SOS COLLECTIVE ACTIONS

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ABSTRACT: The paper points out the challenges to the Brazilian collective actions system brought up by the approval of the new civil procedural act. Constitutional right of access to justice and the individual initiative. Limits to literal interpretation of the statute.

KEYWORDS: Collective actions system. New Civil Procedural Act. Constitutional rights of the ideological defendants. Access to Justice.

I. And 25 years have passed by

The Consumer Code reaches a level of maturity in the Brazilian legal system in times of great transformations, in society, as in the Judiciary branch and, of course, in the own legal framework. As a result of efforts that began in the end of the 70s, the protection rules brought, not only a privileged level to the consumer as a subject of rights, but also broadened the procedural system of collective actions, integrating into the provisions of the Collective[1] Actions Act, published a few years before, whose rules, at the time, had already been assimilated by lawyers.

Those were times of democratic restoration in Brazil and the winds of change in the classic procedures found fertile grounds, encouraging the participation of society in mass litigation management, typical phenomenon of the post modernity introduced in the 90s. The scenario in which consumer rights emerged and in which the collective protection of rights was consolidated seemed favourable to both and this explains the big boost that the two themes initially had.

When the collective issues finally reached the higher courts, the first signs of reaction were noticed, detected in the formation of conservative jurisprudence and in several attempts of legislative changes aimed at limiting the scope of these actions, largely brought by the Attorney's General Office and, at that time, only occasionally by a few NGO's. The attentive consumer law scholars reacted and managed to restrain the announced step backwards in various issues, both relating to the substantive law, as seen in the nationwide famous suit presented by the commercial banks before the Federal Supreme Court, and also in the civil procedure field, that is example the decision of the Superior Court of Justice that consecrated the correct interpretation of art. 16 of the LACP, that will be addressed below.

Current trends are progressive and we are passing through a period of expansion in other areas, with new subjects of rights, such as the handicapped, the elderly, and racial,

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[1] The best English translation for the expression maybe "class action", but I preferred to use "collective actions" because the expression stress the collective nature of the suit and the rights involved.

ethnic or religious groups[2], most recently, in addition to the remarkable quantitative growth of the actions of administrative improbity, which exceed 70% of the total of collective actions promoted by the Attorney's General Office, according to data collected in Rio de Janeiro.

However, the recent approval of the Act 13.105, in 03/16/2015 has raised doubts and fears, in regard of its application to collective demands. Although it has not addressed specifically the subject, the new procedural code strikes in several aspects the collective system, even in its extrajudicial phase. Certainly, the reform of civil procedure was expected and desired by the legal community, but the introduction of the new act in the legal system should be preceded by a debate that takes into account the acknowledgements already received by the collective suits and the court litigation, until recently relegated to philosophical formulations, as noted in relation to fundamental rights.

This essay seeks to contribute to anticipate this debate.

II. Collective procedural rules and the emergence of consumer law

By the end of the 70s, through a group of renowned civil procedural law scholars, the subject of the collective legal protection was first discussed in Brazil. José Carlos Barbosa Moreira, Ada Pellegrini Grinover, Waldemar Mariz Oliveira Junior[3], among others, were inspired by the Italian doctrine and spread among us proposals to introduce new procedural instruments which would be able to cope with the massification of social relations, a trend that at that time was barely announced. This important historical moment was reported by Antonio Gidi, that we quote:

> "The Brazilian class action traces its origins to academic papers delivered in Italy in the 1970s, when a group of Italian scholars began studying American class actions and publishing articles and books on the subject. The most influential of the Italian works in Brazil were written by Mauro Cappelletti, Michele Taruffo, and Vincenzo Vigoriti. The Italian academic movement was warmly received in Brazil by important legal scholars. Shortly thereafter, José Carlos Barbosa Moreira, Ada Pellegrini Grinover, and Waldemar Mariz Oliveira Júnior, three of the most distinguished Brazilian jurists, published important articles on class action suits. The reputation of these jurists and their continuous research and lobbying efforts, as well as the undeniable importance of the provision, contributed to the introduction of the class action in the Brazilian system. The intellectual support of reputable scholars unlocked the doors of the Brazilian system to class actions. After that, it was a matter of time before the class action more fully developed in Brazil."[4]

In fact, it was only a matter of time, because at the beginning of the 80s the first specialized prosecutors came up within the Attorney's General Office. In the State of São Paulo, the Act n. 304/82 regulated the exercise by a specialized prosecutor of the

[2] Section VII of Article 1 of Act 7,347/85, included by Act 12966, of 2014.

3 Cf. Barbosa Moreira. "A Ação Popular do Direito Brasileiro como Instrumento de Tutela Jurisdicional dos Chamados Interesses Difusos," (The Popular Action of Brazilian Law as an instrument of judicial protection of the so-called Diffuse Interests), ," in Temas de Direito Processual. Terceira Série (1977); Grinover. "A Tutela Jurisdicional dos Interesses Difusos," Revista dos Tribunais 25/14 (1979); Waldemar Mariz. "Tutela Jurisdicional dos Interesses Coletivos" 2 Estudos Sobre o Amanhã (1978).

[4] Class Actions In Brazil--A Model for Civil Law Countries. American Journal of Comparative Law Spring 2003, p. 323.

functions relating to "the protection and defense, in the administrative level, of consumer rights"[5]. In Rio de Janeiro, environmental and consumer protection were entrusted to working teams[6] in 1985, the same year that was published Act n. 7347, which established the Collective Action.

The new act inaugurated the discipline of protection of transindividuais rights, collective and diffuse, appointed the Attorney's General Office as its main plaintiff, giving it investigative powers, created the civil investigation, as well as the commitment of conduct adjustment, dealt with the effect of *res judicata* and foresaw the creation of a fund to manage the compensation of collective damages. Even though insufficient to regulate all collective issues, Act 7347 constituted an important milestone in the transformation of the "classic" civil procedure, conceived under individual and formalistic bases[7].

The process of democratic restoration culminated with the promulgation of the Brazilian Federal Constitution in 1988, which included in the chapter about Attorney's General Office several references to the defense of collective interests, granted the right to compensations, including for moral damages and raised the human dignity to its fundamental principle. However, under the new constitutional order, the effectiveness of these norms lacked an apparatus still nonexistent in the legal framework, which was introduced only a few years later by the Consumer Protection Code, in 1990.

The creation of the third type of collective interests - the homogeneous individual rights - finally allowed that, in addition to positive and negative injunctions, the injured group benefit from a single decision, getting through the collective suit the individual losses recovery for massive damages caused by polluters, suppliers and also by the public administration. The integration of the two acts - the Collective Action Act and the Consumer Protection Code - has led some scholars to identify the emergence of a "collective actions microsystem" or, more precisely, a dialogical relationship between the two acts[8].

The Consumer Code (CDC) was received by society and by the Brazilian legal community with great interest, but also with concern. The transforming force of its norms brought a new ethic for the market and was felt right after the beginning of its term, causing immediate changes in the conduct of suppliers, that modified packaging, advertising, contractual instruments, in order to adapt to the new rules. The consumer law scholars had a decisive role in this transformation, and the foundation of Brasilcon – the

[5] For a more detailed overview of the early days of consumer protection in Brazil, may refer to our "O Ministério Público e a defesa do consumidor". Revista Luso Brasileira de Direito do Consumo. v.III n. 9. Março 2013, p. 12-13.
[6] Attorney's General Office resolution 196, 21st of October of 1985.
[7] Interestingly, the Act of Collective Action was struck by a single presidential veto, which withdrew from its text the expression "at any other diffuse interest", on the grounds that the extension of the object of these claims should be preceded by "greater consideration and analysis". Not by chance, it's Art. 1 was continuously amended to include new topics such as the protection of the economic order; of the urban order; the honor and dignity of racial, ethnic or religious groups and the public and social patrimony (Law 12,966/2014).
[8] In the original drafting of the CDC, this interaction was expressly forecast, in art. 89, which was subject of a presidential veto. Fortunately, art. 117 was approved, which introduced art. 21 to Law 7347, to determine that apply "to the diffuse interests and rights, individual and collective, to the extent applicable, the provisions of Title III" of the CDC, which contains the procedure norms of the collective custody, which govern these claims, even if they may be not of consume.

Brazilian Institute of Politics and Consumer Law, would occur shortly after, in 1992, gathering experts from all over the country.

Therefore, consumer protection and collective suits are coincident phenomena since their origin and, although the collective actions may serve as a tool for other interests, it was the ones concerning consumer relations that first reached the courts, and consequently, the first to figure in higher courts' jurisprudence.

Themes of strong social appeal, such as education and health, found on the way of the collective actions the instrument for their protection, that till then depended exclusively on political initiatives, often frustrated by very low levels of social participation through associations that did not play an important role in the young Brazilian democracy. No coincidence that the very troubling issue of the school fees was the subject of the first collective action that was judged by the Federal Supreme Court. This leading judgment was summarized as follows:

> EXTRAORDINARY APPEAL. CONSTITUTIONAL. LEGITIMACY OF THE PUBLIC PROSSECUTOR'S OFFICE TO PROMOTE PUBLIC CIVIL ACTION IN DEFENSE OF DIFFUSE INTERESTS, COLLECTIVE AND HOMOGENEOUS. SCHOOL FEES: FEDERAL PROSECUTION OFFICE'S STANDING TO SUE. 1. The Federal Constitution gives prominence to the Attorney General's Office (...) 5. The so-called school fees, when abusive or illegal, can be challenged by way of public civil action, at the request of the Attorney General's Office, because although they are homogeneous rights of common origin, they are subspecies of collective interests, protected by the State by this procedural mean as stated in article 129, III, of the Brazilian Federal Constitution. 5.1. Minding a theme linked to education, constitutionally protected as administration's duty and obligation of all (FC, art. 205), the Prosecutor's Office is invested of the standing to sue, patent the legitimacy *ad causam,* when the right being sought to protect is inserted in the orbit of collective interests, in segment extremely sensitive and socially relevant that, above all, it is recommended the administration protection. Extraordinary appeal known and provided for, drift away the alleged illegitimacy of the Prosecutor's Office, aiming the defense of the interests of a collective, determine the referral of the case back to the Court of origin, to proceed in the trial of the action. (Tribunal Pleno, RE 163,231, rel. Min. MAURÍCIO CORRÊA, julg. 02/26/1997, DJ 06/29/2001 PP-00055 EMENT VOL-02037-04 PP-00737)

The decision must be invoked[9], not only for its novelty, but especially because it indicates a trend that marked the end of the 90s: the attacks to the full effectiveness of the collective protection standards, the formation of a conservative jurisprudence and the successive legislative revisions.

It should be noted that it was precisely in the defense of individual homogenous rights that emerged the main reductionist theses, the first of them, exemplified by the decision of the Supreme Court, against the standing of the Attorney General's Office, an issue that outlasted in the legal debate for years, despite the legislative provision and the consistent opinion of the scholars against it[10].

[9] Despite the brilliance of its conclusion, which recognizes the social dimension of the issue and affirms the importance of the initiative of the P.O. in such cases, the reasoning of the decision reveals the stage in which the debate on innovation brought by the CDC was found. Interpreting the rule of art. 81, III, states: "...by such provision it's seen that it's minding a new conceptualization in the field of collective interests, being sure that this is just an **atypical nomen iuris** of the sort of collective rights. From where it;'s extracted that homogeneous interests, in fact, are not constituted as a **tertium genus**, but rather as a mere peculiar mode, that can both be fit in the diffuse as in collective interests mode"

[10] On the matter of legitimacy of the P.O., Fredie Didier Jr. and Hermes Zaneti Jr. report that the jurisprudence and the doctrine are divided into four theses: extending/broadening theory, absolute restrictive theory, theory restrictive to

III. The 90s: collective protection as hostage of authoritarianism

After the first period of time, in which we assigned the emergence and expansion of the new rights, the collective's in general, and also the consumer's, the end of the Millennium was a period marked by the clash of antagonistic forces. It is true that there was developments and achievements, but these also caused reactions, either in the legislative activity, as in the judicial decisions.

The expansion of consumer law at this stage is directly related to some important facts. At first, the creation of the Small Claims Courts, by Act 9,099/95, which actually broadned the access to Justice to a new clientele, whose initiatives had been discouraged by costs and difficulties of all sorts. Most part of the new plaintiffs was and still is, of consumers. The larger access to Justice through the individual via represented an increase in litigation, which appears as a cause and consequence of the awareness of the new rights. Beside this phenomenon, there was an increase in the number of consumer's associations, presenting, themselves, collective actions. At the administrative level, besides the PROCONs - Department of Consumer Rights (DPCR) of the Ministry of Justice - started an outstanding performance at national level, enforcing consumer education policies.

These initiatives all together led to the qualitative and quantitative growth of consumer law issues brought to courts, and to a corresponding rising number of collective suits presented by the Attorney General's Office[11]. More claims produced consequently more victories, especially claims for individual losses recovery in a collective perspective.

This scenario was reflected in many court decisions, particularly those of the higher courts, which were called upon to confront major issues on the subject of consumer law, in the collective perspective. Among the many subjects that could be recalled as examples of the confrontation between the consumer oriented trend and the reaction of the suppliers, one case certainly must be mentioned, both for the thesis discussed as for the scope of the matter: the so-called "ADIn of the banks". In December 2001, the National Confederation of the Financial System - CONSIF, presented before the Federal Supreme Court an action, on the grounds of formal and material unconstitutionality of the expression "including those of banking, financial, credit and insurance nature", contained in art. 3. § 2. of the CDC. At that time, more than a decade had passsed by since the Code was enacted and the Federal Supreme Court had formed consistent jurisprudence applying the act to bank contracts, at least since 1994[12]. The representative of the

unavailable homogeneous individual rights and eclectic or mixed theory. ("Curso de Direito Processual Civil". 7. ed. Salvador: Juspodium, 2012, p. 355). This last theory is prestigious in the Supreme Court, as is verified in recent binding decisions: "The jurisprudence of the Supreme Federal Court and of the Superior Court of Justice points out that, when it comes to individual homogeneous interests, the legitimacy of the Prosecutor's Office to propose Collective Action is recognized if evidenced relevant social interest of the protected legal right, linked to the purpose of the institution, even when dealing with homogeneous available individual interests. In this way: RE 631111, Rel: Min. Teori Zavascki, Full Court, tried in 08/07/2014, DJe-213; REsp 1209633/RS, Rel. Minister Luis Felipe Salomão, Fourth Class, tried in 04/14/2015, DJe 05/04/2015." (REsp. 1480250/RS, Rel. Minister HERMAN BENJAMIN, SECOND CLASS, tried in 08/18/2015, DJe 09/08/2015)

[11] Dated in this period are administration acts of the Rio de Janeiro's Prosecutor's Office (MPRJ), taken as an example, that sought to give the institution an internal organization for better performance of the assignments in the collective initiatives: Attorney-General's Resolution 974, 2001, which created the GATE, to give technical support to the investigations and Attorney -General's Office Resolution 1066, 2002, which regulated the public civil investigation.

[12] For all, it's to quote the following decision: " PROOF. CONSUMER DEFENSE CODE. REVERSAL OF THE ONUS OF THE PROOF. BANKING CONTRACT. THE JUDGE CAN DETERMINE THE DEFENDANT TO SUBMIT A COPIE OF THE CONTRACT THAT THE AUTHOR INTENDS TO REVIEW IN COURT. APPLICATION OF WHAT IS PROVIDED IN ARTICLE 3, PAR. 2, OF THE CODE OF CONSUMER

commercial banks, insurance companies and financial institutions[13] pleaded to exclude them from the boundaries of applicability of the Code. The suit, in which participated Brasilcon and other *amici curiae*, was judged by the Federal Supreme Court in 06/07/2006, in favor of consumers.

This important victory has been considered by consumer law scholars as a leading case, for representing the consecration of two thesis: the normative force of the Brazilian Federal Constitution as "institutional guarantee of the enforcement and effectiveness of consumer law", quoting Prof. Claudia Lima Marques[14], and the consumer protection as a fundamental right, recognizing it's horizontal effect, regulating the relations between two subjects of private law, client and the bank.

The first clear reaction came through the lawmaker, Act n. 1570, of 1997, finally converted into Act 9,494/97, whose art. 2. altered art. 16 of the LACP to establish that the effects *erga omnes* of the collective decision would not exceed "the limits of territorial jurisdiction of the judge". There was an evident purpose of reducing the scope of decisions and instantly the consumer law scholars started to argue the application of the provisions of the art. 16 of Act 7347. The constitutionality of this provision was declared by the Federal Supreme Court (ADIn 1,576-1) to all kinds of interest, requiring that the effects of the judgment should be limited to the territory of a given district, where the collective plaintiff filed the suit.

The change in the treatment of the *res judicata* of collective actions, as well as decisions that were guided by a literal and reductive interpretation of art. 16 of the LACP was unanimously criticized, worth quoting, for all, Prof. Ada Pellegrini Grinover that, with authority of one of the authors of the CDC, argued:

> "... the limits imposed by certain judges violate the rule of art. 103, CDC, and despises the guidance provided by art. 91, II, through which it's seen that a suit that verses about the recovery of national or regionalwide losses must be brought in the jurisdiction of the capital of the State or the National Capital, suiting, evidently, the effects of the decision to the entire national territory. This provision applies to other cases that reach groups and categories of individuals, more or less determinable, spread throughout the national territory."[15]

The issue was disputed between scholars and justices, prevailing, at first, the narrow interpretation of art. 16 of the LACP[16]. Only in 2011, the Superior Court of Justice, in judging representative appeal of controversy (CPC art. 543-C), changed the orientation

PROTECTION. ARTS. 396 AND 283 OF THE CPC." (AgRg in Ag 49,124/RS, Rel. Minister RUY ROSADO DE AGUIAR, FOURTH CLASS/PANEL, tried in 10/04/1994, DJ 10/31/1994, p. 29505). Subsequently, the Court approved the v. 297 of its Summary: "The Consumer Defense Code is applicable to financial institutions." (SECOND SECTION, judged in 05/12/2004, DJ 9/9/2004, p. 149)

[13] Still nowadays, these companies are sued more often individually and collectively for issues with their consumers. To be checked in: http://rj.consumidorvencedor.mp.br/top -20/; http://www4.tjrj.jus.br/MaisAcionadas/

[14] A mandatory reference, with vast material on the decision, is entitled "Aplicação do Código de Defesa do Consumidor aos Bancos" (São Paulo: Revista dos Tribunais - ADIn 2.591 . Claudia Lima Marques et al (coord.) 2006 .

15 *Código brasileiro de defesa do consumidor: comentado pelos autores do anteprojeto.* 9 ed. Rio de Janeiro: Forense Universitária, 2007, p. 942.

[16] Research carried out in 2012 at Rio de Janeiro State Supreme Court pointed out that 64% of the decisions issued in collective actions initiated by the P.O. applied the limitation of the effects of the decision to the territorial limits of the judiciary body. (Heloisa Carpena. "Tutela coletiva em 2º. Grau. A experiência da criação das procuradorias especializadas no Ministério Público do Rio de Janeiro." Revista de Processo. Ano 38. n. 225 São Paulo: Revista dos Tribunais, novembro 2013, p. 315).

of its case-law to keep away permanently the application of art. 16 of the LACP, relatively to all kinds of interests[17].

But that was not all! Shortly thereafter, Act n. 1798, 1999, reissued in 2001 (Act n. 2180), brought a real "package" of warranties and privileges to the public administration in court proceedings. This rule added a single paragraph to Art. 1. of Law 7,347/85, excluding from the object of collective actions "claims involving taxes, social security contributions, the Time of Service Guarantee Fund - FGTS or other funds of institutional nature". Note that the provision was justified, refering to the inadequacy of collective claim to these matters and to the determinance of the beneficiaries. However, these issues excluded from the object of collective actions by the act are collective by nature, and the determinance of beneficiaries is precisely a characteristic of the collective interests *stricto sensu*, sharing themselves or with the other party, a common legal position.

The reduction of its object and the confinement of the effects of the *res judicata* challenged the ongoing development of the Brazilian civil procedure, revealed by the filing of a great number of actions and by their uphold by the courts. In 1999, Prof. Ada Grinover published an article entitled "Public civil action hostage of authoritarianism"[18], that warned to the attacks suffered by the system of collective actions. We quote its conclusion:

> "The sole dissonant note, in this scenario, is the political attacks by the Federal Administration, that has used Provisional Measures to reverse the situation, with attacks against the public civil action, trying to diminish its effectiveness, limit access to Justice, thwart the associative movement, reduce the role of the Judiciary. The Legislative, complacent or careless, did not resist the attacks, supporting the actions of the Administration. The civil courts were the last resource, with the lawyers and the Prosecutor's Office pleading for the proper interpretation of the new rules, so that the judicial response reflects the guidelines of the collective processes, and the general principles which they govern, that cannot move backwards."

The alert remains uptodate and fits perfectly to the challenges brought by the recent approval of the Civil Procedure Code which, although providing good instruments that will contribute to the improvement of the collective claims threatens equaly it's effectiveness, as follows.

IV. The new Civil Procedural Code: changes in sight regarding collective actions regulation

The stage in which we find ourselves today can be defined as a synthesis of the two previous moments and a turning point regarding the collective actions, their possibilities and limits and, in particular, their position in the juridical framework. We consider this step inaugurated by the presentation of the Bill n. 5,139/2009, which intended to replace Act n. 7,347/85, to create the Brazilian Code of Collective Actions Procedure[19].

After several legislative changes, the project ended up being rejected by the House of Representatives in 2010. Then, as part of a set of proposals which was named "Consumer

[17] REsp 1243887/PR, Minister Luis Felipe Salomão, Corte Especial, jud. 10/19/2011, DJe 12/12/2011

[18] Revista de Processo. Ano 24. n. 96 São Paulo: Revista dos Tribunais, outubro-dezembro 1999, p. 28-36.

[19] Prior to this, are registered the following drafts: Código Modelo de Processos Coletivos para Ibero-América (2004); Código Brasileiro de Processos Coletivos, da UERJ/UNESA (2005) e do Instituto Brasileiro de Direito Processual (2006). The texts are published, along with the Código Gidi, by Didier Jr. and Zaneti Jr., *op cit.*, p. 463-524.

Code Update", another bill was presented to the Federal Senate - PL n. 282, of 8/3/2012, which would revoke the chapter on procedural law, introducing deep changes in the procedure of collective actions. This project was equaly buried in the House of Representatives in 2013, revealing the "reluctant position of Parliament to the tools of collective actions"[20].

If the collective protection of rights was still immune to the proposals of legislative update, the scenario was quite different regarding the "classic" civil procedure, since the Civil Procedure Code (CPC) has suffered successive revisions. After these, in 2009 was presented the draft of a new Code, which text was finally approved and resulted in Act n. 13105, of 3/16/15.

The new civil procedural statute did not address the collective demands specifically, but as subsidiary source to the discipline of the CDC, the new Code brings up the reflection on some aspects in which the two compete in their application.

The legislator did not intend to establish a general rule for collective actions, however, one can't say that the statute of 2015 was impervious to the mass-oriented reality of jurisdictional provision. A suitable example is the Article 333 of the Project, which introduced the possibility to convert an individual suit into a collective action. The provision was severely criticized by scholars and, fortunately, a presidential veto stroke it out. Nevertheless, the new regulation brought up some interesting contributions and also serious problems that should be soon addressed. Prior to pointing them out, let me quote Fredie Didier Jr. and Hermes Zanetti Jr., still referring to the revoked statute, who alerted:

> "... we should face the CPC as a residual statute, its effect on the collective suits must always be reduced, resisting to discipline collective demands with rules conceived for individual lawsuits."[21]

Due to different, and sometimes antagonistic, rationales, individual and collective lawsuits rarely find common points, therefore, the application of the "classical" procedural rules reduces the effectiveness of collective demands, as can be seen, for example, on the standard of proof, whose value cannot be the same for the individual paintiff, who owns the litigious right, and the collective author, who is only its representative in court. Let's see then what are the innovations that impact these claims.

Among the new civil procedural rules that contribute to the effectiveness of collective suits, concentrating and eliminating individual initiatives, we should highlight, in the chapter that dealt with the powers of the judge, Art. 139, which states:

> "X - When encountering various repetitive individual demands, the judge may provoke the Attorney General's Office, the Public Defender's Office and, to the extent possible, other plaintiffs to which refer Arts. 5 of Act n. 7347, of 24th of July of 1985, and n. 82 of Act N. 8078, of 11th of September of 1990, to, if appropriate, promote the filing of the respective class-action suit".

[20] Humberto Dalla Bernardina Pine. Incidente de Conversão da Ação Individual em Ação Coletiva no CPC Projetado: Exame Crítico do Instituto. Available in http://www.processoscoletivos.net/revista-electronics/63-volume-4-number-3-quarter-01-07-2014-a-30-09-2014/1459-incident-to-conversion-of-action-in-action-collective-in-cpc-designed-exam-critical-of-Institute

[21] *op. cit.* p. 55.

Although, under the old statute, judges had already this power, the new rule can also be understood as creating a duty to publicize the issues that multiply, and can be replaced by one single collective action. Many doubts should arise from this provision concerning the choice of the notified plaintiffs, considering that there are many different group representatives, like private associations or the government (through agencies or the office of the Attorney General).

Another important innovation, concerning directly the collective lawsuits, is also provided among the powers of the judge. Art. 138 authorizes the magistrate to "request or admit the participation of natural or juridical person, agency or entity, with appropriate representation", introducing broadly the *amicus curiae*.

Under the previous legislation, there was a provision in Art. 543-C § 4°. of the CPC, permiting the *amicus* intervention in just one certain appeal. The scope of this intervention and also the extent of its powers are still uncertain. The case-law of the Supreme Court has understood, interpreting the legal statute, as well as Art. 3 of Resolution 8/2008 of the Supreme Court, that the intervention is submitted to strict requirements[22].

The new procedural statute has a much wider scope, as allows the intervention when there is "relevance of the issue, the specificity of the subject or object of the claim or social relevance of the controversy", and will impact largely the collective actions, which often produce social effects. However, in this scenario of uncertainties, Art. 138 becomes object of a fierce debate. Concerning the powers of the *amicus*, § 2° provides that it is up to the judge, in the decision that admits the intervention, to define such powers, what may seem at first that the new act let the issue to be decided exclusively by "the prudent sole discretion" of the judge. On the other way, § 1 states that the *amicus'* cannot appeal, except in certain and strict hypotesis.

The new Code also enlarged the scope of intervention, extending it to the "individual or legal entity, agency or states bodies, as adequate representatives". The Supreme Court currently admits the intervention based on the adequacy of the agency or organization, regarding the issues to be discussed in the appeal. The legal terms, however, are uncertain, creating a risk of abuse. The intervention is meant to assist the judge, helping the decision making process, and was not conceived as a sort of representation of certain interests in dispute.

Adequate representation is a definition identified with the collective lawsuit, referred to the quality of plaintiff who presents in court the interests that belong to a group. The Brazilian law does not allow the judge to control the standing requirements of the

[22] CIVIL PROCEDURE. ADMINISTRATIVE. FEDERAL PUBLIC OFFICER. REMOVAL AND SELECTION PROCESS. ART. 36, § 1, III, ' C ' OF LAW 8,112/90. ALLOWANCE. MOTIONS FOR CLARIFICATION. OMISSION VICE. ADMISSION DENIED IN THE DEED - AMICUS CURIAE. INSTRUCTION FUNCTION. IMPOSSIBILITY OF MERIT REVIEW. PRECEDENTS OF THE SUPREME COURT. EMBARGOES REJECTED. 1. Motions of clarification opposed by association who postulated its admission in the done, after the trial of the merit (attachment 2, p. 3-15). The admitance was denied (attachment 2, p. 83-84) and there was no appeal against the denial (attachment 2, FL. 86). 2. The Act on the condition of *amicus curiae* has the character of assisting the instruction, namely, to promote the presentation of evidences in support of the analytical wealth of trial, as has been exposed by the Federal Supreme Court. Soon, it's goal is not to allow the admission in the deed in order to appeal against the core decision. Precedent: ED on ADI 3460/DF, Rapporteur Min. Teori Zavascki, Full Court, ruling published in the electronic DJe-047 in 12.3.2015; In RE 609,381/GO, Rapporteur min. Zavascki Da, full Court, electronic decision published in the DJe-052 in 18.3.2015. Unknown motions of clarification. (EDcl in Pet 8,345/SC, Rapporteur Minister HUMBERTO MARTINS, Primeira Seção, jud. 04/08/2015, 4/15/2015).

associations, for example. It is a judgment on the person who intends to represent a group, who, for that matter, allows their aptitude and reputation to be gauged. Thus, we can conclude that, concerning the adequacy, the lawmaker in 2015 added another requirement for intervention, being sure that the subjective interest in the outcome of the trial is insufficient to admit it.

Another novelty is remarkable, considering its application to collective demands: the distribution of the burden of proof. The §° 1 of Art. 373 gives the judge the power to shift the burden of proof "due to peculiarities of causes related to the impossibility or extreme difficulties to the party to meet the burden pursuant to the *caput* or when it is easier to the other party to obtain the evidence". The lecturers had already concluded that the judge can decide upon request of the parties or *ex officio*[23], when his decision must be justified.

The standard of proof in collective actions has been poorly discussed so far, although it is one of the main aspects regarding the effectiveness of the collective custody. Particularly when the trial is referred to individual homogeneous rights, the victims must prove the amount of damages only when the enforcement suit is presented, according to articles 95 and 97 of the Code, rules that are often badly interpreted. The scope of the collective actions for individual damages is limited to declaring a defendant's liability. In case the action is successful, each individual class member must bring his or her own case to court, to establish that the claimant is a member of the group (causation) and to prove the amount and extent of the individual damages suffered.

The ideological plaintiff, as the representative of the group, frequently faces difficulties to satisfy his burden of proof, therefore, it would not be reasonable for him to face the same burden the individual plaintiff does. According to the procedural rules for collective protection of rights, the individual situations will be presented before the judge only in the settlement and enforcement suit. If the claim is granted the collective judgment will benefit the members of the group, who may then file an action for calculation of damages and enforcement according to articles 96 to 99.

Thanks to the simultaneous application of the procedural rules of Title III of the consumer code and the new code of civil procedure, the collective plaintiffs will benefit from the rule of Art. § 373° 1, because the "difficulty to satisfy the burden", ordinarily assigned, is noticiable and has inspired the particular rules of consumer law.

When the shift of the burden of proof is predetermined by the legal rule, as occurs in product liability cases, for example, the civil procedural code cannot be applied, prevailing the discipline of consumer protection law, which considers the inequality of the parties, that is also manifest in the judgements. Indeed, the paragraph 3 of articles 12 and 14 of the CDC attribute the burden of proof of the damage to the causer of the damage (manufacturer, constructor, producer or importer), instead of the victim, who "will not be held responsible just in the case they are able to prove that: I. - they had not introduced the product into the market; II. - although having had introduced the product into the market, it had no defect; III. - the culpability is exclusive on the consumer or a third party.

[23] Paulo Cezar Pinheiro Carneiro e Humberto Dalla Bernardina de Pinho (coord.). Novo Código de Processo Civil - anotado e comparado. Rio de Janeiro: Forense, 2015. p. 215.

In these hypothesis, the standard of the burden of proof established by the new Civil Procedural Code won't be applicable.

The judicial administration is one of the highlights of the Civil Procedural Code, evidenced by the introduction of several alternative dispute resolution remedies. Therefore, it is expected that initiatives aiming to enhance mediation and conciliation of the parties will be valued. It has been some years that the issue is attracting attention of the courts of justice[24].

Right after the suit is filled and verified the presence of the procedural requirements, art. 334 determines that "the judge shall conduct a preliminary hearing for conciliation or mediation", to which the parties must compulsorily attend, under penalty of their absence be considered a "violation against the judicial system and being subjected to fine". The conciliation audience was already provided in the CDC of 1973, in its art. 331, law that did not reach full effectiveness, remaining only as a stage of the procedure, to be executed in most cases only formally.

The new Civil Procedural Code is applicable to the collective suits and its rules must be interpreted in accordance with the alternative dispute resolution remedies, in particular, with the commitment to adjust the conduct to legal requirements (TAC), provided by Art. 5° § 6 of Act n. 7347. Much has been discussed on the legal nature of this settlement[25], prevailing the understanding that since the rights do not belong to the representative, but to the group as a whole, plaintiff cannot freely dispose of the group's rights ("inalienable rights"). Therefore, representatives are allowed to make only peripheral concessions[26]. In this context, the new legislation may be a reason to overcome the predominant view on this matter, empowering the ideological plaintiff, in particular the Attorney General's Office, who can set up the agreement during the investigation. The broader scope of the compromise made by the collective plaintiff and the defendants must be strictly followed by the Superior Council of the Office, that will analize the TAC, as already done in the Attorney General's Office of São Paulo.

Finally, due to the concern with mass litigation, the provision of article 976 created a new remedy, so called incident of repetitive demands resolution, which is considered "one of the most important innovations of the Code"[27], till then applicable only before the Federal Supreme Courts (art. 543-C).

According to the provisions of the new Civil Procedural Code the parties, the judge, the Attorney General's Office and the Public Defender's Office have simultaneously standing to claim before the Chief Justice the incident in cases which present the following legal requirements: effective repetition of lawsuits that have a common

[24] We highlight the Project of Alternative Conflict Resolution of the Court of Justice of Rio de Janeiro, comprising a Permanent Center of Conciliation of Small Claims Courts; Pre-Procedure Conciliation; Permanent Core of Consensual Methods of Conflicts Resolution. The Project aims to provide the "self-composition as stand-alone resolution, non judicial, of consumer's conflicts with the providers". The initiative has had great success, reaching agreements in thousands of cases that are no longer presented to courts. Cf: http://www.tjrj.jus.br/web/guest/home/-/noticias/visualizar/23608.

[25] Hugo Nigro Mazzilli. A Defesa dos Interesses Difusos em Juízo. 27. ed., revista, ampliada e atualizada. São Paulo: Saraiva, 2014. p. 458-459.

[26] Opposite views are found even in the Federal Supreme Court case-law: STJ, REsp 802,060/RS, Rap. Minister Luiz Fux, jud.in 12/17/2009, DJe 02/22/2010.

[27] Dalla and Carneiro. *op. cit.* p. 569.

disputed legal issue and "risk of offense to isonomy and to legal security" (Art. 976, I and II). Following the admission of the incident the practical effect is the suspension of all "pending lawsuits, individual or collective, existing in the State or in the region" (art. 982, I). Such suspension may be extended even to the entire national territory, if there is a request made by any of the parties and addressed to the Federal Supreme Courts (Art. 982 § 3°).

The disputed common issue will then be judged by the judiciary board with competence to standardise the jurisprudence, who will determine the legal thesis that should be applied "to all individual or collective lawsuits that address the same legal issue" and also to future cases, under the same conditions (art. 985, I and II). The wording of the rules in Act n. 13105, regulating the effects of the incident of repetitive demands, is not the same approved by the House of Representatives. The Bill n. 8,046/10 provided, in its article 934: "Admitted the incident, the Chief Justice will determine the suspension of pending lawsuits, in the first and second instance courts. The reference to "individual and collective lawsuits" was a last minute addition by the Federal Senate.

There are many questions concerning the application of this provision that certainly should be raised by the interpreters before these serious and powerful effects arise from the use of the incident. Within the limits of this essay, however, we shall focus on just one issue that addresses directly the collective actions: the possibility of its suspension.

Even in a civil procedural approach the literal interpretation of art. 982 § 3 of the CPC is not a desirable outcome. For a logical reason, there cannot exist a "common disputed issue" between an individual lawsuit and a collective one. The problem gets worse when one realizes that collective actions rarely seek custody of only one type of interest. On the contrary, there is frequently a cumulation of demands in one single suit, in which the ideological plaintiff seeks the protection of interests of collective nature and simultaneously the satisfaction of individual claims, when homogeneous, that is, derived from a common origin. So, even if granted the (absurd!) suspension of collective actions due to the incident of repetitive demands, this effect could never reach the lawsuits seeking the protection of diffuse and collective interests, collective interests by nature, for which the individuals cannot stand.

The resolution of this issue is even more compelling in a consumer law approach. The CDC is the statute of the vulnerable ones, its scope is clearly and strictly defined by Arts. 2° e 3°, meaning that its rules apply only to relations characterized by the inequality of the parties. Otherwise, if applied to other kind of relations, there would be a violation to the constitutional principle of equality. As part of the private law framework that is united by the Brazilian Federal Constitution, the CDC "dialogues" with the other statutes, to use the expression so dear to Profa. Claudia Lima Marques[28]. There is a "dialogue of complementarity", when, for example, the new rule plays as a conceptual basis for the rules of the CDC, that is example the Arts. 26 and 27 of the CDC, combined with the provisions of Arts. 189-211 of the Private Law Code. There will be a "dialogue of

[28] Três tipos de diálogos entre o Código de Defesa do Consumidor e o Código Civil de 2002: superação das antinomias pelo "diálogo das fontes". In Adalberto Pasqualotto e Roberto Pfeiffer. O Código de Defesa do Consumidor e o Código Civil de 2002. São Paulo: RT, 2005, p. 11-82.

subsidiarity" when the new legislation regulates matters that were not anticipated in the CDC, such as the contract of transportation, which attracts the incidence of Art. 3° the Consumer Code and Arts. 734-742 of the Private Law Code. Finally, the "reciprocal influences dialogue" will take place when two statutes are applied in two-way basis. A good example is the prohibition of the decay clause (CDC Art. 53) to non-consumer contracts.

Therefore, the provisions of Articles 976 to 987 of the new CPC would be in dialogue of subsidiarity with the rules of Title III of the CDC, that sets the consumer defense in court. This means that the rules that discipline the effects of the objective of the ruling (Arts. 103 and 104 of the CDC) are still applicable to the consumer litigations and won't be revoked by the new discipline, that applies only on a supplementary basis. The normative of the CDC preserves broadly the rights of individual plaintiffs, granting each member of the group a number of choices, as follows: intervening in the collective suit; requiring his suit suspension or continuing and op out the effects of the *res judicata*, that will be produced in the collective suit. On the other way, the lawmaker of 2015, eagering to face the problem of mass litigation, created an inconstitutional, unlawful and unnecessary suspension of the collective suits, that, at first glance, could seem to be acchieved by a sole individual initiative.

If there were a disputed legal issue already presented to a Court through a collective suit, it would make more sense the adoption of the opposite solution: to suspend compulsorily the individual suits that address the same topic. It would then be achieved the goal of all procedural apparatus that seeks to handle mass litigation demands: a single judicial outcome to resolve all individual claims.

V. Conclusion: constitutional interpretation to avoid the retreat

The discussions that will certainly follow the enhance of the new statute should point to the constitutional interpretation. Indeed, the application of the civil procedural law should be guided by the constitutional normative, that considers both collective and consumers' as fundamental rights.

From an institutional perspective, the interpretation that allows the individual plaintiff to request the incident of resolution of repetitive demands in order to achieve the suspension of a collective suit represents a restriction to the collective standing granted by the Federal Constitution to the Attorney General's Office in Art. 129, III. The lawmaker can not create obstacles to the exercise of this right or it would be a constitutional offense.

In a scenario of consolidating former achievements and improving the civil procedural law in order to satisfy new social demands, the new Code could not come up in the Brazilian legal framework as a retreat in the broad movement of access to justice, permiting the individual lawsuits prevail to the collective ones.

The good innovations introduced by Act n. 13,105 suche as the issue of the standard of the burden of proof, in the intervention of the *amicus curiae* and in the adoption of alternative dispute resolutions must be incorporated to the collective actions' system in order to reach effectiveness, contributing to overcome the shortcomings and misunderstandings.

However, one cannot accept the rules, whose wordings could be interpreted in way to thwart the ideological plaintiff' initiative, in evident violation of constitutional provisions that guarantee access to Justice and the standing right to collective action.

Disclosing the data of a research about the effectiveness of consumer collective suits proposed by the Attorney General's Office of Rio de Janeiro[29], we warned that the challenge of making accessible the jurisdictional provision should consider the alternative of collective actions and, in particular, the collective civil liability actions for individual damages (individual homogeneous interests), a suitable remedie to reduce the flood of individual compensation suits that congest the Courts. Access to justice, mass litigation and judicial administration are different approaches of the same phenomenon. More authorized voices have proclaimed that the collective action is "*the only possibility of response to the massification of conflicts*", as quoted in the brilliant decision by Justice Herman Benjamin:

> "*(...) 5. Access to Justice is no rhetoric guarantee, because its concrete effectiveness depends on the enforcement of all other fundamental rights. Within his significance atributed by the Welfare State, the expression goes beyond the access to the courts, to include the access to Law itself, meaning, to a fair legal order (= enemy of imbalances and averse to presumption of equality), known (= socially and individually recognized) and enforceable (= effective). 6. If the norm of the Ancien Régime was the judicial enforcement provided individually, drop-by-drop, in the post-industrial society, even for pragmatic reasons of efficiency and survival of the judiciary framework, the collective suits are the only possible response to the mass litigation issues, which are organized around rights and diffuse interests, collective stricto sensu and individual homogeneous (art. 81, CDC). 7. In addition to benefiting the victims, who see their demands being resolved uniformly and with institutional support, the ad causam legitimacy of the Attorney General's Office and of the NGOs for the proposal of Collective Actions honors and favors the Judiciary itself, which, through this way, while continuing to fulfill its high constitutional mission, prevents the drain of hundreds, thousands and even millions of individual disputes. (...)*"[30]

Consolidation of the achievements reached in one quarter of a century of history of consumer protection in Brazil depends on the interpretation of the new CPC rules according to the Brazilian Federal Constitution that appointed the collective actions as an instrument of access to justice. The legislator in 1988 not only placed the human dignity principle as a foundation of the legal system but also provided means to make it effective. For this purpose, among the fundamental goals of the Republic, elected the social solidarity as a value, subprinciple and an interpretative guide (art. 3°, I). This constitutional option reveals "the decay of the conceptions of legal individualism for the regulation of social problems"[31].

Even if our culture is still founded on individualism in all its nuances, the prevalence of social values must be constantly asserted in the juridical level, as a mean of transformation and enforcement of the constitutional project of building a "free, just and solidary society".

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[29] Consumidor Vencedor. Um projeto do Ministério Público do Rio de Janeiro em busca da efetividade na defesa dos interesses individuais homogêneos dos consumidores". Revista do Consumidor. n.86. São Paulo: Revista dos Tribunais, mar/abr 2013, p. 75-100.

[30] Superior Court of Justice (STJ); 2a. Turma, REsp 347,752/SP, Rap. Min. Herman Benjamin, DJe 11/04/2009.

[31] Maria Celina Bodin de Moraes. O princípio da solidariedade. In Estudos em homenagem a Carlos Alberto Menezes Direito. Antônio Celso Alves Pereira, Celso Renato Duvivier de Albuquerque Mello. (Org.) Rio de Janeiro: Renovar, 2003, p. 545

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