

COMMENTS

THE DEFENSE OF TRANSINDIVIDUAL INTERESTS: BRAZIL AND IBERO-AMERICA

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This article deals with the background, applicability and requirements of collective actions in the defense of transindividual rights and interests, both diffuse and collective, homogenous individual rights, as well as citizen's actions in the context of the Brazilian legal system. It also broaches the impact of the regime of res judicata on such actions, and offers a brief comparative analysis of the protection of transindividual interests in Ibero-America.

Keywords: transindividual interests; citizen's actions; collective actions; res judicata; Brazil and Ibero-America.

1. The Brazilian Legal System

Brazil is considered to have a legal system of 'civil law,' but one can also find many concepts of 'common law' in it. Enrico Tullio Liebman, who conducted an in-depth study of Brazilian law during his stay in São Paulo, where he sheltered from the war, said that the Brazilian legal system blended features of both systems.

In 1981, the Brazilian federation was inspired by the North Americans to create the Brazilian Constitution and, therefore, some concepts of procedural law have also been directly taken from common law. In the same way, we do not have administrative jurisdictions and, as in the United States, ordinary courts have competent jurisdiction in whichever type of lawsuit or issue. Therefore, for us Brazilians to talk about diffuse, collective and homogeneous individual interests or rights is absolutely the same thing, since the legitimate interest and the individual right are both regulated by the judiciary. Also, we have learned from the United States that several writs can

be regarded as instruments of constitutional guarantee: the *habeas corpus*, for the protection of personal freedom even as a preventive measure; the writ of *mandamus*, for the protection of rights other than those of freedom and even against an illegal or abusive jurisdictional act. As from the 1988 Constitution, the *habeas data* was created for the protection of the information data. The 1934 Constitution included citizen suits. In Brazil, citizen suits are corrective, that is, the lawsuit is filed against the administration for the protection of the public goods and values. We have constitutional control, like in the USA, either diffuse or concentrated; therefore, judges may or may not apply the law if they consider it constitutionally legal or illegal. Similarly, the direct action of constitutional legitimacy falls within the competent jurisdiction of the Federal Supreme Court and is based on the American Supreme Court's actions.

2. The Powers of a Brazilian Judge

A Brazilian judge holds strong powers. First of all, I would like to recall the legislative introduction of the so-called mandatory provisions – largely corresponding to the injunctions – initially in the field of the diffuse and collective rights or interests and, then, as a general rule of the procedural system, based on a new rule of 1996, which regulated the obligations to do or not to do. These must be put into effect in a specific way, either by means of indirect constraint, like the *astreintes*, or by means of direct constraint imposed by the judge, who can change the provision of the sentence into another provision specifically meant to achieve the results that would have been obtained if the obligation had been implemented. An example concerning the environment would be the obligation of a company to prevent pollution. The judge can apply the *astreintes* or, at the same time, he can transform the negative obligation of not polluting into a positive one of installing a filter. If this task is not accomplished, the judge can go beyond and determine that a third party install the filter at the expense of the party. In case this cannot be done either, the closing of the plant shall be determined.

Another example could be interlocutory relief as a general principle of the legal system with characteristics that differ from those of the provisional remedy because it is a matter of bringing forward effectively, partially or totally, the effects of the decision. Also in this matter, a judge holds strong discretionary powers, although the law evidently establishes the conditions and the limits of the interlocutory relief.

One can notice that the Brazilian judge, even without having the defining function of the North American judge, has been invested with large discretionary powers. The Brazilian legislator, influenced by the procedural law scholars that were in charge of the changes, invested the judge with confidence, maybe because the work can be very well controlled. The Appellate Court can immediately suspend the interlocutory relief determined by the judge of the trial court and an injunction against the jurisdictional act would be adequate to this situation.

That confidence is based on a political position since Brazil, like many countries in Latin America, is hostile to and suspicious of the government – due to previous authoritarian regimes. However, people have a great deal of confidence in the judge and in the administration of the justice. Naturally, there are controls and limits like those that refer to the application of the principle of reasonableness, an unwritten constitutional principle and considered a principle of necessity and adequacy between the means and the goals.

3. Introducing the Protection of Transindividual Interests in Brazil

Without a doubt, the first source of inspiration for the protection of the transindividual interests in Brazil were the Italian jurists / legal writers in the 70^s: Cappelletti, Denti, Proto Pisani, Vigoriti, Taruffo were / are civil law jurists who have examined, in depth, the issue of the collective actions both in terms of the analysis of North American law and in terms of general proposals for a jurisdictional protection of collective interests.

More pragmatic, the Brazilian system began with theoretical exercises of the Italian jurists of the seventies in order to build a jurisdictional system that could be put into practice immediately and that protected the diffuse interests.

Since 1977, a revision of the constitutional Citizen Suit Act of 1965 considered as a 'public asset' the assets and rights of artistic, esthetic, historical or tourist value.

Several citizen suits were filed to defend diffuse interests related to the environment. However, the citizen suit could not cover the wide range of the protection required by diffuse interests, not even as far as the environment is concerned, since its practice is subordinated to the illegality that comes from the acts or omissions of the government, whereas the threat or the violation of the diffuse interests usually arises from private actions. On the other hand, the standing, exclusively conferred on the citizen, excluded the intermediary bodies, which were stronger and more prepared than the individual to fight against the environmental threat or harm.

In 1985, Law No. 7.347 was passed to govern public interest civil actions for the protection of the environment and of the consumer as far as indivisible assets and, consequently, diffuse interests were concerned. Later, the 1988 constitution pointed out, in many provisions, the relevance of the collective interests, raising the defense of all the diffuse and collective interests to a constitutional level – without any limits to the matter – and making them an institutional task of the Office of the Attorney General, which is extremely autonomous and independent in Brazil (but allowing the law to increase the standing (Art. 129(II)(1)); mentioning afterwards, the judicial and extrajudicial representation of the associative entities for the defense of their members (Art. 5(XXI)); creating the collective writ of mandamus with the standing to sue of the political parties, the unions and the associations legally constituted

and established for at least one year (Art. 5(LXX)); finally, pointing out the purpose of the unions for the defense of the collective and individual rights and interests of the corresponding class (Art. 8(III)) and highlighting the standing regarding the Indians and their communities and the organizations for the defense of their interests and rights (Art. 232).

But, it still lacked the collective jurisdictional protection for the personal rights of the members of the groups that had to resort exclusively to individual actions, which multiplied the claims, led to contradictory decisions, did not stimulate the access to the judicial proceedings and weakened the principle of making the suits less expensive. It was necessary to create procedural mechanisms that would permit the collective protection of individual rights that could be put together when they were homogeneous and had a common source (in fact and of right). A tool, similar to the class action for damages in the North-American law, had to be created and expanded beyond the scope of the condemnatory action, respecting the principles inherent to the civil law systems.

It was in this context that the Consumer Defense Code (Law No. 8.078/1990) appeared in Brazil to crown the legislative work and to extend the scope of the public civil action law by determining its applicability to all the diffuse and collective interests and creating a new category of rights and interests, individual in their nature and approached as personal but dealt with by the civil justice as collective due to their common source, which awarded them the denomination of homogeneous individual rights. It must be mentioned that the procedural protection of the Consumer Defense Code comprehends the diffuse, collective, individual and homogeneous rights of any nature, even those which are not included in the consumer's relation, in accordance with the law.

Nowadays, it is usual to admit two kinds of collective rights (in a broad sense) in the legislation, legal writings and jurisprudence, these being: (i) the diffuse rights, which are indivisible and to which indefinite classes of people are entitled; (ii) the homogeneous individual rights (in the Brazilian and Iberian-American jargon), which are divisible and to which the members of specific classes are entitled. They may be taken to court in the form of personal suits, but may also be dealt with in a collective way.

That is why an astute Brazilian legal scholar, Barbosa Moreira, remarked that diffuse rights are ontologically collective whereas homogeneous individual rights are only incidentally collective because, as far as the procedure is concerned, they may have a collective impetus.

One more remark shall be made: sometimes, the diffuse rights belong to indeterminate and indeterminable people, since there is not any legally binding relationship that joins the members of the group. They are rights concerning quality of life, like environmental, consumer, and public service user rights. But, sometimes, one cannot determine who is entitled to them, as people are members of a group

having some kind of legal connection – for instance, associations and legal entities – and they may be determinable. This legal relationship can also be found between each member of the group and the adverse party, like a relation between the Treasury Department or a school and an individual person.

In Brazil and in several South-America countries, the first abovementioned rights are, strictly speaking, diffuse, whereas the latter are named collective, also *stricto sensu*. Nevertheless, the procedure for both diffuse and collective rights is alike. Anyway, it is important to point out that there are two kinds of ‘transindividual’ rights that are subject to collective suits: the first kind are diffuse rights (in Brazil they are subdivided into diffuse and collective); the other kind are the ones we will call homogeneous individual rights, according to Brazilian and Iberian-American terminology.

4. Diffuse and Collective Interests *stricto sensu*

Both the diffuse rights or interests and the collective ones have a transindividual and indivisible nature because they can only be dealt with in a combined way; therefore, they are essentially collective. Essentially collective due to their indivisibility: the satisfaction of the right or interest of a member of the group necessarily corresponds to the satisfaction of the interest or right of all the others, while the refusal of the interest or the right of a member of the group corresponds to a refusal for everyone.

5. Law No. 7347/1985

In Brazil, at first, there was a specific statutory law dating back to 1985 that governed diffuse and collective interests or rights. We were perfectly aware that it still lacked the jurisdictional protection of individual rights for a collective damage, that is, the mass tort cases or class actions for damages. That became particularly obvious in the case of the consumers who suffered any kind of consumption damages. The environment, for example, can be regarded in its indivisible dimension also for the compensation of damages. The Law of 1985 provided for decisions that demanded the restoration of the damaged environment. However, as far as the consumer relations were concerned, the most that the law could do was to deal with the actions for injunctive relief. As far as indivisibility was concerned, the only possibility for enforcement actions was perhaps the adverse judgment stemming from misleading advertising for the benefit of all consumers. Nevertheless, the compensation for personal damages incurred by the consumer, in a collective way, still had to be considered. Then, the consumer defense code was enacted.

However, intentionally, the 1985 Law did not deal with that. Intentionally, because the Brazilian legal system was already deeply innovating as a system of civil law in

a segment that could receive a simpler procedural treatment, which was the field of diffuse or collective rights or interests of an indivisible nature. Which aspects / provisions of the law remained in force after the enactment of the Consumer Protection Code?

The standing, which is attributed to public agencies and associations, is mixed. Firstly, it is attributed to the Attorney General's Office, which is an institution of great autonomy regarding both the judiciary and the government. One dares to say that the Attorney General in Brazil is a fourth power and, effectively, it can be thus considered. The Brazilian Attorney General has always performed some functions concerning the civil procedure, either as a plaintiff or as *custos legis*. With the passing of the law for the protection of the collective interests, broadly speaking, it has been strengthened in such a way that today 90 percent of the collective actions are instituted by the Attorney General. Together with this standing, as a concurrent and independent standing, there is the one attributed to governmental agencies working for the public interest, like those for the consumers defense, the environment, etc., even if they are not legal entities. In the private sector, the standing is attributed to the associations, which have been established for at least one year and which have among their institutional goals the defense of those interests; however, a judge can exempt the association from the former requirement whenever there is a need for a group that is not yet organized to perform. The standing is concurrent and independent. The Brazilian legal system does not confer standing to citizens but they have the standing to file the constitutional citizen suit.

In Brazil, at first, the standing is *ope legis*, without the judge's control over the so-called adequacy of representation. I would remark that legal writers argue that, in spite of not having a written statute regarding the judge's representation control (the seriousness, the credibility, the coincidence between the plaintiff's claim in court and the group's true interests, etc.), the Brazilian legal system enables the judge's control in this regard.

6. The Constitutional Citizen Suit

On the other hand, it must be noted that while the Brazilian system of collective actions does not provide the citizens with the standing to bring collective actions, one cannot consider it as a deficiency, because they have the standing to file constitutional citizen suits. The reason for this is that, together with the collective actions from 1985 (named in Brazil as 'public civil actions' – because institutionally the Attorney General is entitled to and performs the various procedural controls and initiatives when the lawsuit is filed by an association or any other public agency), in Brazil there is also the citizen suit, which is a constitutional action against the Government for the defense of the 'public asset' including the goods and rights of artistic, esthetic, historical or tourist value.

The citizen suit was later incorporated into the constitution of 1988. What happened was that, between the enactment of the 1965 Law and the 1985 Law, the citizen suit was the only instrument for the defense of the diffuse and collective interests regarding the environment, broadly speaking. In the case of the citizen suit, the standing is awarded to the citizen who, by means of that legal remedy, may go to court to request the protection of diffuse and collective interests, in the field of the environment.

7. The Collective Defense of the Divisible Rights: Homogeneous Individual Interests

However, the 1985 Law left the jurisdictional protection of the personal subjective rights uncovered but they could be judicially dealt with in a collective way. Those rights are individual, divisible and every holder could – and can – file his / her claim on these grounds. Nevertheless, those individual rights can be dealt with in a collective way, as long as some particular aspects are respected.

Then, in 1990 the consumer defense code was enacted, opening to the protection of the so-called homogeneous individual rights: individual rights that, in court, may be dealt with in a collective way if they bear the characteristics of ‘common origin’ and ‘homogeneity’. It must be remarked that the procedural provisions of the consumer defense code are not applied just to the consumer relations, but to all the segments in which the purpose of the procedure is the protection of the diffuse collective and homogeneous individual interests. The law is very clear in this matter.

8. Collective Actions for the Defense of the Homogeneous Individual Interests

We shall see now how this collective action is carried out when the matter is the compensation of the damages personally suffered by a group of people which roughly corresponds to the class actions for damages and to the mass tort cases in the North American system. But in Brazil it is not necessary to fund group litigation: the standing to sue of public and private entities allows the party to file the claim without naming the persons who form the group. The first part of the action is an enforcement action, without indication of the group’s members, and it is brought by the ones who have the standing and, as already mentioned here, in favor of an undetermined group (the consumers of a harmful product, the inhabitants of a region, or the participants in an undertaking). The generic decision that sustains the compensation of the damage endured, at this point by undetermined individuals, will replace the entitled party in court. Once the general damage is accepted by the court, the liability is established and it is determined that compensatory damages will have to be paid, the individual lawsuits begin. Either individuals or entities may bring

the action, the latter acting as representatives. During the lawsuit, each and every member of the group will have to prove his / her personal damage, the link between their personal damage and the general damage sustained in the judgment for the plaintiffs, as well as to quantify the damage. This is similar to the North American system with the difference that it does not establish a total compensation, which means that in Brazil the judgment for the plaintiffs are for damages endured. It means that for every damaged individual, the personal compensation will have to be quantified according to the adversary system in an action known in Brazil as 'liquidation according to new evidence' because new facts will have to be proved. It is different from that realization that usually follows the generic judgment for the plaintiff in the traditional Brazilian lawsuits, since it will not be enough to prove the *quantum debeatur*, but the *an debeatur* (if the personal damage has a link with the general damage) will still have to be discussed. So, in the payment of monetary damages, the sum is not divided among claimants, but each of them receives the sum corresponding to the personal damage effectively sustained. There are cases in which the Brazilian system resorts to the North American idea of fluid recovery, and that happens when the personal damages are insignificant if compared to the total damage, as usually happens with consumer relations. An example is when a consumer finds out that the weight printed on the label is slightly different from the actual contents of the container. Then, if the personal compensation is not proportional to the general damage, one can make use of the fluid recovery technique, and the total sum (corresponding to the damage caused and not to that personally endured) will be deposited in a fund for the protection of the consumers.

9. Requirements of the Collective Action to Protect Homogeneous Individual Interests

When the consumer defense code was enacted / drawn up it included the category of the homogeneous individual rights or interests. At that time, we used to say that for the collective protection to exist, said rights or interests had to be homogeneous, having a common origin. But today one believes that this homogeneity must be emphasized and that, indeed, it must be one of the conditions of the collective action of compensation for the damages personally endured. In my point of view, two requirements of the North American legal system for this type of class action are also necessary in Brazil: the prevalence of the common interests over the individual interest and the superiority of the collective protection. In our civil law system, I will refer to the fact that the prevalence is an issue of the theory of procedural law (conditions of the action) because if there is no prevalence of common matters over private matters, the rights are not homogeneous, at least not sufficiently so to be dealt with collectively. The superiority of the collective protection can be demonstrated in terms of the usefulness of the provision, and, therefore, in terms

of the interest to sue because the collective decision that determines the generic adverse judgment needs to be effective for the individual. Since the individual will have to prove all the facts again in the process of realization, if the collective decision is not effective for all practical purposes, it will be of no use. I recall, as an example, the damage caused by asbestos or tobacco in the United States, when the North American courts did not classify the action as a class action because it lacked the requirements of prevalence and superiority. In this way, the Brazilian doctrine limits the broad field of homogeneous rights, which are sometimes successfully dealt with collectively and refer back to the North American concepts of the conditions of the action in civil law, also because the moment of the certification corresponds to our condition of admissibility.

10. The Suitable Actions

The provision is clear in Brazil and in the Model Code of Collective Suits for Iberian-America. Under the title 'Effectiveness of the jurisdictional protection' it says: 'For the defense of the rights and interests protected by this Code, all kinds of actions that provide their adequate and effective protection shall be admitted' (Art. 4).

There is not any doubt, thus, that reality itself has already extended the collective jurisdictional protection to all kinds of litigations: so, the focus of the suit on the defense of individual homogeneous rights is not only present in the North American class action for damages.

11. The Regime of the *res judicata* in Actions to Protect Indivisible Interests

Concerning the *res judicata*, we have followed a path which is different from that of the North American system. With regard to the diffuse and collective interests or rights, of indivisible nature, the procedural treatment is *erga omnes* (and it could not be different because that is in the same concept of indivisibility of the right) with a combination that came from the constitutional citizen suit, in the sense that, when a judge rejects the request of the citizen claimant for insufficiency of evidence there is no *res judicata* and a new suit can be brought by anyone who is entitled to do so, always based on new evidence. This solution, traditional in Brazil, was studied and described as a kind of acceptance of the decision *secundum eventum litis*, or considered as a case of *non liquet*, in which the judge was allowed to be exempt from making a decision. And this technique, devised as an instrument against the possible collusion of the citizen party against his / her counterpart (in order to get a contrary decision with *erga omnes* effects), has been reproduced from the law of the public civil action and from the consumer defense code, with regard to the diffuse and collective interests or rights.

12. The Regime of the *res judicata* in the Action to Protect Divisible Interests: The Decision *secundum eventum litis*

The treatment of the *res judicata* for homogeneous individual rights *secundum eventum litis*. It deliberately bears on the opt-out and the opt-in of the common law system, in which the member of the group will not be affected by the *res judicata* unless the class action was chosen (opt in) or the intention to be excluded from the action has been demonstrated (opt out). I must say that we have studied the system of the North American opt out a lot, and we have noticed that in the United States it often causes insoluble problems like when one intends to get the personal notification to all the members of the group so that they can opt. Just bear in mind the famous *Eisen* case, in which the obligatory notification put an end to the class action. Nowadays, the notification is more parsimonious, but in this way one cannot tell whether all the members of the class have been made aware. And, it could affect the constitutional right of everyone having his / her day in court. Another way had to be chosen, also because in Brazil there would have been obstacles for the implementation of the opt-out or opt-in techniques, such as inadequate information, the social level of the population, the difficulty to access the judiciary and so on.

So, for the homogeneous individual rights we have opted, frankly, for the *res judicata secundum eventum litis*, that is, a decision *erga omnes*, intended to favor and not to harm personal objectives. If the decision is unfavorable towards the collective action it will only be effective in a collective way, preventing a new collective action. However, the personal matters will not be affected and every individual will be able to make them useful during an ordinary proceeding. The former unfavorable collective decision may be equivalent to a simple precedent (and in Brazil one does not follow the *stare decisis*, the binding precedent). *Res judicata* will not hinder a new lawsuit.

13. The Decision *secundum eventum probationis*

Nowadays new issues on the decision *secundum eventum litis* have been proposed in Brazil. For example: when the judge rejects the claim without asserting that he did so based on the insufficiency of evidence, what will happen if science later discovers that a certain product was effectively harmful, differently from what was proved in court? This is new evidence that could not be produced at the time of the judgment, and may be valid when an eventual suit of revocation ends. I support, therefore, in a recently published article in the *Magazine of Procedural Law* that the claim can be brought again even if the judge did not assert that his refusal was based on insufficiency of evidence. But how can one justify, according to legal writers, a position that seems to represent an offense to the myth of the *res judicata*? Firstly, I need to say that in Brazil there is a recent remarkable tendency to the making *res judicata*'relative' when

there are other constitutional interests at stake. One does not need to go too much further into this field but it is worth mentioning the existence of a sentence *secundum probationem*, which does not mean an innovation in Brazil. There are cases in Brazil where the judge decides that the party is not entitled based on the documental evidence provided. It is the case of the writ of mandamus and the *habeas corpus*, based only on documental evidence, in which the judge makes a decision based on the evidence produced. But in case the claim is rejected the party may bring another suit following the ordinary proceeding and based on broader evidence.

Therefore, one should draw a parallel between the above-mentioned Brazilian solutions and *res judicata* in collective actions. This idea could then be extended to the classical procedure, in the lawsuits of new scientific evidence for the acknowledgment of paternity (DNA). The existence of a decision *secundum probationem* would naturally appear circumscribed to the cases of the new evidence that could not be produced at the time of the judgment. This way, the issue of the preclusion of the sentence would be overcome.

I recognize that this is a daring position, and one must recognize that in Brazil we are free from prejudice. The new Brazilian civil procedure tried to review the principles, the concepts, the traditional institutes specially the most valuable one for civil procedure: effectiveness.

14. Collective *res judicata* to Benefit Individual Claims

The *res judicata* that refers to a favorable decision in a class action may be transferred to individual claims, and thus shorten the procedural steps through which one intends to have individual rights recognized.

This is true not only of the favorable decision that referred to the homogeneous individual rights. As a matter of fact, in this case, the transfer of the *res judicata* is almost a truism. But it is also true of the decision that favorably decided about the litigation on diffuse and collective rights.

For example: if in the decision it was admitted that there was environmental damage, indivisibly considered, and determined that the defendant should repair it, the people who individually suffered the personal damages may make use of the collective *res judicata* to shorten the procedural steps whose aim is to obtain a personal compensation. It seemed to Liebman when he wrote about the Old Italian regime of the transfer of the penal *res judicata* to the civil area to compensate an *ex delicto* damage, that in this case, there would be an extension of the penal *res judicata* to the reasons, which would be '*abnorme*.' The Brazilian doctrine chooses to explain this phenomenon – both concerning the effectiveness of penal *res judicata* in the field of civil compensation and concerning the effectiveness of *res judicata* in the collective suit for the defense of the diffuse and collective rights to benefit the individual claims of damages compensation – as an objective amplification

of the litigation purpose. Therefore, when the judge declares 'I sentence you to reconstitute the environment,' he is implicitly declaring that he is also sentencing you to compensate the victims of the environmental damage.

15. The Defendant Class Action

Brazilian law does not provide for the passive class action – the North American defendant class action.

But today both legal writers and jurisprudence recognize that in Brazil, even without an express provision, the combined analysis of several statutes shows the possibility of a collective litigation not brought by the group, but against them. I realize that, in this case, the issue of the judicial control on the 'legitimate representation' is still more subtle, so that the people who are members of the group can suffer the effects of the contrary decision.

16. Notifications

The Brazilian criterion of *res judicata*, for individual homogeneous rights (class actions for damages, among others), just to benefit and not harm the individual claims – without the opt-out system, renders notifications less important than in other systems. But the law requires that the class action be broadly publicized to allow the members of the group to intervene in the action, not as a form of opt-in, but in order to help the party to obtain a successful result. It is a form of joinder of parties, but the individuals cannot prove and require their personal recovery in the first part of the proceeding.

17. Settlements

A great number of collective suits are filed in Brazil by the Attorney General, the most active entity in this matter. Before the suit, the Attorney General conducts an administrative inquiry that many times leads to a settlement. Public Defenders often obtain settlements of individual damages. Settlements are less frequent during judicial proceedings. Settlements oblige the parties and constitute an enforceable instrument. But we do not have statistics in Brazil.

18. Costs and Benefits

The entity entitled to the collective action does not pay any court costs nor, in case of defeat, the other party's attorneys' fees, unless the judge deems that the party acted in bad faith (*in mala fide*), in which case the party has to pay an amount equivalent to the court costs multiplied tenfold as well as the attorneys'

fees (normally 10 percent of the value of the action) to the other party. Should the collective action be successful, the defendant pays the court costs and, if the plaintiff is an association, the attorney's fees.

In Brazil, we do not face the North American problems posed by the high cost of attorneys' fees.

19. The Protection of Transindividual Interests in Ibero-America

Of the civil law systems, Brazil was the first country to introduce the protection of the diffuse and collective interests or rights in its legal system, and, later, of homogeneous individual rights. This attitude was welcomed, little by little, by the other Latin American countries. The Model Code of Civil Procedure for Ibero-America mentions diffuse interests and a wider standing is awarded to the citizen, while the regime of *res judicata* is identical to the Brazilian regime for the diffuse and collective interests. This code, that is only a model inspired by the several legal systems, was fully adopted in Uruguay. In Argentina the case law had already established some concepts and today the Constitution of 1994 sets forth a remedy for the protection of collective rights, a kind of injunction, better than its predecessor. Portugal introduced the defense of the diffuse and collective interests by means of the law for the constitutional citizen suit of 1995, and, later, the case law recognized, with the same name used in Brazil, the category of the homogeneous individual rights. Nowadays, almost all the other countries in Latin America – like Peru, Colombia, Guatemala, Costa Rica, Paraguay and others – have adopted in their systems, though sometimes with different names, the procedural protection of the diffuse or collective interests as well as of the homogeneous individual rights. But the great boost for the improvement of the collective actions system was provided by the Model Code of Collective Actions for Ibero-America, promoted by the Ibero-American Institute of Procedural Law, prepared by a commission coordinated by me and approved in 2004. The Code is only a model, as its name says, but it contains principles and immediate operating rules and was considered a source of inspiration by numerous South American countries for their own national laws. As the source of inspiration of the Model Code is the Brazilian system, it was expanded to many Latin American legal systems. Similarly, so were the mixed standing (which also included the citizens), the *res judicata secundum eventum litis* for the homogeneous individual interests, the Attorney General's control over actions and possibly being a party, the *res judicata secundum probationem*, etc.

20. The Practical Application of Collective Actions in Brazil

It can be said that the existence of collective actions has changed Brazilian Civil Justice, from an individualistic view to a collective and social view. Sometimes the

associations and the Attorney General exaggerate in the number of lawsuits filed, but this was expected. It was also expected that once in a while the courts and judicial decisions would slow down, sometimes excessively. But it seems that in that process of come-and-go, of forward and backwards steps, of continuous reorganizations, Brazil found the way towards the effective protection of the transindividual rights. To sum up, Brazil reviewed the tasks of the judge and the Attorney General and also those of the associations. These, in fact, are exceptions in suiting and have not yet reacted to the appeals as expected. Although free from procedural expenses and from the burden of the defeat, they prefer to resort to the General Attorney in order to bring the collective action.

In Brazil, we have a large amount of collective actions and interlocutory provisions are frequent. Even though they are often reviewed by the Court of Appeals, there has been a clear distinction between individual and collective actions, with all the differences that must exist and really exist between them. But, unfortunately, we do not have statistics.

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