typicality requirement is an unnecessary duplication of the previous requirement. However, jurisprudence has established that while the commonality requirement focuses on the class characteristics, the typicality requirement establishes whether the claims of the representative and that of the absent members originate from the same event, practice, or conduct. In *General Telephone Company of the Southwest v. Falcon*, the Supreme Court held that the class representative had to “possess the same interest and suffer the same injury as the class members.” (*General Telephone Co. v. Falcon*, 1982). The typical requirement centers on “whether the class representative’s claims have the same essential characteristics as those of the putative class. If the claims arise from a similar course of conduct and share the same legal theory, factual differences will not defeat typicality” (*Stirman v. Exxon Corp*, 2002). Therefore, a test of typicality is done to avoid conflicting interests between representative and putative members of the class. If there are, a problem of inadequate representation of the legal interests of the class arises.
- (4) the class representatives will fairly and adequately protect the interests of the class (adequacy of representation). This requisite is key in guaranteeing the interests of absent parties are represented in a class action. Under this requirement, the courts evaluate whether the interests of the class representative are consistent with the interests of the class (*Berger v. Compaq Computer Corp*, 2001) Thus, for example, the Supreme Court of the United States has indicated that the requirement of adequacy of representation is not verified when the same class contains people with claims for both current and future damages. In these cases, the court ordered the creation of subdivisions within the general class (*Ortiz v. Fibreboard Corp*, 1999). In another case, the Court ruled that the claims of the named representatives were not aligned with those of the other class members and decertified the class (*Amchem Products, Inc. v. Windsor*, 1997)

In certifying the class, the judge verifies that the class representative has correctly prepared the pleadings with the facts of the case, has the necessary experience in this type of actions, has a broad knowledge of the law and has the necessary resources to carry out the work. Sometimes the judge can examine the behavior that the class representative has had in other court proceedings and whether there are any pending disciplinary actions (*Barrie, et al v. Intervoice Brite Inc., et al*, 2009)

Regarding adequacy of representation, the Federal Practice Manual for Legal Aid Attorneys clarify:

“The 2003 amendments to Rule 23 added subsection (g), which requires the court to appoint class counsel and now explicitly mandates that counsel fairly and adequately represent the class. Under Rule 23(g), certification of the class precedes appointment of adequate counsel. Rule 23(g)(1)(A) lists the factors that the court must consider in appointing class counsel. They include pre-filing investigation, experience in class actions or similar claims, knowledge of law, and resources that counsel will commit to representing the class”. (Gutman et. al, 2011, p.25)

Aside from the Rule 23 (a) requirements, the Courts have admitted three implicit requirements for the class action to proceed:

1. **Definable Class:** To be certified, the class must be defined (determined), possible and feasible. If the class is determined in vague terms or with subjective criteria, it is understood that the class action is not possible, since it will not be possible to establish with certainty the number of members of the class and therefore the certification will be rejected (*Oldroyd v. Kugler*, 1972). It is possible that objective criteria can be established for the determination of the class, however, if from their study it is concluded that the integration of the group is too difficult, it is understood that the conformation of the same is not viable. If the objective criteria for determination are so broad that they include members who individually have not suffered harm and therefore should not belong to the class, it is possible that subclasses may be established. (Lopez-Cardenas, 2011). The case of *Pagan v. DuBois* (1995) presents a groundbreaking development in this regard, as it was ruled that Latino inmates who spoke English as well as Spanish did not suffer any harm and therefore did not make up a class in a lawsuit where Latino inmates sued a prison for not providing Spanish speaking staff.
2. **Class Representatives Must Be Part of the Defined Class:** To be certified as a class, the named representatives must also be class members. According to this, each named representative must have the same interest and injury as other members of the class (*Lewis v. Casey*, 1996) Also, for each defendant, at least one plaintiff must be able to trace injury to the defendant (*Motor Freight System, Inc. v. Rodriguez*, 1977). For example, plaintiffs in an employment dis-

crimination suit would need to be qualified for the job positions at issue to act as named representatives of the people against whom an employer has allegedly discriminated. The claims of the class representative must reflect the claims of the entire class because the representative is acting not only on his or her behalf, but on behalf of all others 'similarly situated' and damaged due to the same circumstances. The court generally appoints the class representative and must determine that the class representative will adequately represent the interests of all class members. The class representative generally receives a larger portion of the settlement than other class members in return for acting in that capacity, but the court ultimately decides how much the lead plaintiff will receive (Deskin Law Firm, 2015).

3. Plaintiffs must have a live (not moot) claim: In order to certify the class, the courts have established that the claim must be real and not fictitious, debatable, or simulated. However, it is possible that after the class has been certified some claims may become moot. In this case, the entire claim does not become moot, and the representative may continue the course of action as to the relevant claims (*Roman v. Korson*, 2004).

In addition to meeting all four Rule 23(a) requirements, to proceed, a class action must meet one of the three requirements of Rule 23(b) as follows:

1. Rule 23(b)(1) Classes: It happens in cases in which individual lawsuits by members of the class may lead to the risk of inconsistent or contradictory judgments to the class members, generating inconsistencies and legal uncertainty. In other words, this hypothesis foresees that when multiple legal sentences of a contradictory nature may arise from the same legal issue, it is necessary to group them together in the same action in order to avoid totally different decisions on the same matter (Verbic, 2007). While the action described in Rule 23(b)(1)(A) is intended to protect the defendants from inconsistent adjudications imposing incompatible obligations that might result from independent actions brought by individual plaintiffs, Rule 23(b)(1)(B)'s action is designed to protect absent class members from litigation that could impair "their ability to protect their interests" (Gutman et. al, 2011).
2. Rule 23(b)(2) Classes: Under Rule 23(b)(2), the class must show that the defendant acted in a way "generally applicable" to class members, making declaratory and injunctive relief appropriate. In *Wal-Mart Stores*, the Court held that Rule 23(b)(2) is only satisfied when a single injunction or declaratory judgment would provide relief to each member of the class. It does not authorize class certification when each individual class member would be entitled to a different injunction or declaratory judgment against the defendant.

3. Rule 23(b)(3) Classes: This last hypothesis of predominantly compensatory nature is also known as class action for damages or common question class actions. The aim of this action is to achieve judicial celerity, in addition to promoting the uniformity of decisions regarding individuals with common issues (Lopez-Cardenas, 2011). Rule 23(b)(3) permits certification of the class when the primary relief sought is damages. It requires that the common questions of law and fact predominate over any individual questions and that a class action be superior to other methods for fair and efficient resolution of the conflict.

In these cases, the district court has discretion in determining whether common questions predominate and whether a class action is possible.

## Overview of group actions in Colombia

### **They are constitutional actions, very strict in terms of their formal requirements**

Group action lawsuits are established by article 88 of the Colombian Constitution and regulated by Law 472 of 1998. To achieve the successful exercise of the right to access to justice, the judge in a group action must rule impartially, effectively, and prudently in all cases submitted by affected parties (Lopez Cardenas, 2011). Compare this to class actions in the United States, which do not have a constitutional component; instead, they were developed by the legislator through Federal Rule of Civil Procedure 23, which governs the certification and conduct of class actions (Van Shaack, 2003).

### **They are rooted in the damage caused to a plural number of people, without prejudice to their corresponding individual causes of action (Article 88 of the Constitution)**

Group actions always seek reparation in the form of monetary damages without prejudice to the plaintiffs' individual causes of action. For injunctive relief of rights that are subject to violation, the Constitution and the Law have established the figure of popular actions under article 88, the same article 88 that consecrates group actions. There is a Fund for the Defense of Collective Rights, administered by the Defensoría del Pueblo (Ombudsman's Office), who is responsible for the promotion of group actions and the management of resources ordered by the judges to pay the members of the various groups (Defensoría del Pueblo, 2010). The defendants deposit the payment into the Fund and from there the monies are distributed following the guidelines established by the judge in their sentence. It follows that there are two distinct phases in group actions. In the first, the action goes through the judicial system, with the judge playing a significant role and has broad discretion to carry out the interests of justice. During the second phase, the

Ombudsman's Office exercises administrative powers and distributes the money recovered amongst the plaintiffs.

By contrast, class actions can be started for either monetary or injunctive or declaratory relief (Gutman et. al,2011). Classes under (b)(1) are permitted when grouping all plaintiffs is necessary to protect the defendant from inconsistent adjudications, or to protect the rights of absent class members. Classes under (b)(2) and (b)(3) are broader, as (b)(2) allows for class actions for declaratory or injunctive relief, and (b)(3) permits opt-out class actions when common issues “predominate” and the class action is the “superior” device for resolving the controversy (Klonoff, 2014).

### **They can be started to guarantee the protection of all human rights, not only collective rights**

Shortly after Law 472 was passed, the Constitutional Court, in sentence C-215 of 1999 (Corte Constitucional,1999) indicated that group actions included subjective rights of constitutional or legal origin, but that these actions did not involve collective rights. This created legal uncertainty, as the Constituent Assembly specifically had intended for the protection of collective rights. To fix this, the Constituent Assembly issued sentence C-1062 of 2000 (Corte Constitucional,2000) where it clarified that group actions can proceed in the case of a massive violation of fundamental and collective rights.

It is important to distinguish between popular actions and group actions in the Colombian legal system. After some initial confusion, the Constitutional Court has ruled on the differences between group and popular actions, affirming that although both actions have in common that they are collective actions, they are differentiated by (i) their aim and (ii) the nature of the rights affected. Regarding the aim, group action lawsuits have an eminently reparatory purpose of a wrong caused to individual or collective interests susceptible of individualization, while popular actions have a preventive purpose. The Court has emphasized that class or group actions do not relate exclusively to fundamental constitutional rights, nor only to collective rights, since they also include subjective rights of constitutional or legal origin that have been injured or affected, for which requires the reparation before a judge.

Regarding the nature of the rights and interests protected, while popular actions seek to essentially protect collective rights and interests, group actions protect all types of rights and interests, whether they are collective or individual, since what is sought is the compensation for damages resulting from the affectation of a subjective interest, caused to a plural number of persons.

### **The group interests may be represented by an attorney**

To properly represent the interests of the group, the right representation by an attorney is key. Article 56 of Law 472 of 1998 does not expressly state the conditions for a group representative, so some jurisprudential developments have been made, prompting the judge

to review the formal requirements of a group action lawsuit before accepting it (Consejo de Estado, 2007.) In the face of this legal void, Colombia has attempted to adapt the common law principle of adequacy, which has been developed extensively. However, some key provisions have proven inapplicable in Colombia.

In common law jurisdictions, namely the United States, to assess whether the representative of the group meets all the qualities necessary to represent the group's interests, the judge must examine that there are no substantial conflicts between the interests of the representative and the absent members of the class, as it must infer that the attorney representing the class will be able to guarantee a vigorous jurisdictional protection of the interests of the absent members (Bujosa Vadell, 1995).

These evaluation criteria developed by U.S jurisprudence demand that the representative of the class have all the necessary conditions to face an appropriate defense, understanding that fair and adequate representation implies that the result of the class action would not be better than the one that could be obtained by each member absent from the class if they acted individually. Therefore, if the representation of the group is not adequate, the process should not generate legal effects for the absent ones, since their due legal process would have been affected (*Vassalle v. Midland Funding LLC*, 2013).

In Colombia, however, since Law 472 of 1998 does not establish a review mechanism for assessing the qualities of a group representative, the judge assigned to hear a group action lawsuit is not authorized to rule on strictly subjective or personal matters, such as the behavior, credibility, and experience of the legal representative.

Some Colombian legal scholars think that to ask the judge to decide on the experience and suitability of the attorney would result in a detriment of the right of access to justice, since judges are not qualified to form such a subjective opinion and determine that certain lawyers are not fit to adequately represent the interests of the group. In other words, our judicial system is not capable of demanding this kind of requests from the representatives, since the demands could end up violating the rights of the victims to be represented by certain lawyers, in detriment of a general access to justice (Lopez Cardenas, 2011).

The solution would be for the higher courts or the legislature to regulate the criteria required for an attorney to represent a group in a group action lawsuit. Having clear criteria regarding who can represent many people in a group action has clear advantages over the common law system of judicial discretion. In the first place, clear criteria can allow the court to streamline the process of selecting attorneys to represent a large group. This helps in managing cases more efficiently, reducing delays, and ensuring that legal proceedings move forward smoothly. Further, setting criteria allows the court to ensure that attorneys possess the necessary expertise and competence to handle complex class action cases. This can lead to better legal representation for the affected group, promoting justice and fair outcomes. Clear parameters can be geared towards promoting diversity and fair representation among the appointed attorneys. This helps in preventing any potential bi-

ases and ensures that the legal team represents the interests of the diverse group effectively. Establishing criteria helps in selecting lawyers who are committed to protecting the rights of the class members. This is crucial in class action cases where many individuals might be affected, and their interests need to be safeguarded.

In addition, clearly defined criteria create a framework for holding appointed lawyers accountable for their actions. This accountability is important for maintaining the integrity of the legal process and ensuring that lawyers act in the best interests of the class. Ultimately, efficiently managed class action lawsuits contribute to judicial economy by consolidating similar claims. This can prevent the court from being burdened with numerous individual cases that share common legal issues, saving time and resources.

Finally, a transparent and well-defined process for selecting attorneys enhances public trust in the legal system. When people see that criteria are in place to ensure fair and competent representation, they are more likely to have confidence in the judicial process (Méndez, 2022).

The right representation directly relates to the victims' interests. In fact, the person who files the suit is invoking the cause of action of all the group members. The importance of this lies in the fact that representation is not intended to protect only the interests of the plaintiff group but those of the entire affected group. Colombian jurisprudence has made a distinction between these two groups, saying:

“The distinction between these groups is that the complainant group is made up of those exercising the right to act, formulating the claim on behalf of the entire affected group, filed by either a single person or by a group of people, who meet the condition of belonging to the affected group. This group may increase in number as others join the action before the collection of evidence phase. These new claimants, as well as the original ones, have the right to invoke extraordinary or exceptional damages to obtain greater compensation and to benefit from a monetary award. The affected group is a more generic concept that refers to the group made up of no less than twenty people who have suffered an individual harm from the same cause, a group whose members must be identified by their names in the lawsuit, or in any case, in the same opportunity the criteria to identify them and define the group must be expressed, in the terms of article 52, numerals 2 and 4 of law 472 of 1998. This group is part of all those affected that they have not managed to exclude themselves from the process, i.e., the complainant group is part of them, who appear during the process and who never showed up to act in the process, but who were affected by the same act.” (Consejo de Estado, 2005, p.6)

### **A minimum number of 20 determined or determinable persons is required to form a group.**

Article 46 of Law 472 of 1998 has established a minimum of 20 victims to form a group. By victim, we refer to the injured party whose rights are being violated or damaged by a wrongful act (Crawford, 2002). Jurisprudence has established that for this action to

proceed, it is necessary to prove that the persons who make up the group are “direct victims” of the harmful event, thereby restricting the scope of this reparation mechanism. Although article 46 of Law 472 of 1998, only provides a minimum number of people, the courts have distinguished two types of victims; those who suffered the direct violation (direct victims) and those who suffered the consequences (indirect victims) (Consejo de Estado, 2000). According to Crawford (2002), this distinction has proven to contradict international standards in victim reparation, making it more cumbersome to determine who the real victims are.

Direct victims are defined as the persons on whom the damaging consequences of the illegal act fall upon, without an intermediary or interruption of continuity (Lopez Cardenas, 2011) Therefore, the relatives of an injured plaintiff have no cause of action as direct victims of group action. The Council of State of Colombia has determined that direct victims are the only ones who can join a group action and a minimum number of 20 direct victims is required for the group action lawsuit to be admissible (Consejo de Estado, 2000).

Regarding indirect victims, only when the damage caused to the direct victim generates a series of events in direct detriment of a dependent party (parents, children), can these parties join the group action lawsuit as indirect victims (Mejía Gomez, 2003). If the requirements mentioned are met, a group action lawsuit can be started by direct as well as indirect victims.

Regarding numerosity in U.S class actions, Rule 23 of the Federal Rules of Procedure says that a class action is appropriate when “the class is so numerous that joinder of all members is impracticable. There is no minimum number of plaintiffs required to form a class, but it requires the extra step of certification by a judge.”

### **Legal alternatives for group members**

There are several possibilities for the group members, in addition to joining the group:

- i) They can request to be excluded and initiate their individual lawsuits: Group actions are a constitutional mechanism for a group of people to exercise their fundamental and collective rights. The law provides that the plaintiff can file an individual lawsuit if their interests are better protected by doing so (Ley 472 de 1998).
- ii) They can request to be included in the action by appointing a judicial proxy. If the plaintiff does not wish to appear directly, they can appoint an attorney to represent them.
- iii) They can wait for the results of the group action and join it in the 20 days following the sentence (Defensoría del Pueblo, 2010).

In class actions, every person who joins is known as a class member. The main plaintiff is known as the named plaintiff or class representative. Everyone else is known as an

“absent class member”. Absent class members have no power or control to make decisions about the case and have fundamentally different rights and duties than the named plaintiffs and they are not entitled to attorney-client privileges (*Wyly v. Milberg Weiss Bershad Schulman LLP*, 2009). Although the courts have ruled that class device is an exception to the usual rule, that litigation is conducted by and on behalf of the individual named parties only, they have restricted the mechanism to the actual class members (Dodon, 2016).

## **Judicial discretion**

The Judge in the group action decides, among other things, i) the payment of a collective indemnity that contains the average sum or the percentage of the individual compensation; ii) indicates the requirements that must be met by beneficiaries who did not participate in the process to claim compensation; iii) orders the delivery of said compensation to the Fund for the defense of collective rights and interests of the Ombudsman’s Office, which in turn with issue individual payments and iv) orders the payment of fees for the representing attorney (10% of the compensation of those who were not judicially represented in the case) (Defensoría del Pueblo, 2010).

In class actions, the courts have ruled that “a district court has broad discretion in deciding whether a suit may be maintained” (Barrington Wolff, 2014, p.1911). This broad discretion gives judges the ability to certify the class, and with it, they hold the power over whether the plaintiffs obtain relief. In cases where the statutory language allows it, the discretion not to certify can operate as a safety mechanism that allows courts to explore all available avenues for relief in cases from which they can determine when class treatment is appropriate and, conversely, when broad certification orders threaten to undermine the values sought to be promoted by the legislative scheme (Barrington Wolff, 2014).

## **Determination of Damages**

As previously explained, the judge in a group action has the discretion to determine the amount and payment of damages to the victims. Art. 34 of Law 472 of 1998 establishes that any judicial decision on claims in a popular action may contain an order to do or not to do, order the payment of damages, and demand the performance of necessary actions to return things to the way they were prior to the violation of the rights or collective interest, when physically possible. These damages can be either monetary or non-monetary, depending on the interest violated (Gamarra-Amaya, 2019), because it has traditionally been the view of the legislator that not every harm can be made whole again by mere monetary means. The Supreme Court has affirmed the principle of “*arbitrum judicum*”, by which the judge has ultimate discretion to impose damages. Damages are generally divided into two major categories: *daño emergente* and *lucro cesante*.

The Colombian Civil Code, in its articles 1613 and 1614 defines the first as arising out of “the damage or loss that arises of an obligation that was not fulfilled, of erroneous fulfillment, or fulfilled late” (Código Civil Colombiano, 2000, p.228). This is to the loss-

es derived from the damage and to the injured party's diminished estate because of the harmful conduct. *Lucro cesante*, by contrast, refers to the loss of earnings suffered because of the damage. Thus, what under normal circumstances would have brought a financial advantage to the victim did not occur, nor will it occur; and therefore, the expectation of future economic benefit disappears with the harmful event.

In the United States, damages are imposed as a remedy or compensation in favor of a party whose interests have been infringed due to a tortious act. Therefore, damages are understood as the consequence, not the injury itself, like the Spanish word *daño* implies (Gamarra-Amaya, 2019). Punitive damages are those awarded against a negligent, malicious, or omission actor that causes grievous harm to the plaintiff. It also acts as a deterrent or punishment, so that others don't commit the same tortious act. The judge or jury, depending on local law, has discretion to award punitive damages based on the extent of plaintiff's harm and the behavior of the wrong doer.

Regarding class actions, the United States Supreme Court has been traditionally skeptical of class actions in personal injury cases, limiting the opportunities for a class certification. In determining damages, it must be determined whether compensatory damages were determined prior to an award of punitive damages, the ratio between compensatory and punitive damages, and a comparison of comparable civil penalties and punitive damages (McGovern, 2010).

### Statute of Limitations

The statute of limitations for group actions is two years from the act or omission that caused the damage. This means that group actions expire two years after the occurrence of the event, i.e., they must be exercised within two years from the date on which the damage was caused or the infringing action that caused the damage ceased. The two year-period starts running from the date of the event giving rise to the damages claimed in the lawsuit occurs, and it must be determined whether it was a one-time event, or whether its effects have been prolonged over time, considering its effects and consequences (Defensoría del Pueblo, 2010).

The issue of the statute of limitations in class actions is more complex, as it is related to the type of claim being asserted and the statute of limitations for that specific type of injury. For example, in the event of an automobile crash, the normal time for filing a lawsuit in court is two years, so a class action against the manufacturer for defective parts must be filed within two years of the injury occurring (Coble, 2015). The doctrine of statute of limitations for putative class members has been developed by the courts following the standards set in *American Pipe and Construction Co. v. Utah* (1974) where it was established that the commencement of a class action tolls the statute of limitations for individual claims later subsequently filed by putative class members (Rutner, 2017).

## Conclusion

In the pursuit of a more equitable and robust legal framework for the protection of collective rights in Colombia, the examination of group actions has revealed a compelling avenue for redress. In this study, the convergence of Colombian group actions with the well-established U.S class actions emerges as a pertinent and progressive consideration for the evolution of collective rights protection in Colombia.

The Colombian legal landscape has undeniably witnessed transformative strides since the introduction of group actions in the 1991 Constitution, offering an avenue for individuals to collectively address grievances that transcend the limits of individual harm. However, the applicability of this mechanism only to public entities leaves a discernible gap, particularly when considering torts perpetrated by private entities. Our comparative analysis with the U.S class actions framework underscores the efficacy and adaptability of such mechanisms in navigating the complexities of corporate accountability (Gamarra-Amaya, 2022).

The experience gleaned from the United States, where class actions have been instrumental in holding private entities accountable for a range of transgressions, provides a valuable model for Colombia's legal evolution. Expanding the scope of group actions to encompass private entities aligns with the global trend of recognizing the social implications of corporate misconduct and aligns Colombia with international standards for the protection of collective rights.

The incorporation of private entities into the ambit of group actions does not merely symbolize a legal expansion but signifies a conscientious commitment to cultivating a legal environment that fosters fairness, accountability, and redress. Lessons drawn from the successes and challenges of U.S class actions serve as invaluable points of reference, offering insights into tailoring mechanisms to the specific needs of the Colombian socio-legal environment.

For enforcement mechanisms to be meaningful, they must become part of the popular vernacular and easily accessible regardless of where the victim is located. Group actions in the remote regions can potentially play an important role in this process. Although class actions were used as a precedent in developing this novel concept, it is clear that group actions have a much different application than the class action mechanism in common law jurisdictions, i.e. the United States. The first and most important differentiating characteristic is that group actions can only be started against the State, since the State is the one and only guarantor of human rights. Class actions, by contrast, can be used against both public and private entities when the rights of a class of citizens are violated. From this, it can be inferred that group actions are conceived with the primary objective of obtaining reparations for damages occurred at the hands of the State, while group actions target private individuals with the potential to diminish their business profits.

Another important difference lies in the requirement for certification laid out in Federal Rule 23. The U.S judge has wide discretion in certifying the class, as we have seen in previous chapters. The requirement in Colombia is no less burdensome, as it requires demonstrating at least 20 direct victims of the alleged violation. Both situations have, in the past, made it difficult for plaintiffs to achieve success in the litigation of their cases. For class actions to become an effective vehicle for the defense of human rights, it is necessary to overcome the challenges of obtaining certification, and for group actions to become more widely available, the courts need to rethink the prerequisites of 20 direct victim.

Colombia must advance its mechanisms of access to justice not only when faced with human rights violations, but also when the welfare of its citizens is compromised by the actions or omissions of a private agent. There is no reason why group actions should not proceed in the realm of private law, except for the arbitrary distinctions that Colombian courts have made in a non-purposeful manner. Thus, it is up to the legislator to address the issue and widen the range of application of Law 23 of 1998.

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### **About the authors**

**Laura Cecilia Gamarra Amaya** is a lawyer. Professor at the Catholic University of Colombia. LL.M. in International Law from Georgetown University. Executive editor of *Novum Jus Journal*.

<https://orcid.org/0000-0002-0823-6224> - Contact: [lcgamarra@ucatolica.edu.co](mailto:lcgamarra@ucatolica.edu.co)

**Andrés Arturo Venegas Segura** is a Professor at the Catholic University of Colombia. Anthropologist, National University of Colombia. B.D. in Physics, Universidad Distrital Francisco José de Caldas. Specialist in Bioengineer. Doctor in Education.

<https://orcid.org/0000-0001-8065-5696> - Contact: [aavenegas@ucatolica.edu.co](mailto:aavenegas@ucatolica.edu.co)

**Nelson Ricardo Fino Puerto** is a Professor of the Department of Basic Sciences at the Catholic University of Colombia. B.D in Physics

<https://orcid.org/0000-0003-4057-8758> - Contact: [nrfino@ucatolica.edu.co](mailto:nrfino@ucatolica.edu.co)

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