

# Revisiting Popular Action

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## REVISITING POPULAR ACTION

By Raul Sanchez Gomez\*

**ABSTRACT:** The concept of Popular action is the right to promote judicial activity in defense of the general interest. Sometimes it is placed on a slippery slope and based on spurious interests. Despite broad constitutional recognition of the doctrine, there are limits on popular action through the Botín and Atuxta Doctrines established by the Jurisprudence of the Supreme Court. A comprehensive legislative reform of the institution should be accomplished urgently.

### I. Introduction to the Criminal Conflict

In legal systems where the victim may become a party to the criminal conflict, the performance as plaintiff has been designed from a strictly controversial perspective. The inherent conflict between the victim and the offender must be subject to limitations on content and decorum. As Moreno Catena stated, "together with the conflict between the victim and the person responsible for the facts, which effectively grants the criminal prosecution a public consideration, there is another conflict that is established between the victim ... and the person presumed to have committed the crime."<sup>1</sup> This conflict cannot be forgotten; it may occupy a leading position in the concerns of jurists, even above the general prevention."<sup>2</sup> In the Spanish system of Criminal Procedure, the intersubjective aspect is established through the concept of the nonofficial power to prosecute.<sup>3</sup> In other words, an accusation can be made directly by the victim or the victim's family members during any procedural stage<sup>4</sup>, as prescribed by Article 109 of LEcrim.<sup>5</sup> On the other hand, the social aspect of the conflict concerns the existence of a legal dispute between the offender and society, which is (and will always be) interested in the prevention and suppression of crime. Both dimensions, intersubjective and social, connect in the resolution of the conflict. As claimed by Gimeno Sendra, "in criminal proceedings the conflict between offender and [the] offended remains in the background, limited to the area of civil claims bounded by the crime. Since a criminal [offense] is an attack or endangerment of legal rights, the conflict arises between society—which demands the *ius puniendi* of the State—and the alleged perpetrator of

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<sup>1</sup> Víctor Moreno Catena, *El Ministerio Fiscal, director de la investigación de los delitos*, 1 TEORÍA Y DERECHO REVISTA DE PENSAMIENTO JURÍDICO 74, 79 (2007).

<sup>2</sup> *Id.*

<sup>3</sup> See See LUIS MARÍA DÍEZ PICAZO GIMÉNEZ, EL PODER DE ACUSAR: MINISTERIO FISCAL Y CONSTITUCIONALISMO 141-71 (2000).

<sup>4</sup> As well as the legal standing rights of the private plaintiff.

<sup>5</sup> Spanish Code of Criminal Procedure will be cited as LEcrim.

the illegal action."<sup>6</sup> However, as Jacoby points out: "the idea of private prosecution is alien to modern America, as is its basic supposition that crime is essentially a private concern between the aggressor and the victim. (...). As such, the American system conceives the criminal act to be a public occurrence and society as a whole to be the ultimate victim."<sup>7</sup> Under the Spanish understanding of criminal conflict resolution, both perspectives of prosecution are compatible, and even desirable, for the best resolution of the criminal controversy. This is especially true as to those crimes with a more visible socio-educative impact.

## II. Citizenship and Citizen Participation in the Administration of Justice

Article 125 of the Spanish Constitution constitutionalized the engagement of citizens in *popular action* and the participation in the Administration of Justice through the institution of a Jury in criminal trials as well as in customary and traditional courts.<sup>8</sup>

To be specific, popular action is a nineteenth-century legal mechanism<sup>9</sup> that allows any Spanish citizen to bring a case to national courts for any crime, so long as the case is within the interest of the public.<sup>10</sup> Certainly, as claimed by Gutierrez Alviz Conradi and Catena, "it is empowered to regulate popular action in a way he or she considers most convenient; it is a blank constitutional provision which leaves its legal configuration to the criteria of the Legislator. However, an exception to [the] rule [should be noted]: the Legislator is not competent to decide the suppression of popular action of our system, as it is not possible to respond to the constitutional provision with oblivion or disappearance."<sup>11</sup> Consequently, Article 100 of the Spanish Code of Criminal Procedure () states that a criminal proceeding for the prosecution of an offender will occur when resulting from all crimes or

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<sup>6</sup> JOSE VICENTE GIMENO SENDRA FUNDAMENTOS DE DERECHO PROCESAL: (JURISDICCIÓN, ACCIÓN Y PROCESO) 21 (1981). Gimeno Sendra states that "the generic object of criminal proceedings is determined by the conflict between the subjective right to punish and the right to freedom of the individual. In our opinion, the current criminal and procedural laws glimpse the existence of an inner interest in the composition of criminal disputes, as we will develop later when analyzing the various criminal typologies and their impact on the criminal conflict resolution. It is important not to forget that, the recognition of the presence of an intersubjective interest in criminal composition, once defined its limits, does not necessarily imply a privatization in the application of penalties and security measures." GIOVANNI LEONE MANUALE DE DIRITTO PROCESSUALE PENALE 466 (1973).

<sup>7</sup> Joan E. Jacoby, *The American Prosecutor in a Historical Context*, 4 JOURNAL OF NATIONAL DISTRICT ATTORNEYS ASSOCIATION 33, 38 (1997).

<sup>8</sup> Popular action was regulated in articles 255 and 307 of the 1812 Constitution, articles 73 and 93 of the Constitution of 1856, article 93 of the 1869 Constitution, and articles 29 and 103 of the Constitution of 1931. A concern for citizen participation in the Administration of Justice can be found in the constitutional process of 1869 and in the extreme left-wing Government Program at the Congress of 1849, the Manifesto of the Central Committee in March 15, 1865, the Manifesto of the Revolutionary Council, of September 20, 1868, or the Bill of Rights of Higher Revolutionary Council of October 8, 1868. For a historical overview of the evolution of the popular action right, see NICOLÁS GONZÁLEZ CUÉLLAR SERRANO et al., COMENTARIOS A LA LEY DE ENJUICIAMIENTO CRIMINAL Y OTRAS LEYES DEL PROCESO PENAL 503 (2005); see also JULIO PÉREZ GIL, LA ACUSACIÓN POPULAR 7-31 (1st ed. 1997).

<sup>9</sup> Popular action first appeared at Ley number 2 of the First Title of Código de las 7 Partidas, under the reign of Alfonso X El Sabio, six centuries ago. However, it was a marginal legal instrument, on recent legal history, popular action was established at Provisional Rules for the Administration of Justice of 1835 and at both the 1872 and 1882 Spanish Code of Criminal Procedure.

<sup>10</sup> Daniel Rothenberg and Baltazar Garzón, *Let Justice Judge: An Interview with Judge Baltasar Garzón and Analysis of His Ideas*, 24 HUM. RTS. Q. 4, 930 (2002).

<sup>11</sup> FAUSTINO GUTIÉRREZ-ALVIZ CONRADI AND VÍCTOR MORENO CATEN, ARTICLE 125: LA PARTICIPACIÓN POPULAR EN LA ADMINISTRACIÓN DE JUSTICIA, COMENTARIOS A LA CONSTITUCIÓN ESPAÑOLA DE 1978 168 (1st ed. 1996). See also PEDRO CRESPO BARQUERO, COMENTARIOS A LA CONSTITUCIÓN ESPAÑOLA 1940-49 (2009).

misdeemeanors. Moreover, under the Code, the exercise of criminal action, commonly understood as the right to accuse a person alleged to have committed an offense punishable by law, corresponds either to those directly harmed by the crime, or to any citizen through the exercise of popular action.<sup>12</sup> Additionally, as Luna and Wade observe with regard to the French model, which is similar to the Spanish model, “an investigating magistrate controlled the focus and reach of the pretrial phase of the criminal process with an expectation that the magistrate would fully investigate the matter and prepare a comprehensive documentary record or ‘dossier.’”<sup>13</sup> If the investigative magistrate concludes that a crime had occurred and that a particular individual was responsible, the case would proceed to trial with the ‘dossier’ as the evidentiary centerpiece. If the magistrate reached a contrary conclusion, the case is to be closed without further prosecution.<sup>15</sup> Thus, a party filing a claim for popular action need not suffer any injury or have any direct connection to the crime or perpetrators in the case. Likewise, consider the duties entrusted to the Public Prosecutor<sup>16</sup> Popular action allows those parties to pursue criminal charges during the investigative phase regardless of the willingness of the State to undertake criminal action. The Public Prosecutor’s office may assist or oppose popular action, a position which often has a significant impact on the development of the case and upon any possible trial that might result from an investigation.<sup>14</sup>

By definition, criminal action is the right to bring a legal case to court and is considered a right of those citizens directly affected by criminal acts.<sup>15</sup> From the Public Prosecutor’s perspective, criminal action should be considered a duty. However, the jury trial and popular action, both major institutions regulated by Article 125 of the Spanish Constitution, recognize legal faculties traditionally assumed by Judges and Public Prosecutors to citizens.<sup>16</sup> Functionally then, according to Article 1.2, national sovereignty belongs to the Spanish people, from whom all State powers emanate.<sup>17</sup>

Thus, popular action (*quivis ex populo*) arises in the Spanish legal system of criminal proceedings in order to prosecute certain crimes considered highly reprehensible, or those with a wider social impact.<sup>18</sup> As Gimeno Sendra states, “[t]hrough popular action, anyone has the right to initiate a criminal [proceeding] and exert a claim on behalf of Society, by which a

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<sup>12</sup> Article 270 of LEcrim can be translated as follows: “*all Spanish citizens, whether or not they are victims of a crime, may file a complaint by exercising popular action as established by Article 101 of the law.*”

<sup>13</sup> See ERIK LUNA AND MARIANNE WADE, *THE PROSECUTOR IN TRANSNATIONAL PERSPECTIVE* 14 (1st ed. 2012). See also Abraham Goldstein and Martin Marcus, *The Myth of Judicial Supervision in Three “Inquisitorial” Systems: France, Italy Germany*, 87 *YALE L. J.* 240 (1977).

<sup>15</sup> *Supra* note 10, at 931.

<sup>16</sup> See IGNACIO FLORES PRADA *EL MINISTERIO FISCAL EN ESPAÑA* 383-534, 535-624 (1999). See also VICENTE GIMENO SENDRA, *LA ACCIÓN POPULAR, EL JURADO Y LOS TRIBUNALES DE ESCABINOS. COMENTARIOS A LA LEGISLACIÓN PENAL* 388 (1992); see also FAUSTINO GUTIÉRREZ-ALVIZ CONRADI AND VÍCTOR MORENO CATEN, *ARTICLE 125: LA PARTICIPACIÓN POPULAR EN LA ADMINISTRACIÓN DE JUSTICIA, COMENTARIOS A LA CONSTITUCIÓN ESPAÑOLA DE 1978 69-70* (1st ed. 1996) (regarding the public prosecution and the popular action).

<sup>14</sup> *Supra* note 10.

<sup>15</sup> Popular action, as it is understood here, cannot be identified with the basic characters of class actions regulated at Rule 23 of Federal Rules of Civil Procedure, principally because popular actor is not directly affected by the criminal facts. Class action implies that the person standing in court is part of the group affected by the facts sued. See SUSANA OROMÍ VALL- LLOVERA *EL EJERCICIO DE LA ACCIÓN POPULAR: (PAUTAS PARA UNA FUTURA REGULACIÓN)* 34-35 (1st ed. 2003).

<sup>16</sup> *Id.*

<sup>17</sup> JULIO BANACLOCHE PALAO, *EL FUTURO DE LA ACCIÓN POPULAR: LÍMITES* 1 (1st ed. 2012).

<sup>18</sup> Víctor Moreno Catena, *La acción popular: El proceso penal*, TIRANT ONLINE (Sept. 1, 2015), <http://www.tirantonline.com>.

particular situation or individual right will be recognized, and/or by which a particular person will be bound to comply with a legal provision.”<sup>19</sup>

However, under Article 125 of the Spanish Constitution, popular action is intended to be a constitutional right with a legal configuration (Article 19.1 Code of Organization of Judicial Power) expressly recognized for those criminal proceedings determined by Law (Articles 101, 270 and 761 of the Constitution, LEcrim).<sup>20</sup> Moreover, popular action taken together with the right to effective judicial protection provides a riveting practical effect. As consistently shown through jurisprudence,<sup>21</sup> the legal standing of the private prosecution<sup>22</sup> derives directly from Article 24.1 of the Spanish Constitution as an injured party, while the legal standing granted to the popular actor derives from the popular action embodied in the Article 125, thereby enabling the risk of an interference as to a Constitutional Complaint in both contexts.<sup>23</sup> Since the July 11, 1983 Decision of the Constitutional Court, the connection and interference of these rights have been observed. This is because a restrictive interpretation of popular action in terms of constitutional and/or legal phrasing and terminology was at risk to a contrary interpretation with respect to the right to effective judicial protection. As declared by Rothenberg and Garzon, in the context of Pinochet and other Argentinian cases, “the central idea of popular action is to allow judicial review of cases of societal import that might be too politically sensitive to be handled by Public Prosecutors representing the interests of the state.”<sup>24</sup> Therefore, protection of popular action through constitutional ruling implies that the defense of the common interest is a personal interest

Finally, with respect to the right to exercise popular action, Article 280 of LEcrim imposes an obligation on the plaintiff to post bail in advance. In other words, the complainant (or plaintiff) must provide bail as determined by the presiding judge. How much money one

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<sup>19</sup> VICENTE GIMENO SENDRA, *CONSTITUCIÓN Y PROCESO* 83 (1st ed., 1998).

<sup>20</sup> Cf. Juan Añón Calvete, *Doctrina Botín y doctrina Atutxa. Acusación particular y acusación popular: límites al ejercicio de la acción popular*, TIRANT ONLINE (Sept. 14, 2015), <http://www.tirantonline.com>

(holding that it would be a real fundamental right). See also Javier Echano Basaldúa, ¿LEGITIMACIÓN DE LAS PERSONAS JURÍDICO-PÚBLICAS Y DE LOS PARTIDOS POLÍTICOS? PROBLEMAS ACTUALES DEL PROCESO PENAL Y DERECHOS FUNDAMENTALES 167 (1st ed. 2010); see also NICOLÁS GONZÁLEZ-CUÉLLAR SERRANO et al., *COMENTARIOS A LA LEY DE ENJUICIAMIENTO CRIMINAL Y OTRAS LEYES DEL PROCESO PENAL* 503-11 (1st ed. 2005).

<sup>21</sup> Decisions of the Constitutional Court: 62/1983 of July 11th, 108/1983 of November 29th, 115/1984 of December 3rd, 147/1985 of October 29th, 137/1987 of July 22nd, 34/1994 of January 31st, or 79/1999 of April 26th, among others.

<sup>22</sup> The concept of private prosecution, to be translated as “acusación particular” refers the action rights of victim or his or her family members that can develop that roll position at any of the criminal stages. However, the term “acusación privada” refers a private prosecution regarding exclusively torts (traditionally considered private crimes under Spanish Law), such as libel or slander.

<sup>23</sup> See JOSÉ ALMAGRO NOSETE, *CONSTITUCIÓN Y PROCESO* 98 (1st ed. 1984) (regarding the effects of the legal standing on the popular action); see also VICENTE GIMENO SENDRA, *CONSTITUCIÓN Y PROCESO* 84 (1st ed. 1998); see also JULIO MUERZA ESPARZA et al., *LAS PARTES EN EL PROCESO PENAL (I), DERECHO PROCESAL PENAL* 153 (8th ed. 2007).

<sup>24</sup> Daniel Rothenberg and Baltazar Garzón, *Let Justice Judge: An Interview with Judge Baltasar Garzón and Analysis of His Ideas*, 24 HUM. RTS. Q. 4, 8 (2002). The cases included thousands of claims of torture, kidnaping, and murder against non-Spanish citizens committed by military regimes in Argentina and Chile. The Argentine case began with fewer than ten named victims and gradually expanded to include over six hundred individuals of Spanish descent or their relatives who were murdered or disappeared by the military regime. The Chilean case began with seven victims and expanded to cover hundreds of claims.

must pay for bail is determined using proportionate economic parameters (Article 20.3 LOPJ). As stated in the March 2, 1998 Decision of the Constitutional Court: "the requirement of bail . . . imposed on [a person] not directly [affected] by the crime being pursued (Articles 280 and 281 of LEcrim), is not in itself contrary to the essence of Law, as it does not impede access to jurisdiction. (Decisions of the Constitutional Court 62/1983, 113/1984 and 147/1985).

In conclusion, our jurisprudence has persistently acknowledged the interconnection between Articles 24.1 and 125 of the Spanish Constitution. However, as evidenced by the Supreme Court decision of June 5, 1993, "it is necessary to measure very carefully . . . the treatment given . . . to popular action, because although it is a recognized constitutional right, its concept cannot be interpreted so broadly that [it] automatically converts the simple denouncer or appellant with the dialectical possibilities that would occur at the National Supreme Court level. Additionally, the limit to the exercise of popular action is imposed by cash collateral requested by the tribunals. However, it is widely known that in practice, the prerequisite is more fictitious than real. In other words, the quantity demanded is simply symbolic in preventing possible situations of helplessness.

### III. Limits to the Exercise of Popular Action

In spite of broad constitutional recognition, the exercise of popular action is known to seek certain limits regarding the right to promote trial activity defending the general interest.<sup>25</sup> Accordingly, the judicial interpretation of Article 782.1 is significant and with few critical opinions,<sup>26</sup> as established in SSTs December 17, 2007 and April 8, 2008 resolutions to be considered from a complementary perspective.<sup>27</sup> Thus, it is not possible to continue to

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<sup>25</sup> There are primary issues with respect to the popular action which remain unresolved, like the concept of injury or its implementation depending on the criminal facts. See Gonzalo Quintero Olivares, *Dos problemas pendientes de la justicia penal*, 17 ESTUDIOS PENALES Y CRIMINOLOGICOS 401-36 (1994); see also GONZALO QUINTERO OLIVARES, LA JUSTICIA PENAL EN ESPAÑA 163 (1998); see also Gonzalo Quintero Olivares, *La acción popular: pasado, presente y futuro de una institución controvertida*, 37 REVISTA DE DERECHO Y PROCESO PENAL 93-131 (2015).

<sup>26</sup> See references published in national newspapers by Andrés De La Oliva Santos or Enrique Gimbernat Ordeig. See FRANCISCO ORTEGO PÉREZ, EL JUICIO DE ACUSACIÓN 4 (1st ed. 2007).

<sup>27</sup> Vicente Gimeno Sendra, *La doctrina del Tribunal Supremo sobre la Acusación Popular: los casos Botín y Atutxa*, DIARIO LA LEY (Mar. 22, 2013), [www.diariolaley.laley.es](http://www.diariolaley.laley.es); see also Víctor Moreno Catena, *El ejercicio de la acción penal. La intervención de la víctima. El ejercicio de la acción popular, Fiscalía europea y derechos fundamentales*, TIRANT ONLINE (Sept. 14, 2015), [www.tirantonline.com](http://www.tirantonline.com). See Javier Ángel Fernández Gallardo, *Cuestiones derivadas del auto de apertura del juicio oral en el procedimiento abreviado*, 32 ANALES DE DERECHO 18- 22 (2014); see also ANNAÏCK FERNÁNDEZ LE GAL, *El derecho a la acusación popular. Reflexiones en torno a la reciente doctrina del Tribunal Supremo*, in EL PODER JUDICIAL: VI CONGRESO DE LA ASOCIACIÓN DE CONSTITUCIONALISTAS DE ESPAÑA 703 (2009); see also JOAQUÍN GIMÉNEZ GARCÍA, REFLEXIONES SOBRE LA ACCIÓN POPULAR EN EL PROCESO PENAL DESDE LA JURISPRUDENCIA DE LA SALA SEGUNDA DEL TRIBUNAL SUPREMO 330 (2009); see also Luis Gómez Amigo, *El ejercicio de la acusación popular en los delitos de violencia de género*, 765 ACTUAL JURIDICA ARANZADI 1 (2008); see also Jorge Barreiro, *Jurisprudencia de oportunidad: el ocaso de la acción popular*, 61 JUECES PARA LA DEMOCRACIA 9 (2008); see also Javier Muñoz Cuesta, *Situación actual del ejercicio de la acción popular. Especial referencia a la actuación de varias acusaciones populares bajo una misma postulación y dirección técnica*, 10 REVISTA ARANZADI DOCTRINAL 3 (2010); see also Francisco Ortego Pérez, *Restricción "Jurisprudencial" al ejercicio de la acción penal popular (Un apunte crítico a la controvertida "doctrina Botín")*, DIARIO LA LEY, 2008, at 4.

the trial phase at the sole request of the popular actor<sup>28</sup> when the Public Prosecutor and private prosecution have moved to dismiss the case as per the Botín Doctrine.<sup>29</sup>

Additionally, Emilio Botín, former President of Banco Santander, was accused of tax fraud and forgery in a case involving credit assignments. The tax fraud was estimated to be about 87 million euros. Together, the Public Prosecutor and State's Attorney, who typically represent the interest of the National Tax Department, functioned instead as the victim by assuming private prosecution. Although both the Public Prosecutor and State Attorney moved to dismiss, the popular actors requested to proceed to trial. A complete dismissal was adjudicated by the National Courthouse by the December 20, 2006 Resolution, appealing popular actors to the Supreme Court of Spain who dismissed the case following a strictly grammatical interpretation of Article 782.1 of LEcrim. Under the Supreme Court's understanding, the concept of private prosecution refers to the victim (regarding the criminal proceeding). In other words, the concept does not include a popular actor. Accordingly, when both private prosecution and the Public Prosecutor move to dismiss a case, a judge is bound thereby and consequently cannot proceed to trial.<sup>30</sup> The accusing parties applied for dismissal considering that the amount considered fraudulent was already paid by the Bank to the National Tax Department prior to trial. Therefore, Society perceived the decision to dismiss the case as a sort of personal immunity to criminal trials specifically designed for wealthy and influential individuals. Notwithstanding the judicial conclusion, it was largely claimed by the scientific doctrine through a legal reform of the basic statute of popular action. Judicial creation of Law, *ex novo*, is considered an exception of the continental system. It is important to acknowledge that a formal and strict interpretation of Law neither accomplishes nor solves the problems presented by the doctrine regarding popular action in criminal trials. Any situation where an individual's or organization's interest can supersede the interest of the victim is certainly perverse. Public Prosecutors aim at constitutional activity of legality and fairness by protecting the fundamental rights of the parties implicated during trials. Considering these premises, popular actors should thus serve their intended constitutional purpose.

After the December 17, 2007 Supreme Court Decision, the High Tribunal declared its Decision on April 8, 2008, which was based on the following facts: the President of the Vasque Parliament, Juan María Atutxa, as well as others, were indicted for severe disobedience on a judicial legal assistance request brought by the Supreme Court.<sup>31</sup> Mr. Atutxa did not accomplish the judicial order of dissolving several political groups under Organic Law of Political Parties.<sup>32</sup> The March 27, 2003 judicial decision was declared by the Supreme Court as ordering the dissolution of Herri Batasuna, Euskal Herritarrok and Batasuna, upon the request of the State Attorneys' Office and Public Prosecutor in both

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<sup>28</sup> This doctrine was established on the premises of the abbreviated procedure.

<sup>29</sup> On a federal level, this phase known as "apertura del juicio oral" refers the first appearance of the parties at the trial phase. However, the trial is normally structured as a whole act after this moment. *See Auto de apertura del juicio oral*, [http://www.juicios.cl/dic300/AUTO\\_DE\\_APERTURA\\_DEL\\_JUICIO\\_ORAL.htm](http://www.juicios.cl/dic300/AUTO_DE_APERTURA_DEL_JUICIO_ORAL.htm).

<sup>30</sup> LEONARDO PRIETO-CASTRO FERRÁNDIZ AND PABLO GUTIÉRREZ DE CABIEDES, *DERECHO PROCESAL PENAL* 308 (1st ed. 1989).

<sup>31</sup> *See also* Supreme Court of the Basque Country Judgment, (Dec. 19, 2006), <http://www.larioja.com/apoyos/documentos/atutxa.pdf> (last accessed Dec. 24, 2016) (dismissed the case against Mr. Atutxa, formally applying the prior Botín Doctrine).

<sup>32</sup> European Humans Rights Court confirmed the adequacy of this law to the European Convention of Human Rights. *Batasuna v. Spain*, 5 Eur. Ct. H.R. 1, 22 (2009).

Vasque and Navarrian Parlament.<sup>33</sup> This decision further announced that a terrorist organization, Euskadi Ta Askatasuna (ETA), was connected to these political groups. The parties to the case were composed of Public Prosecutor and popular actor, Manos Limpias.<sup>34</sup> Surprisingly, no private prosecution showed cause at trial. Fortunately for the Botín doctrine, it was declared that in those cases where there is no private action, it is legitimate for popular action, on its own request, to demand the trial phase (Atutxa Doctrine). As Ortego Perez stated, "such judgments and resolutions have had a special significance outside of the legal field because . . . they have caused relevant media coverage, highlighting, [and] the current phenomenon of [the] excessive judging of the public life."<sup>35</sup> This doctrinal interpretation was largely criticized, even by dissenting judges because of the literal wording of the above-mentioned provision as "once the opening of the trial was requested by the Prosecution or the popular action, the investigating judge would agree unless dismissal shall be approved."<sup>36</sup> Therefore, if the position of the popular actor is subordinate to public and private prosecution during criminal proceedings, this doctrine does not reduce the procedural guarantees of parties.<sup>37</sup> Furthermore, the fact that criminal prosecutions are public in nature cannot lead us to consider its official character. In fact, private prosecutions are as public as those articulated by Public Prosecutors.<sup>38</sup> Thus, the principles of publicity and officiality have different meanings.<sup>39</sup>

The activities of Public Prosecutors should be understood under Spanish Law from an official point of view: the public nature of their activity refers to its constitutional mission, which overwhelms the prosecution activity. When this activity is considered from an exclusively public perspective, the chance of conceding the private nature to the power of prosecution is revealed. This option is contrary to Spanish Law.<sup>40</sup> However, when the prosecution activity is considered from an official and nonofficial perspective, a personal or even general interest in prosecution can arise.<sup>41</sup> For that reason, private prosecution should only be considered when only the victim has legal standing over the case, excluding at any

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<sup>33</sup> Other minor political institutions in Álava, Guipúzcoa and Vizcaya requested to proceed with dissolution of these political parties. Tribunal Constitution, Boletín Oficial Del Estado, Sentencia 62/2011 (Spain), *translated in* <http://www.tribunalconstitucion.es/es/jurisprudencia/ResolucionTraducida/62-2011,%20of%20May%205.pdf>.

<sup>34</sup> This organization is commonly involved in trials where a potential political impact can be deduced, among other topics. Mathieu de Taillac, *Le juge Garzon pris dans un etaujudiciaire en Espagne*, LE FIGARO, May 12, 2010, <http://www.lefigaro.fr/international/2010/05/12/01003-20100512ARTFIG00680-le-juge-garzon-pris-dans-un-etau-judiciaire-en-espagne.php> (discussing Manos Limpias impact on trials).

<sup>35</sup> Francisco Ortego Pérez, *Restricción Jurisprudencial al ejercicio de la acción penal popular*, DIARIO LA LEY, 2008, at 4.

<sup>36</sup> JUAN MONTERO AROCA et al., EN DERECHO JURISDICCIONAL III PROCESO PENAL 69-70 (19th ed. 2011).

<sup>37</sup> Víctor Moreno Catena, *La acción popular: El proceso penal*, TIRANT ONLINE (Sept. 1, 2015), <http://www.tirantonline.com>.

<sup>38</sup> SUSANA OROMÍ VALL-LOVERA, EL EJERCICIO DE LA ACCIÓN POPULAR 33 (1st ed. 2003).

<sup>39</sup> EMILIO GÓMEZ ORBANEJA, COMENTARIOS A LA LEY DE ENJUICIAMIENTO CRIMINAL 209 - 216 (1951). See SUSANA OROMÍ VALL-LLOVERA, EL EJERCICIO DE LA ACCIÓN POPULAR: (PAUTAS PARA UNA FUTURA REGULACIÓN) 32-33 (1st ed. 2003).

<sup>40</sup> This means that under Spanish Law, prosecutors are tied to the strict application of law. For example, "deals" with defendants cannot be entered into openly. Although plea bargains are commonly used in this system, they do not have the same meaning as that in the United States.

<sup>41</sup> However, Spanish doctrine does not clearly make this distinction, referring the public nature of the Public Prosecutor's activity as opposed to the parties' power of prosecute.



stage, the Public Prosecutors intervention during the whole trial.<sup>42</sup> To conclude, criminal action under the Spanish Code of Criminal Procedure has a public nature which includes several potential actors such as Public Prosecutors, State Attorneys and individuals.

The American doctrine has consistently rejected this argument. As Worrall points out, “perhaps the most unique feature of American prosecution is that it is public. [Additionally], [p]ublic prosecution is not the result of our British common law heritage. For example, after Connecticut adopted a system of public prosecution by 1704, other colonies quickly followed. To be sure, there are some traces of private prosecution in the United States. One example is the grand jury. However, even grand juries are intimately tied to public prosecutors, as prosecutors directly present evidence to the grand jury.”<sup>43</sup> The logic behind having a public prosecutor was articulated in a 1921 Connecticut court decision:

*In all criminal cases in Connecticut, the state is the prosecutor. The offenses are against the state. The victim of the offense is not a party to the prosecution, nor does he occupy any relation to it other than that of a witness, at interested witness mayhaps, bur note the less, only a witness. . . .It is not necessary for the injured party to make a complaint nor is he required to give bond to prosecute. . He is in no sense a relator. He cannot in any way control the prosecution and whether reluctant or not, he can be compelled like any other witness to appear and testify (Mallery v. Lane, 97 Conn. 133 (1921)).*

Many other arguments can be brought to debate ideas along these lines. However, many such viewpoints lack legal reasoning, which is where our discussion should remain focused. As Almagro Nosete also points out, “popular action, understood as a means of controlling the public prosecution, monitors, complements and supplements, in a way that when it monitors, it does not act but merely observes; when it complements, it is seen as coincident with the interests of the Public Prosecutor; and when it supplements, it acts as a substitute for those interests.”<sup>44</sup> Because the configuration of popular action may transcend the legal field, such as the right to promote judicial activity in defense of the general interest, the notion seems to walk a fine line which may sometimes serve illegitimate interests. For instance, as per Quintero Olivares, “most of the well-known cases are nothing but improper political debates, harassing sniper weapons or numbness in the hands of organizations or associations that are supposed to fight against corruption.”<sup>45</sup> Similarly, Moreno Catena stated that “the claimant position has led, in recent decades, to abuses regarding the exercise of popular action by political parties, by public entities . . . or by associations (often created *ad hoc* with the purpose to tackle corruption across the political and economic system, assuming

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<sup>42</sup> As an exception, where there are minors involved on private criminal cases the Public Prosecutors may participate on the proceedings from an specific point of view: protecting the best interest of the child.

<sup>43</sup> JOHN L. WORRAL, *THE CHANGING ROLE OF THE AMERICAN PROSECUTOR* 5-6 (M. Elaine Nugent-Borakove ed., 1st ed. 2008).

<sup>44</sup> JOSÉ ALMAGRO NOSETE, *Acción Popular*, in *LA REFORMA DEL PROCESO PENAL* 228 (1989).

<sup>45</sup> See Quintero Olivares, *Dos problemas pendientes de la justicia penal*, 17 *ESTUDIOS PENALES Y CRIMINOLÓGICOS* 401-36 (1994); see also Pablo Lanzarote Martínez, *La acusación penal: ¿ejercicio de soberanía? Ministerio Fiscal versus acción popular*, 1 *LA LEY* 1820-26 (1998); see also Pablo Lanzarote Martínez, *Algunas consideraciones en torno al Ministerio Fiscal y el proceso penal*, 18 *REVISTA JURÍDICA DE LA REGION DE MURCIA* 33-45 (1994).

that the mechanisms of our legal system are ineffective to pursue it).<sup>50</sup> Certainly, the risk of distorting the configuration of popular action exists, especially in cases where there is a private interest that overcomes the defense of the general one. In fact, most mediated cases present a positive example of this, as public opinion goes beyond the position of the media. Just a quick look at any newspaper library is enough to caution the basis for such claims. While this argument is not sufficient to dismiss popular action<sup>51</sup>, this beautiful luxury of Law must be understood as the maximum expression of recognition of the citizen.<sup>46</sup> As Díez-Picazo Giménez notes, "the existence of popular action in criminal matters collides with the inherent notion of the modern state about persecution of the crimes should be a public function itself."<sup>47</sup> Hence, it lends itself to severe critics: apart from the fact that criminal proceedings developed from a formal accusatory perspective, popular action implies that individuals can use the Investigating Judge to cause criminal research based on their sole interest. While it is true that the risk of using popular action for illegitimate purposes is always present, it is equally clear that the lack of public monopoly in criminal action limits the possibilities of political power to be gained as an advantage, both for excess and default in the indictment by manipulating the Prosecution Service. The possibility of several actors alleging accusations implies, by definition, the possibility of reciprocal controls between them."

Indeed, popular action represents a political role regarding citizen participation in Justice. It also constitutes a direct guarantee of the principle of legality in cases lacking the exercise of criminal action or the withdrawal of the accusation by the prosecution. It brings free access to criminal proceedings to the citizenship as a whole.<sup>48</sup> While the configuration of popular action is one thing, its potential devious effect in a specific case is a different one.<sup>49</sup> As the November 17, 2005 Supreme Court Decision points out, "it is true that popular action can be and has been abused in the context of policy strategies and other measures. Nevertheless, this is something objectively separate and should not impede on the position of those who, utilizing it in accordance with its constitutional purposes, effectively contribute to making the legal system more efficient."<sup>50</sup> This should be left to the Court to determine on a case-by-case basis. To this end, the Spanish Code of Criminal Procedure provides a number of tools that inform people of the unsustainability of the official accusation as per Article 782.2 of LEcrim. Further, the content of Article 125 of the Spanish Constitution provides a

<sup>50</sup> See FAUSTINO GUTIÉRREZ-ALVIZ CONRADI AND VÍCTOR MORENO CATENA, ARTICLE 125: LA PARTICIPACIÓN POPULAR EN LA ADMINISTRACIÓN DE JUSTICIA, COMENTARIOS A LA CONSTITUCIÓN ESPAÑOLA DE 1978 573 (1st ed. 1996); see also Francisco Ortego Pérez, *Restricción "Jurisprudencial" al ejercicio de la acción penal popular (Un apunte crítico a la controvertida "doctrina Botín")*, DIARIO LA LEY, 2008, at 4.

<sup>51</sup> See NICOLÁS GONZÁLEZ-CUÉLLAR SERRANO et al, COMENTARIOS A LA LEY DE ENJUICIAMIENTO CRIMINAL Y OTRAS LEYES DEL PROCESO PENAL 507 (1st ed. 2005).

<sup>46</sup> José Almagro Nosete, *La "acción popular" ante el tribunal de garantías constitucionales. Valoración Crítica*, 12 REVISTA DE DERECHO POLÍTICO 5 (1981-1982).

<sup>47</sup> See LUIS MARÍA DíEZ-PICAZO GIMÉNEZ, EL PODER DE ACUSAR. MINISTERIO FISCAL Y CONSTITUCIONALISMO 155-56 (1st ed. 2000); see also Víctor Fairén Guillén, *El artículo 125 de la Constitución: la acción popular y su fortalecimiento*, in *La Reforma del proceso penal 601-02* (1989). See Pablo Lanzarote Martínez, *La acusación penal: ¿ejercicio de soberanía? Ministerio Fiscal versus acción popular*, 1 LA LEY 1820-26 (1998); see also María Luzón Cánovas, *La acción popular. Análisis comparativo con la acusación particular*, 2 LA LEY 1796-1806 (2002).

<sup>48</sup> See Vicente Gimeno Sendra, *La acusación popular*, 31 PODER JUDICIAL 89 (1993); see also VICENTE GIMENO SENDRA, CONSTITUCIÓN Y PROCESO 85 (1st ed. 1998).

<sup>49</sup> Javier Gómez de Liaño, *Uso y abuso de la acción popular*, IUSTEL DIARIO DEL DERECHO (Oct. 30, 2014), [http://www.iustel.com/diario\\_del\\_derecho/noticia.asp?ref\\_iustel=1133323](http://www.iustel.com/diario_del_derecho/noticia.asp?ref_iustel=1133323).

<sup>50</sup> *Id.*

wide margin in this context, mainly in the legislative development of popular action.<sup>51</sup> To mitigate these risks, the necessary procedural mechanisms are generally set during the arraignment phase,<sup>52</sup> with a direct relationship between the exercise of popular action and the legal ownership of the rights of the injured (as per the February 15, 1994 Constitutional Court Decision).<sup>53</sup> Additionally, the popular actor must be placed in a subordinate position with respect to the private and public prosecution, unless those parties do not enter an appearance in the criminal proceedings or show delayed or fraudulent conduct.<sup>54</sup>

Finally, there have been contrasting opinions that suggest the possibility of denying the exercise of popular action to political parties and associations without a legitimate interest in the trial when its intervention is not related to the pursued crime.<sup>55</sup> It is also possible to reduce the number of crimes whose prosecution can urge the popular accusation.<sup>56</sup> In this context, after the terrorist acts on March 11, 2004, at the Atocha train station in Madrid, many confusing facts arose during the investigation. It is fair to state that it may have been the most difficult trial in recent Spanish history. However, after reviewing the conclusions of the National Court in its October 31, 2007 decision,<sup>57</sup> there remain some key aspects of the investigation phase still needing additional clarification at the trial phase after bringing enough evidence against all of the accused. Indeed, a factual connection between E.T.A. and the terrorist acts committed in Madrid were wrongly disclosed to society. Even more so, this factual connection was the first investigation line that the Government officially disposed.

In conclusion, popular action has been involved in trials with a specific general interest related to Economy, Security and Politics. However, the Noos case can bring a new interpretation of what was previously written. The facts of the case are as follows: Noos is a nonprofit organization composed by essentially two partners, Mr. Urdangarín, former Duke

<sup>51</sup> FAUSTINO GUTIÉRREZ-ALVIZ CONRADI AND VÍCTOR MORENO CATEN, ARTICLE 125: LA PARTICIPACIÓN POPULAR EN LA ADMINISTRACIÓN DE JUSTICIA, COMENTARIOS A LA CONSTITUCIÓN ESPAÑOLA DE 1978 573 (1st ed. 1996).

<sup>52</sup> FRANCISCO ORTEGO PÉREZ, EL JUICIO DE ACUSACIÓN 115-18 (1st ed. 2007); *see also supra* note 58, at 576.

<sup>53</sup> *See* Julio Banacloche Palao, *La acusación popular en el proceso penal. Propuestas para una reforma*, 1 REVISTA DERECHO POLÍTICO 23 (2008); *see also* VICENTE GIMENO SENDRA, CONSTITUCIÓN Y PROCESO 86-87 (1st ed. 1998); *see also* NICOLÁS GONZÁLEZ -CUÉLLAR SERRANO et al, COMENTARIOS A LA LEY DE ENJUICIAMIENTO CRIMINAL Y OTRAS LEYES DEL PROCESO PENAL 506 (2005); *see also* JUAN MONTERO AROCA, et al., LAS PARTES, EN DERECHO JURISDICCIONAL III. PROCESO PENAL 72-73 (19th ed. 2011); *see also* GONZALO QUINTERO OLIVARES, LA JUSTICIA PENAL EN ESPAÑA 214 (1998); *see also* VIGILIO LATORRE LATORRE, ACCIÓN POPULAR/ACCIÓN COLECTIVA 151 (1st ed. 2000).

<sup>54</sup> Víctor Moreno Catena, *La acción popular. El Proceso Penal*, TIRANT ONLINE (Sept. 1, 2015), [www.tirantonline.com](http://www.tirantonline.com).

<sup>55</sup> Vicente Gimeno Sendra, *La acusación popular*, 31 PODER JUDICIAL 89 (1993). *See* ALFONSO AYA ONSALO, EL EJERCICIO DE LA ACCIÓN POPULAR POR LAS PERSONAS JURÍDICAS. PROBLEMAS ACTUALES DEL PROCESO PENAL Y DERECHOS FUNDAMENTALES, 182-212 (2010); *see also* Javier Echano Basaldúa, ¿LEGITIMACIÓN DE LAS PERSONAS JURÍDICO-PÚBLICAS Y DE LOS PARTIDOS POLÍTICOS? PROBLEMAS ACTUALES DEL PROCESO PENAL Y DERECHOS FUNDAMENTALES 173-182 (1st ed. 2010); *see also* NICOLÁS GONZÁLEZ-CUÉLLAR SERRANO et al., COMENTARIOS A LA LEY DE ENJUICIAMIENTO CRIMINAL Y OTRAS LEYES DEL PROCESO PENAL 504-05 (1st ed. 2005); *see also* JUAN MONTERO AROCA, et al, LAS PARTES, EN DERECHO JURISDICCIONAL III. PROCESO PENAL 69-70 (19th ed. 2011); *see also* Javier Muñoz Cuesta, *Situación actual del ejercicio de la acción popular. Especial referencia a la actuación de varias acusaciones populares bajo una misma postulación y dirección técnica*, 10 REVISTA ARANZADI DOCTRINAL 2-4 (2010); *see also* Francisco Ortego Pérez, *Restricción "Jurisprudencial" al ejercicio de la acción penal popular (Un apunte crítico a la controvertida "doctrina Botín")*, DIARIO LA LEY, 2008, at 4.

<sup>56</sup> María Luzón Cánovas, *La acción popular. Análisis comparativo con la acusación*, 2 LA LEY 1796-1806 (2002).

<sup>57</sup> National Court has jurisdiction on trials regarding terrorist act over the whole national territory (Organic Law of the Judicial Power article 65.7 and law 4/1988 of May 25th).

of Palma de Mallorca and Mr. Diego Torres, a business man. Both are indicted for economic felonies with respect to public funds from their organizations. Consequently, following the investigation, Cristina de Borbón y Grecia, Infanta of Spain, the former King's daughter, among others involved with the Royal House and Government of Islas Baleares, were also indicted. After appealing the prior judicial indictment, Cristina de Borbón y Grecia has been indicted as an accessory to a tax felony. The question at issue is whether the Botín Doctrine is applicable. As previously discussed, when both private prosecution and the Public Prosecutor apply for dismissal the judge is bound and cannot proceed to trial. However in this case, the accusing parties will apply for the opposite option: to proceed with trial in order to discuss the case against the rest of the defendants.

The judicial order to proceed with a trial will analyze the criminal factum shown after the investigation phase according to the prosecution, and will determine which parties enter the trial as the accused. A judge may decide, justifiably, to exclude facts or persons from the trial, so an order for dismissal must be provided, opening a new topic on a complicated appeal (as per Articles 737 and 641 of LEcrim). As always, the debate continues to transcend legal argument regardless of the final outcome. On January 11, 2016, the trial commenced. This marked the first of pretrial matters set to be resolved in a criminal trial phase, where all the swords are well-shaped and drawn but all the cards are face up.