

**ADEQUACY OF REPRESENTATION: A COMPARISON
BETWEEN CLASS ACTIONS IN THE NORTH AMERICAN
AND BRAZILIAN MODELS**

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ABSTRACT: This paper analyses adequacy of representation in class actions in Brazil. Starting with its concept, characteristics and possibilities so it can later be compared to the traditional North American class action system. The aim is to compare and contrast the Brazilian system of representation control in class actions to the North American system, considering trends in precedents and doctrine as well.

KEYWORDS: adequacy of representation; class action; Brazilian model; due process of law.

I. Introduction

For this study, the North American system of class actions was selected to be compared to the Brazilian system for the following reasons: despite great differences when contrasting common law and civil law systems, the existence of a common core is noticeable, as discussed by Vincenzo Vigoriti³⁶. In addition, said author highlights the existence of a common ideology between the two legal families in spite of different customs, forms and legal instruments.

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³⁶ VIGORITI, Vincenzo. *Garanzie costituzionali del processo civile*. Milano: Giuffrè, 1973, p.1.

For these reasons, it is important to analyze the North American system of class actions and the control of adequate representation in said country and question how the Brazilian legal framework currently deals with this subject.

Firstly, we will cover the concept, content and features of adequate representation in general and then we will analyze the North American system and the legal background for such control of adequate representation in said country.

Afterwards, we will study the way Brazilian legislation regulates legitimacy in class actions and the way that control of representation takes place here. Furthermore, we will present a brief analysis of higher courts precedents so we can reach conclusions on the theme and its possible evolution.

As explained by Vincenzo Vigoriti³⁷, popular participation may occur in justice when the claim becomes a tool for the principle of participation to come to life. The legal protection of diffuse interests is among several occasions when this phenomenon can take place. It evidences confidence in the procedural system as well as the will to renovate said system.

The use of the procedural system to protect collective interests, in *latu sensu*, brings intricate questions to the political-constitutional spectrum as well as technical questions³⁸. For the purposes of this article, it is relevant to discuss the different perspective in class actions when compared to individual lawsuits regarding legitimacy.

We have to highlight the lack of adequacy of the structure and of individual civil procedure institutes when transported to the collective spectrum. Hence, in the collective spectrum, the procedural instruments shall be chosen according to the peculiarities of the material interests at stake³⁹.

II. Adequate representation: concept and characteristics

It is to be noted that adequate representation and legitimacy are usually discussed together by the doctrine. However, they are not similar institutes despite being related to one another. Adequate representation is a broader institute and requires deeper analysis of elements of the concrete case by the judge to ensure the due process of law⁴⁰. Hence, it is important at this point to define the concept of “adequate representation” in order to proceed. Nonetheless, this is not an easy task, mainly when talking about such broad terms carrying strong subjective load as, initially, it is the judge who shall point to the presence or absence of adequate representation.

Flávia Hellmeister Clito Fornaciari, on her thesis about this topic, defined adequate representation as ‘[...] a quality presented by the representative who shall act on behalf of the association or group when defending interests of collective nature [...]’⁴¹. The quality of the representative is measured by the capacity of efficiently defending the interests at stake in a social, administrative and legal perspective. Thus, adequate

³⁷ VIGORITI, op. cit., p.12-16.

³⁸ Ibid., p. 14.

³⁹ Along these lines: COSTA, Susana Henriques da. *O controle judicial da representatividade adequada: uma análise dos sistemas norte-americano e brasileiro*. In: SALLES, Carlos Alberto de. (Coord.). *As grandes transformações do processo civil brasileiro: homenagem ao professor Kazuo Watanabe*. São Paulo: Quartier Latin, 2009, p. 956.

⁴⁰ COSTA, Susana Henriques da. *O controle judicial da representatividade adequada: uma análise dos sistemas norte-americano e brasileiro*. In: SALLES, Carlos Alberto de. (Coord.). *As grandes transformações do processo civil brasileiro: homenagem ao professor Kazuo Watanabe*. São Paulo: Quartier Latin, 2009, p. 956.

⁴¹ FORNACIARI, Flávia Hellmeister Clito. *Representatividade adequada nos processos coletivos. Tese de doutorado orientada pela professora Ada Pellegrini Grinover, apresentada à Faculdade de Direito da USP*. São Paulo: Faculdade de Direito da USP, 2010. p. 54.

representation does not depend on the existence of a claim, which shows the importance of studying this institute separate from legitimacy⁴². Nonetheless, in a legal perspective, the adequate representative will be the claimant of the class action, acting on behalf of the group and its members.

Eurico Ferraresi⁴³ explains that the relation between legitimacy⁴⁴ and *res judicata* is straight but not binding, as the ones affected are not parties in the lawsuit. Hence, they must be represented in order to properly meet the adversarial principle.

The same author teaches that:

The requirement for adequate representation originates in the system of common law, presenting itself as a natural consequence of the protection of due process. Common law countries demand that the collective claimant should adequately represent the interests of the group since unidentified interested parties, who would not even be heard in trial, are absent. This is the reason why courts pay double attention when they assess the capacity of the collective claimant.⁴⁵

Adequate representation works as an institute that legitimizes collective judicial relief as the ruling will reach those who have not filed the claim. Hence, representation must have been adequate. According to Susana Henriques da Costa⁴⁶: This is the concept that makes it possible to introduce diffuse, collective and homogeneous individual interests to the courts and it justifies the *erga omnes* effect of the ruling, reaching third parties who were not parties in the claim. Hence, in class actions, adequate representation is intimately linked to the due process of law in its substantial aspect.

This debate is distinctively relevant in the United States of America as the *res judicata* is *pro et contra there, while in our system, the res judicata is secundum eventum litis and in utilibus*. This might be the reason why the North American system is more focused on adequate representation as *res judicata* will produce effects on the individual spectrum, even when it is harmful. Nevertheless, the adoption of a diverse system of collective *res judicata* in our legal framework does not ensure adequate representation and the effectiveness of collective relief.

42 *Ibid*, p. 50. "Hence, the importance of procedural studies on adequate representation is to ensure that those representatives are the spokespersons of those citizens, groups and classes entitled to certain rights, which are judicially controversial. This does not imply, however, that the concept of adequate representation is linked to the lawsuit". Along the same lines: FISS, Owen. *Um novo processo civil: estudos norte-americanos sobre jurisdição, constituição e sociedade*. São Paulo. Revista dos Tribunais. 2004. P. 51-52.

43 FERRARESI, Eurico. *Ação popular, ação civil pública e mandado de segurança coletivo: instrumentos processuais coletivos*. Rio de Janeiro: Forense, 2009. p. 111.

44 VIGORITI, Vincenzo. *Interessi collettivi e processo: la legittimazione ad agire*. Milano: Giuffrè, 1979, p. 65. "Il problema della legittimazione ad agire in giudizio (legitimatío ad causam), e cioè il problema della individuazione dei soggetti che in concreto possono stimolare e nei confronti dei quali deve essere stimolata, in un determinato caso, la funzione giurisdizionale, costituisce uno dei temi classici della teoria generale del processo e non ha certo bisogno di introduzione."

45 FERRARESI, Eurico. *Ação popular, ação civil pública e mandado de segurança coletivo: instrumentos processuais coletivos*. Rio de Janeiro: Forense, 2009, p.112. According to MULLENIX, Linda S. *New trends in standing and res judicata in collective suits. General Report – Common law. In: Direito processual comparado. XIII World Congress of Procedural Law*, Salvador, 16-22 set. 2007; Rio de Janeiro: Forense, 2007. The author defines representation as follows: "intricately related to the protection of the due process of absent class members. Because the class representatives are representing the interests of absent class members, the representatives are guardians and fiduciaries for the class interests."

46 COSTA, Susana Henriques da. *O controle judicial da representatividade adequada: uma análise dos sistemas norte-americanos e brasileiro*. In: SALLES, Carlos Alberto de. (Coord.). *As grandes transformações do processo civil brasileiro: homenagem ao professor Kazuo Watanabe*. São Paulo: Quartier Latin, 2009, p. 956.

Adequate representation is one of the requirements for a class action to be certified pursuant to Rule 23 (a) (4). Verification of adequate representation is not limited to certification. It can occur at any point throughout the case, even after the case ends as it will be discussed ahead. In the latter, in case the judge verifies the inadequacy of representation, the ruling does not produce any effects.

To ensure that a group is adequately represented, the case shall not proceed as a class action if there are divergent interests within the group.

The aim of this study is to analyze representation in class actions in Brazilian law, making some comments about foreign law, mainly North American law from the United States of America. Nonetheless, the theme of legitimacy cannot be left aside as it is closely linked to adequate representation as mentioned before.

Thus, in case the judge understands there is no adequate representation in a given case, the lawsuit shall be terminated for absence of one requirement for actions as explained by Ada Pellegrini Grinover⁴⁷.

The two themes to be covered on adequate representation are: subjects who best fulfill this role of defending the individuals who are not present in the lawsuit and the control by the judge of the fulfillment of said role.

Regarding the first theme, about subjects, it is interesting to observe that usually each system adopts a solution. In Brazil, the option was to legitimize public and private entities, but not natural persons, except for citizen lawsuits⁴⁸. The assessment of adequate representation shall be outlined by the judge or by legislation. The Brazilian legislation adopted the legal criteria, setting forth beforehand who would be possibly apt to defend the transindividual rights before the courts. The North American legislation adopted the other system.

The Brazilian legislator laid down a list of legitimate representatives in article 5 of the Public Civil Lawsuit Act – Act 7347/85- and article 82 of the Consumer Protection Act. Considering this long list of legitimate representatives, two positions can be taken: either all entities are vested with presumption *juris et de jure* of legitimacy, with no judicial control on representation, or adequate representation of all legitimate bodies should be verified. The adoption of the first position brings hurdles, such as the possibility of entities without the adequate operational, economic and legal structure filing reckless or weakly argued class actions. Because of this possibility, the control of adequate representation, mainly of associations, has been gaining momentum in doctrine⁴⁹.

Hence, considering the legal background, the judge must assess if the association has been established for a minimum length of time and if the bylaws of the association state the aim of protecting the rights involved, that is, if there is thematic relevance between the class action filed and the association. Thus, the Brazilian legislator set forth criteria for the judge to verify adequate representation in class actions filed by associations.

⁴⁷ GRINOVER, Ada Pellegrini. *"Novas questões sobre a legitimação e a coisa julgada nas ações coletivas"*. In: *O processo: estudos e pareceres*. São Paulo: DPJ Ed., 2006. Nonetheless, this topic is controversial as at times the doctrine refers to adequate representation as a condition to the action and at times as a procedural requirement. Por todos: MAZZILLI, Hugo Nigro. *A defesa dos interesses difusos em juízo: meio ambiente, consumidor, patrimônio cultural, patrimônio público e outros interesses*. 20a ed. São Paulo: Saraiva, 2007, p. 296. "The requirements of adequate representation and thematic relevance are procedural requirements, not conditions of the action [...]"

⁴⁸ FERRARESI, Eurico. *Ação popular, ação civil pública e mandado de segurança coletivo: instrumentos processuais coletivos*. Rio de Janeiro: Forense, 2009, p. 115. "The Brazilian alternative for competing legitimacy is the most adequate once there are several apt entities to file class actions. [...] There is no hierarchy or preference of one legitimate representative over another. They all equally legitimate representatives who can file the lawsuit – as long as they adequately represent the group."

⁴⁹ FERRARESI, Eurico. *Ação popular, ação civil pública e mandado de segurança coletivo: instrumentos processuais coletivos*. Rio de Janeiro: Forense, 2009. p. 118.

It is important to highlight that said control is not fully effective to prevent fraud but this is not the main objective of adequate representation⁵⁰.

There are subjective criteria to assess adequate representation, which are: credibility, capacity, prestige, experience of the legitimate representative, history in judicial or extrajudicial protection of group interests, behavior in other cases, coinciding interests or not, length of establishment of the association, representation of the individual before the group. Hence, the judge shall analyze the association together with the legal situation of substantive law⁵¹. Just abiding by the law would not suffice, nor would it be efficient to have legislation setting forth strict criteria of assessment of adequate representation.

The following excerpt by Flávia Hellmeister Clito Fornaciari is worth mentioning: ‘Therefore, there is no feasible justification for any legislation about collective rights not to include adequate representation in the principles of the lawsuits used to defend said rights as it is intrinsic to the very concept of representational lawsuits.’⁵²

III. North American *class action*

In this work, the intention is not to analyze all legal frameworks from countries where common law is the legal system. The objective is to analyze the system in the United States of America, ‘[...] as the Brazilian legislator collected precious information from that system, mainly concerning judicial relief on homogeneous individual interests, [...]’⁵³, as well as for its tradition in class actions.

By means of a *class action*, it is possible to bring to the judicial system a claim filed by or on behalf of a great number of individuals as these individuals have related interests or by the greater efficiency of collective accountability.

Nevertheless, in that system, for a class action to be considered as such, it shall meet some requirements:

Requirements for a class action: one or more members of a class may sue or be sued as parties, representing all class members only when

- (1) The class is so large that a meeting of all members is not viable,
- (2) There are legal or factual matters that are common to the class,
- (3) The claims or exceptions of the representative parties are typical of the claim or class exceptions and
- (4) The representative parties shall fairly and adequately protect the interests of the class.⁵⁴

As Eurico Ferraresi points out: ‘the North American system of class actions allows the judge to assess if the claimant is adequately representing the group based on the circumstances, credibility, seriousness, among other criteria.’⁵⁵

⁵⁰ FORNACIARI, Flávia Hellmeister Clito. Representatividade adequada nos processos coletivos. *Tese de doutorado orientada pela professora Ada Pellegrini Grinover, apresentada à Faculdade de Direito da USP*. São Paulo: Faculdade de Direito da USP, 2010. p. 52.

⁵¹ *Ibid.*, p. 53.

⁵² FORNACIARI, Flávia Hellmeister Clito. Representatividade adequada nos processos coletivos. *Tese de doutorado orientada pela professora Ada Pellegrini Grinover, apresentada à Faculdade de Direito da USP*. São Paulo: Faculdade de Direito da USP, 2010. p. 54.

⁵³ LEONEL, Ricardo de Barros. *Manual do processo coletivo. 2 a ed.* São Paulo: Revista dos Tribunais, 2011. p. 59.

⁵⁴ GRINOVER, Ada Pellegrini. *Da class action for damages à ação de classe brasileira: os requisitos de admissibilidade. In: O processo coletivo na tutela do patrimônio público e da moralidade administrativa: ação de improbidade administrativa, ação civil pública e ação popular*. São Paulo: Quartier Latin, 2009. p. 49.

⁵⁵ FERRARESI, Eurico. *Ação popular, ação civil pública e mandado de segurança coletivo: instrumentos processuais coletivos*. Rio de Janeiro: Forense, 2009. p. 116.

Antonio Gidi⁵⁶ highlights that the North American law is more interested in the facts than in legal fiction. Thus, the creation of means to control adequate representation had to be implemented to ensure the right of all members to be heard in court by means of their representative. Moreover, North Americans believe that only one member of the group, with interest in the litigation against the defendant, shall be able to defend well the interest of the group. In addition, said author mentions the following advantages:

By these means, the legislation achieves three results. Concomitantly, the risk of collusion is minimized, the group's representative and lawyer are pushed to act vigorously and the real interests of the absent members are brought to the lawsuit. Ultimately, the aim is to ensure, as much as possible, that the result achieved with the collective relief is not different from the one that would have been achieved had the members personally defended their interests.

Besides the assessment of the representative, North American law also assesses the group's attorney, his/her experience in defending collective claims as well as the capacity to afford the legal costs thereof and the absence of conflicts between the attorney, group and representative in order to grant adequate representation.

A. Respect to the constitutional guarantees: due process

In regards to this theme, Vincenzo Vigoriti⁵⁷ has defined well the problem of adequate representation and its impact on procedural guarantees of the subjects absent in the case. Rule 23(a) (4) sets forth that one condition to class actions and adequate representation shall be that: 'The representative parties will fairly and adequately protect the interests of the class'.⁵⁸

This demand is based on the due process of law, which should not allow court rulings for or against those who were not able to be duly represented in the lawsuit.

The adequacy of relief is analyzed case by case, considering various data such as the type of interest, the object of the case, the financial capacity of the representatives, among others. The ruling will impact on individuals who were not parties in the case. That is the reason why this theme is of great importance and greater powers are granted to the judge in class actions.

As Susana Henriques da Costa points out: 'Serious analysis of adequate representation shall be linked to a perspective of ensuring guarantees, to the need of personal notification of the absent members on the existence of the class action so they can opt out.'⁵⁹

If a large number of individuals is affected, there might be complications to the running of the case as a class action considering the difficulties in notifying all individuals. Thus, *Rule 23* was amended in 2003 so notification could be different according to the type of class action. For *mandatory ones* (Rule 23 (b)(1) and (b)(2)), personal notification is not required. All the judge needs to ensure is that appropriate notice occurs. In this type of class action, there is no right to self-exclusion as the interest cannot be divided.

⁵⁶ GIDI, Antonio. *A class action como instrumento de tutela coletiva dos direitos: as ações coletivas em uma perspectiva comparada*. São Paulo: Revista dos Tribunais, 2007. p. 100.

⁵⁷ VIGORITI, Vincenzo. *Interessi collettivi e processo: la legittimazione ad agire*. Milano: Giuffrè, 1979, p. 271-288.

⁵⁸ BAICKER McKEE, Steven; JANSSEN, William M.; CORR, John B. *A student's guide to the Federal Rules of Civil Procedure*. 3^a ed. Saint Paul: West Group, 2000. p. 361. "Because class actions vest authority over the interests of passive members of the class in the hands of class activists, Rule 23(a)(4) requires the court to ensure that class representatives will be individuals who will meet those responsibilities fully."

⁵⁹ COSTA, Susana Henriques da. *O controle judicial da representatividade adequada: uma análise dos sistemas norte-americano e brasileiro*. In: SALLES, Carlos Alberto de. (Coord.). *As grandes transformações do processo civil brasileiro: homenagem ao professor Kazuo Watanabe*. São Paulo: Quartier Latin, 2009, p. 961.

Nonetheless, in class actions for damages – Rule 23(b)(3) -, notification of each member is mandatory as the member can self-exclude from the group and the interests can be divided. However, there is no requirement stating that all members should be notified as this kind of requirement could slow the pace of the class action. Hence, having all members who can be notified with reasonable effort is enough.

Hence, adequate representation combined with this system of notification of the absent members ensures the due process of law and allows the *res judicata* and collective agreements to occur.⁶⁰

B. Moment: certification at any point throughout the case

Whenever there is any doubt on adequate representation, the judge shall redefine the group or not certify the case as a class action. In addition, it is important for the representative to be accordant with the interests of the group. In case the judge realizes this is not happening, that is, when there are internal conflicts, he/she may order the division in sub-groups, call other representatives, redefine the group or rule that the action should only be partly collective.

Such analysis of adequate representation shall not be limited in time, that is, preclusion does not occur. The judge shall verify adequate representation at any time regardless of any motion filed by any of the parties.

C. Inadequate representation: collateral attack

Theoretically, it should not even be possible to talk about inadequate representation as the concept of representation is vested with the concept of adequacy. It needs to be effective to ensure the due process of law to all subjects who could not be present in the action.

Nevertheless, if one or some members of the group are not adequately represented, a subsequent action may be filed to settle the matter *as it is the individual's right not to be affected by a ruling in a case he/she has not been duly represented*. This is called *collateral attack*. Hence, *res judicata* and its limits shall be assessed in this later claim as Susana Henriques da Costa⁶¹ explains. Thus, adequate representation is what determines collective *res judicata*, that is, if adequate representation in a class action occurs, the ruling shall impact the group as a whole, even if the ruling is not favorable.

IV. Brazilian legislation: control of adequate representation in class actions

The Brazilian legislator granted active legitimacy to a clear number of entities, namely: the Public Prosecutor's office; the Federal government, the states, the municipalities and the Federal District; direct and indirect public administration agencies specifically aimed at defending the interests protected, even with no legal entity status; associations established for at least one year and whose aim is to defend its members' transindividual rights. Hence, the Brazilian system is mixed once public and private entities can be legitimate parties.

Considering this legal background, there are some scholars such as Nelson Nery Júnior and Rosa Maria de Andrade Nery⁶², who understand that collective legitimacy should be *ope legis*, that is, the judge could not assess adequate representation on a case-by-case

⁶⁰ COSTA, Susana Henriques da. *O controle judicial da representatividade adequada: uma análise dos sistemas norte-americano e brasileiro*. In: SALLES, Carlos Alberto de. (Coord.). *As grandes transformações do processo civil brasileiro: homenagem ao professor Kazuo Watanabe*. São Paulo: Quartier Latin, 2009. p. 962.

⁶¹ *Ibid.*, p. 963.

⁶² NERY JÚNIOR, Nelson, NERY, Rosa Maria A. *Código de Processo Civil Comentado e Legislação Extravagante em vigor*. 11ª ed. São Paulo: Editora Revista dos Tribunais, 2010, p. 1443.

basis as the legislator had previously and explicitly listed all legitimate parties. Vincenzo Vigoriti⁶³ teaches that legitimacy, above all, is a matter of legislative policies and just after a technical problem. Nevertheless, fewer people have been supporting this theory⁶⁴.

Other scholars defend, based on the North American experience, that the control of adequate representation exists in our legal system as well, which take places in two phases as explained by Fredie Didier Júnior and Hermes Zaneti Júnior: ‘Firstly, it is necessary to check if there is legal authorization for a certain entity to substitute collective holders of the rights being discussed and lead the class action. After, the judge proceeds with the control of adequate representation in the concrete case in order to assess the existence of all elements that ensure adequate representation of the rights being discussed.’⁶⁵

The need for judicial control in the second phase results from the compliance with the due process of law. The requirement for the association to have been established for at least one year in order to file a class action as set forth in article 82, paragraph 1 of the Consumer Protection Act can be waived by the judge and shows the possibility of judicial control over legitimacy.

Along these lines, the legitimacy of the Public Prosecutor’s Office to defend solely homogeneous individual interests when social relevance is present is affirmed by precedents and the wording of ruling 7 of the Superior Council of the Public Prosecutor’s Office. This case-by-case analysis is linked to the analysis of adequate representation.

Besides, precedents from the Federal Supreme Court demand a link between object of the class action and the legitimate party, something they have named “thematic pertinence”, which would be a form of judicial control of adequate representation⁶⁶. Despite being a form of control, it does not match adequate representation as the latter encompasses, besides the link, other criteria such as seriousness, aptitude, actions in the defense, among others. The courts have called “adequate representation” what is in fact only “thematic pertinence”⁶⁷. In regards to this topic, Susana Henriques da Costa explains that: ‘Brazilian scholars had to reflect on and revise the understanding that judicial control of adequate representation of the legitimate party to file a public civil action is not allowed because of precedents stating the requirement of thematic pertinence in the concrete case, even in cases where the law makes no reference to this matter.’⁶⁸

The bill proposed by Flávio Bierrenbach had mentioned judicial control of adequate representation but the Public Civil Action Act accepted the proposal of the Public Prosecutor’s office of São Paulo, which sets forth *ope legis* legitimacy without mentioning adequate representation. Other pieces of legislation that followed were along the same lines. Nevertheless, it is relevant to refer to Ada Pellegrini Grinover:

⁶³ VIGORITI, Vincenzo. *Interessi collettivi e processo: la legittimazione ad agire*. Milano: Giuffrè, 1979, p.66.

⁶⁴ FORNACIARI, Flávia Hellmeister Clito. *Representatividade adequada nos processos coletivos. Tese de doutorado orientada pela professora Ada Pellegrini Grinover, apresentada à Faculdade de Direito da USP*. São Paulo: Faculdade de Direito da USP, 2010, p.60.

⁶⁵ DIDIER JR., Fredie; ZANETI JR., Hermes. *Curso de direito processual civil: processo coletivo*. Vol. 4. 5a ed. Salvador: Editora JusPodivm, 2010, p. 211-212. The trend is for the legislative confirmation of said possibility of judicial control.

⁶⁶ Along these lines: ADI 2482/MG, STF, Pleno, relator ministro Moreira Alves, j. 2-10-2002, DJ de 25-4-2003.

⁶⁷ Along these lines: STJ-REsp 651.064/DF, Rel. Min. Luiz Fux, 1ª Turma, j. 15-3-2005, DJ 25-4-2005, p. 240.

⁶⁸ COSTA, Susana Henriques da. *O controle judicial da representatividade adequada: uma análise dos sistemas norte-americano e brasileiro*. In: SALLES, Carlos Alberto de. (Coord.). *As grandes transformações do processo civil brasileiro: homenagem ao professor Kazuo Watanabe*. São Paulo: Quartier Latin, 2009, p. 972.

Yet, practical problems have been coming to light as a result of the management of class actions by associations, which, in spite of meeting the legal requirements, do not present any credibility, seriousness, scientific-technical knowledge, economic capacity or possibility of producing an effective procedural defense. Said items are all critical to ensure adequate and fair representation. Even in the Public Prosecutor's Office representation, there have been many concrete cases in which the interests defended by the *public prosecutor* do not match the true social values of the class they are allegedly defending before the courts.⁶⁹

In cases such as the ones mentioned by professor Ada Pellegrini Grinover, it would be interesting to grant the judge control over adequate representation.

As it has been mentioned before, the elements for certification in the United States of America are set forth in rule 23 (a) and the criteria to be met so a case is considered to be a class action is laid down in rule 23 (b). Fredie Didier Júnior and Hermes Zaneti Júnior⁷⁰ point out that in Brazilian law, certification shall also occur in a phase of correction as a guarantee for the defendants since in class actions countless and severe consequences to the parties might be brought about. Hence, it would be a natural demand. These authors name it as the principle of adequate representation in class actions.

Flávia Hellmeister Clito Fornaciari⁷¹ highlights that, regardless of the law, the judge shall assess the requirements for the admissibility of the class action on the pretrial order as adequate representation would be intrinsic to the system, therefore, not depending on the law.

Along these lines, authors highlight that in Brazilian Law, the Administrative Improbability Act – Act 8.429 of 1992, in article 17, paragraph 6, - sets forth a phase in which the existence of minimal elements of evidence should be verified. As this Administrative Improbability Act is part of the collective procedural microsystem⁷², this very piece of legislation could be applied to any class action according to Fredie Didier Júnior and Hermes Zaneti Júnior⁷³. However, Susana Henriques da Costa, in an opposite standing, explains that:

The same principles and rules of interpretation that apply to class actions shall be applied to the Citizens' Suit, Public Civil Lawsuit and Administrative Improbability legislation as they are products of the same historical and legal moment. They are all collective demands and, as such, are subject to the general theory of class actions.

The fact that all demands mentioned above are collective, however, does not automatically imply that the pieces of legislation are interdependent, that is, that the laws have reciprocal application. [...] The sharing of specific rules, as opposed to principles, can only occur by express legal provision.⁷⁴

⁶⁹ GRINOVER, Ada Pellegrini. *Ações coletivas ibero-americanas: novas questões sobre a legitimação e a coisa julgada*, in Revista Forense, nº 301, p. 3-12.

⁷⁰ DIDIER JR., Fredie; ZANETI JR., Hermes. Curso de direito processual civil: processo coletivo. Vol. 4. 5ª ed. Salvador: Editora JusPodivm, 2010, p. 113-114.

⁷¹ FORNACIARI, Flávia Hellmeister Clito. Representatividade adequada nos processos coletivos. *Tese de doutorado orientada pela professora Ada Pellegrini Grinover, apresentada à Faculdade de Direito da USP*. São Paulo: Faculdade de Direito da USP, 2010, p.62-63.

⁷² Class actions is not codified and its regulation occurs by the complementary relationship among several pieces of legislation, mainly the Consumer Protection Act, the Public Civil Lawsuit Act, the Administrative Improbability Act and the Child and Adolescent Protection Act, the Senior Citizen Protection Act and the Writ of Mandamus Act. The Civil Procedures Code is a residual source of this microsystem.

⁷³ DIDIER JR., Fredie; ZANETI JR., Hermes. Curso de direito processual civil: processo coletivo. Vol. 4. 5ª ed. Salvador: Editora JusPodivm, 2010, p. 113-114.

⁷⁴ COSTA, Susana Henriques da. O processo coletivo na tutela do patrimônio público e da moralidade administrativa. São Paulo: Quartier Latin, 2009, p. 133-135.

Hence, contrary to what the authors mentioned above defend, the application of the provision of the Administrative Improbability Act would only be possible if there was express legal provision.

Eurico Ferraresi teaches that: ‘The new trends show that in countries with civil law systems, adequate representation is assessed by criteria previously set forth by legislation. Case by case assessment by the judge in regards to adequate representation stands out in the North American system. It is rare to see countries where this type of individual control by the judge is allowed.’⁷⁵

According to Susana Henriques da Costa⁷⁶, judicial control of adequate representation shall be allowed both in quantitative and qualitative spectrums. In the former case, the judicial structure shall not be used for a demand that will probably have to be submitted again. In the latter, it is not possible to control the quality of the motions and pleadings presented. The collective *res judicata* in Brazil brings guarantees (article 103 of the Consumer Protection Act). However, it is not effective to allow a claim to progress if there are high risks of said claim being filed again, as it has been noted. Along these lines, Susana Henriques da Costa concludes: ‘Hence, in all perspectives, judicial control of adequate representation is better and most effective. Effectiveness is the motto of modern civil procedures. There are no reasons to deny the assessment of the judge on the collective legitimacy to represent the absent members in the legal procedural relationship.’⁷⁷

Article 13 of the Civil Procedures Code tackles the deficiency in representation in the classic individual civil procedure. As the institutes and principles of traditional civil procedure shall not be simply adopted by the collective cases, it is not possible to apply this procedure in class actions⁷⁸.

V. Conclusions

Considering the questions raised, we can summarize the following conclusions:

1. The members of the group who are not parties in the lawsuit must be adequately represented so the due process of law is duly respected. Inadequate representation is non-representation since adequacy is part of the concept of representation needed for the class action to be effective, fair and efficient.

2. The Brazilian legislator adopted the *ope legis* control of adequate representation, that is, the legitimate individuals who are allowed to file class actions are expressly mentioned in the law. In the North American judicial system, main paradigm for class actions, adequate representation is assessed by the judge.

3. To compensate said distinction, each country deals with *res judicata* differently. Nevertheless, *res judicata* as set forth here, pursuant to article 103 of the Consumer Protection Act – does not ensure, necessarily, the effectiveness of collective judicial relief

⁷⁵ FERRARESI, Eurico. *Ação popular, ação civil pública e mandado de segurança coletivo: instrumentos processuais coletivos*. Rio de Janeiro: Forense, 2009, p.118.

⁷⁶ COSTA, op.cit., p. 975-976.

⁷⁷ COSTA, Susana Henriques da. *O controle judicial da representatividade adequada: uma análise dos sistemas norte-americano e brasileiro*. In: SALLES, Carlos Alberto de. (Coord.). *As grandes transformações do processo civil brasileiro: homenagem ao professor Kazuo Watanabe*. São Paulo: Quartier Latin, 2009, p. 975.

⁷⁸ "Art. 13, CPC. When verifying the procedural incapacity or irregular representation of the parties, the judge shall suspend the action and set a reasonable amount of time for the problem to be solved. In case the party fails to solve the problem, the following might occur: I – to the claimant the judge shall declare the nullity of the action; II – to the defendant, be declared to be in default; III – to the third party, be excluded from the action." Along these lines: FORNACIARI, Flávia Hellmeister Clito. *Representatividade adequada nos processos coletivos*. Tese de doutorado orientada pela professora Ada Pellegrini Grinover, apresentada à Faculdade de Direito da USP. São Paulo: Faculdade de Direito da USP, 2010, p.61.

as it allows the refiling of actions, which objects the pillars of economy and instrumentality.

4. It is necessary to acknowledge that, besides the list of legitimate parties who are allowed to file class actions, the judge may perform the role of controlling representation so the action reaches its goals the most effective way possible.

5. Doctrine and precedents share this understanding, mainly because of the recognition of the need for a thematic relevance, the possibility of the judge waiving the requirement of agreement for the constitution of associations, among others.

6. Powers should be granted to the judge so he/she can control adequate representation and prevent that a fully incapable but legally legitimate entity is allowed to lead the action unsatisfactorily, disconnected from its object, until the end.

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