Collective litigation and due process of law: the Brazilian experience[•]

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1. Preliminary Issues

Collective proceedings present several challenges to the traditional paradigms of the procedural law and, particularly, to the principles that guide the procedural practice.

Issues such as legitimation, jurisdiction, *res judicata*, and decision enforcement receive quite a different treatment at the collective field and deserve a new approach The necessity for adapting traditional institutes and creating new concepts requires that one rethinks many of the ideas that founded the civil procedure.[1]

This problem is strengthened when one faces de challenge of examining the guiding principles of the procedural law. The first problem one faces is the perspective in which these principles are considered. Usually, the Civil Procedure guarantees are thought from the viewpoint of the parties (individual plaintiffs and defendants) involved in the litigation. Rights such as to an adequate defense, to be heard in an adversarial proceeding, to a fair decision and to the due process of law

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[1] MARINONI, Luiz Guilherme. *Novas linhas do processo civil*. 4th ed., São Paulo: Malheiros, 2000, p. 68-69.

take into consideration the protection that should be provided to the people involved in the litigation, seeking to safeguard their legal positions in the best possible manner. However, when one thinks of collective proceedings, the situation is quite diverse. That happens because in this case one protects "non-subjective" interests, or mass interests, being natural that the situation of the parties (especially the one that will represent the group in court) has less relevance.

The fundamental procedural rights and principles, thus, not only in the collective proceedings, but especially in this field, cannot be reflected upon only in terms of the involved parties. They require consideration from the protected interests, and, in a broader manner, from everyone that is part of the society. Thus, the fundamental rights cannot be thought only from the point of view of the individuals, whilst faculties or powers of which they are the holders, but are also legally valid from the perspective of the community, such as values or purposes.[2] It is under this perspective that one has to handle here the fundamental principle of the due process of law.

On the other hand, the content itself of the fundamental procedural rights and principles also suffer adaptations in the field of the collective judicial protection. Considering their origins in the individual lawsuits, it is natural that some of the traditional clauses of many fundamental guarantees require a reformulation for their application in the collective environment.

Established in article 5th, LIV, of the Brazilian Federal Constitution,[3] the guaranty of the due process of law, especially in the collective level, requires in its current version a posture that transcends its classical elements.[4] The aspect has been insistently emphasized by the doctrine, which perceives the peculiar needs of the

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[2] ANDRADE, José Carlos Vieira de. *Os direitos fundamentais (na Constituição portuguesa de 1976)*. , p. 144-145; MARINONI, Luiz Guilherme. *Técnica processual e tutela dos direitos*. São Paulo: RT, 2004, p. 168.

[3] "Nobody shall be deprived of his freedom or of his possessions without the due process of law".

[4] Long time ago, for that matter, Calamandrei already affirmed that "*i classici principi ne procedat iudex ex officio, ne iudex iudicet in re sua, audiatur et altera pars sono rispondenti sì alle esigenze di un processo 'liberale', ma non però a quelle di un processo 'giusto'*" (CALAMANDREI, Piero. *Processo e democrazia*. Padova: CEDAM, 1954, p. 145-146).

collective tort litigation, and seeks offering an adapted view of the guarantee of the due process and its elements.[5]

In fact, in the collective proceedings it will be hard to think about the guarantee of the due process of law in the same way that one may look at it in the individual level. This does not mean that the principle, in the collective field, must be mutilated or sacrificed. But certainly it is necessary to review the content of the principle in light of the necessities of collective interests, adapting it to the peculiarities and requirements inherent to this type of judicial protection and of the rights subject to it.

The simple example of the standing for the cause may be useful to understand this new approach. While in the individual litigation, the guarantee of the due process of law points, normally, to the existence of subjective right to a "day in Court", it is evident that in the mass tort litigation this extent will rarely be observed. In collective actions, the axis of analysis of the right to the "day in Court" moves from the individual parties to the protected interests. It is the interest that deserves the guarantee of access to the Judiciary, in the most complete, efficient and timely way, abstracting the individuals that may be eventually affected. This happens because the large majority of the collective interests do not belong to one or some determined individuals. It belongs diffusely to a group or to the whole community. For this reason, the guarantee of access to the Judiciary could never be guaranteed in an individual level, as it is done in the field of the traditional proceedings.

The same should be said in relation to subjects as the *res judicata* or the effects of the decision. The limits commonly imposed to those institutes – at least by the Brazilian law – have another dimension in the collective level, as this is inherent to the very essence of the collective action. It is obvious that the expansion of these concepts does not imply the sacrifice of the essence of the due process of law clause.

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[5] *See* among others, FISS, Owen. "The political theory of the class action". *Washington and Lee Law Review*, vol. 53, iss. 1, *passim*. In Brazilian law, *see*, especially: MANCUSO, Rodolfo de Camargo. *Jurisdição coletiva e res judicata*. 2ª ed., São Paulo: RT, 2007, p. 277 and ss. The importance of this reanalysis of the principle of the due process of law makes part of the Brazilian Jurisprudence suggest the use of the expression "social due process" (VENTURI, Elton. *Processo civil coletivo*. São Paulo: Malheiros, 2007, p. 146 and ss.).

But it certainly demands a rereading of this concept, based upon the needs and particularities of such type of litigation.[6]

In conclusion, issues as these impose the due process clause, at the collective level, to be seen in a slightly different configuration from the traditional one. And this new approach emerges with a much higher emphasis to the *political dimension* of the principle. As mentioned before, it becomes more relevant to offer to *the protected interest* the fundamental procedural guarantees – access to Justice, timeliness, the right to be heard, broad legal defense etc. – than to simply deliver them to the procedural parties who stand for those interests. This shift of the object of protection responds to the main goal of the State itself in offering to these interests an adequate answer and allowing the social participation – in different ways than participatory democracy normally offers - in the management of the general issues.

2. The Brazilian practice of the recovery of mass tort and of the collective recovery of damages

The Brazilian civil procedure seeks, through several legal statutes, to offer a broad protection to collective interests. There are, in fact, several statutes that deal with the collective tort litigation, which interrelate, making the national doctrine think about a true "microsystem" of collective protection.[7]

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[6] "The principles express concepts and values that are indissolubly linked to the cultural environment. However, as society evolves every day, the principles must be resized in this same intensity and speed. If it weren't so, it would be false that the principle acquires concreteness by its contact with reality. Incidentally, if the principles' content did not change with time, the Constitution would remain plastered to the literality of its norms or to the interpretation that one day was conferred to them" (MARINONI, Luiz Guilherme. *Curso de processo civil – teoria geral do processo*. 3ª ed., São Paulo: RT, 2008, vol. 1, p. 53-54).

[7] In this sense, among many others, *see* MARINONI, Luiz Guilherme; ARENHART, Sérgio Cruz. *Curso de processo civil – procedimentos especiais*. 2nd Ed., São Paulo: RT, 2010, p. 306-307; MARINONI, Luiz Guilherme. *Técnica processual e tutela dos direitos,* ob. cit., p. 102; MENDES, Aluisio Gonçalves de Castro. *Ações coletivas*. 3rd Ed., São Paulo: RT, 2012, p. 193 e ss.; GRINOVER, Ada Pellegrini. "Direito processual coletivo". *Direito processual coletivo e o anteprojeto de código brasileiro de processos coletivos*. São Paulo: RT, 2007, p. 11.

This system was designed to deal both with the transindividual rights,[8] and the mass individual rights. However, due to the peculiarities of each one of these interests, some variations on the dealing of specific issues of its protection are foreseen.

Particularly, in relation to the recovery of the damages, there are substantial differences between the models adopted for the protection of mass individual rights and collective rights.

For the later, the model adopted by the Brazilian legislation generally is related to the performance of one or several representative parties,[9] to whom the almost integral command of the lawsuit is delivered as well as the choice of the way of satisfying the interest. In fact, the plaintiff of the collective lawsuit has the power to choose the type of protection to be sought, to quantify the amount of money pursued (according to the criteria he considers more adequate to the extent of damage and its reparation), as well as, within certain limits, to elect the most appropriate opportunity to start the enforcement of the sentence.[10] The plaintiff does not have, however, the

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[8] In the Brazilian law, the transindividual rights (also called collective rights *lato sensu*) are subdivided in diffuse rights and collective rights. The former are characterized, as provides art 81, sole paragraph, I, of the Consumer's Protection Code (Federal Law No. 8.078/90) for their indivisible and meta-individual character, having as holder an indeterminate group of individuals, linked by circumstances only of fact. The collective rights are defined, by article 81, sole paragraph, II, of the same statute, as being the "trans-individual, of indivisible nature of which is owner a group, category or class of people connected among themselves or to the contrary party by a basic legal relationship". As one can see, the difference between both categories is in the higher or lower determinability of the group who owns the right. Actually, the differentiation between both categories is of little utility, and is not even used in other statutes of reference, such as the Model Code of Mass Litigation for Iberoamerica. For that reason, in this text, the term "collective right" is used indiscriminately to refer both to the diffuse rights and to the collective rights.

[9] Notwithstanding some polemic among the national authors, it is usually accepted that the standing for mass litigation in Brazil is *ex lege*, that is, by act of law, independently of the analysis of any adequacy (adequate representativeness) for the concrete case. Thus, as long as authorized by law, some entities have the prerogative of protecting collective rights or mass individual rights in the manner they find more suitable, independently of consent or inquiry of the affected group.

[10] Art. 15, of Law No. 7.347/85 (which regulates, generally, the lawsuit for protection of transindividual rights in Brazil) says that only if the plaintiff of the collective lawsuit does not require the beginning of the enforcement of the decision within 30 days, starting from the final judgment of the

power of determining the destination of the amount of the compensatory damages. This value, according to an explicit rule, will be directed to a public fund (administered by a Federal Council or State Councils), which shall apply its resources in the "reconstitution of the aggrieved assets" (art. 13, of Federal Law No. 7.347/85)[11].

The logic of the Brazilian legislation is quite different when dealing with mass individual rights. With the objective of preserving the individual nature of these rights, Brazilian law provides a *biphasic* procedure for the mass tort litigations. In this procedure, there is a first *mass* phase, conducted by the representative party, who will act in defense of the group until the final judgment of the case. With the *res judicata* on the established claim, the "holding" of the litigation returns to the harmed individuals, who are free to postulate or not the enforcement of their private damages. Thus, from the final judgment, the representative party no longer is the protagonist in the claim; the holders of the subjective rights that have been protected determine the sequence of the lawsuit, and must proceed toward the individual execution phase. These aggrieved, shall, then, determine their specific damage's extension and promote, at their expense, its enforcement. Only in exceptional cases, when the individuals do not present themselves for the individual enforcement – or when the number of those who claim for that is not compatible with the extension of the damage – the representative party is authorized to participate again, requiring a general enforcement, whose product is directed to the public fund aforementioned.

As one can see, there is a very diverse logic in the treatment of the collective rights and the mass individual rights. While the first model privileges the performance of the representative party, allowing the determination of the amount pursued and the form of protection, the second is still linked to the idea that the rights outlined herein

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case *(res judicata)*, is that the other possible representative parties for the collective law suit may start its enforcement.

[11] Gradually, the Brazilian legislation has expanded the destination of the resources from the "Fundo de Defesa de Direitos Difusos" (the federal fund to which large part of the resources originating from collective litigation is destined), which may actually be applied "to the recovery of assets, the promotion of educational and scientific events, and in the editing of information material specifically related to the nature of the contravention or the injury caused, as well as to the administrative modernization of the public organs responsible for the execution of policies related to the areas mentioned in the 1st paragraph of this article" (art 1st , paragraph 3rd, of Federal Law No. 9.008/95).

constitute *subjective rights* and, for this reason, it would be inadequate to expropriate from its owners the sovereignty in the choice of the manner and time to fulfill the interest.

3. The problems of the Brazilian normative system

The Brazilian system, however interesting, ends up being inefficient in practice.

3.1. The reparation of collective rights

With regard to the judicial protection of collective rights, the main problems verified are the determination of the value of compensation damages and the ineffectiveness of the Brazilian public funds.

Considering that collective rights are, as a rule, undisposable – normally referring to interests without economic expression – one can imagine the difficulty of attributing to them any monetary dimension, aiming its compensation. Indeed, this difficulty makes that, frequently, the collective tort lawsuits aim only a "compensation" for the generated illicit, so that the aggression to the law does not go without a judicial answer.

That is the reason why so many monetary reparations in this field are random, with no parameter for the court's decision.

On the other hand, Brazilian judicial decisions still oscillate a lot in the acceptance of the imposition of collective "moral damages"[12] – which would have, here, a role similar to the punitive damages admitted in some other countries (e.g., United States). Brazilian Higher Courts' opinions tend to vary between the peremptory unacceptance of the collective "moral damages"[13] – even though the figure is expressly described in the national legislation (art. 1st, *caput*, of Federal Law

[12] "Moral damages" are a form of compensation for the pain someone suffers with the conduct of another one. It is used in Brazil for many purposes, as a way of evaluating collateral or indirect damages, not specially comprehended in the traditional limits of damage compensation.

[13] In this sense, Superior Court of Justice (STJ), 1st Judgment Panel. AgRg in the REsp No. 1.305.977/MG. Reporter (Rel.) Min. Ari Pargendler. DJe 16.04.13; STJ, 1st Judgment Panel. AgRg in the REsp No. 1.109.905/PR. Rel. Min. Hamilton Carvalhido. DJe 03.08.10.

No. 7.347/85) –, the imposition of a severe burden of proof as a condition for accepting this figure[14] and the broad admission of this institute, which includes decisions that practically acknowledge that the collective moral damages, in certain cases of collective tort litigations, are *in re ipsa*, not even demanding demonstration.[15]

Leaving behind the problem of determining the amount of damages, there is also an important concern about Brazilian public funds. Directing the product of the judicial decision's enforcement to these funds generates, as a practical matter, a useless solution for collective rights protection. This happens because rarely the funds apply their resources in the legally established finality: the recomposition of aggrieved assets. Several studies[16] have indicated that the money of the funds does not return to the reestablishing of the violated interests or to the prevention of new illicit. On the opposite, it is employed on other purposes, so that the aggrieved assets remain without any effective recovery or juridical answer. In other words, the rule that states that the money obtained in collective tort suits should *always* be destined to public funds ends up, for several practical reasons, rendering unfeasible the adequate protection of collective rights.

The consequences of all these problems for the due process clause are notorious.

On one hand, the current practice of handling every mass tort only with compensatory economic measures implies, almost always, inadequate answers, incapable of offering adequate protection to the rights. First of all, as previously noticed, collective rights are not, as a rule, of economic content, so it is impossible to dimension them monetarily. Secondly, because the public funds have not fulfilled

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[14] In these terms, STJ, 1st Judgment Panel. AgRg-REsp 277.516/SP. Rel. Min. Napoleão Nunes Maia Filho. DJe 03.05.13; STJ, 3rd Judgment Panel. REsp 1.291.213/SC. Rel. Min. Sidnei Beneti. DJe 25.09.12; STJ, 3rd Judgment Panel. REsp 1.221.756/RJ. Rel. Min. Massami Uyeda. DJe 10.02.12.

[15] Thus, STJ, 2nd Judgment Panel. REsp 1.269.494/MG. Rel. Min. Eliana Calmon. DJe 01.10.13; STJ, 2nd Judgment Panel. REsp 1.367.923/RJ. Rel. Min. Humberto Martins. DJe 06.09.13; STJ, 2nd Judgment Panel. REsp 1.198.727/MG. Rel. Min. Herman Benjamin. DJe 09.05.13.

[16] *See* ARENHART, Sérgio Cruz. "A tutela de direitos individuais homogêneos e as demandas ressarcitórias em pecúnia". *Direito processual coletivo e o anteprojeto de Código Brasileiro de Processos Coletivos*. GRINOVER, Ada Pellegrini; MENDES, Aluísio Gonçalves de Castro; WATANABE, Kazuo (Org.). São Paulo: Revista dos Tribunais, 2007, p. 216-230; MACEDO JUNIOR, Ronaldo Porto. "Propostas para a reformulação da lei que criou o fundo de reparação de interesses difusos lesados". *Ação civil pública*. Coord. Édis Milaré. São Paulo: RT, 2001, p. 753.

their institutional role, its resources are not applied to the recovery of the violated protected rights or to the prevention of new illicit actions.

Considering the due process of law, it is easy to realize that this situation is unacceptable under any angle one can examine. Under the perspective of the collective right to be protected, the inadequacy of the judicial answer provided – or the emptiness of the protection due to the inexistence of an effective compensation of the caused injury – implies a clear violation of the due process. On the other hand, the inexistence of criteria for the quantification of the pecuniary damages, and even for the admission of the so-called collective moral damages[17] make it much more difficult to establish the cause of action of the demand and of the defendant's defense itself. After all, without being sure about what the courts will effectively require to adjudicate a determinate amount of damages as a judicial answer to an injury to collective rights, it is absolutely impossible to specify the facts that must be alleged and proven for the demand or the defense to be accepted.

3.2. The compensation of the mass rights

The situation is also worrying when examining the legal regime offered to mass rights by Brazilian law.

The Brazilian solution of privileging the individual person, returning to the holder of the right the control of the judicial protection of the right at the decision's

[17] The confusion that Brazilian Courts often do between *moral damages* (e.g., pain and suffering) and punitive damages largely aggravates the problem. In the origins, reparations for pain and suffering had as its scope allowing the compensation of the pain, of the suffering and the anguish generated by certain fact to the affected person. But due to the lack of the express provision, in the Brazilian Law, of the "punitive damages" category, the jurisprudence increased the application of the pain and suffering (moral) damages to also reach the objective of the latter. Nevertheless, the lack of an adequate doctrinal basis to establish the outlines of both categories, it is common for the Courts to muddle the requisites of the institutes and demand some type of "serious pain or suffering" demonstration for the awarding of punitive damages. Departing from this confusion, it seems almost natural to assert the incompatibility of moral damages with collective rights, or to require, for its imposition, absolutely inappropriate conditions. Obviously, however, such demands make much more difficult to offer the adequate protection of the rights here discussed.

enforcement phase, may seem intelligent at first glance, but easily shows its insufficiency.[18]

The logic of class actions (for mass rights) should be eliminating the pulverization of individual claims, concentrating all the discussion of the several individual rights in a sole trial (collective). However, as mentioned before, in Brazilian system, this idea only guided the discipline of the first part of the collective proceeding. For the enforcement phase, the legal regime privileges the individual, stimulating him to present himself in court to claim the value that is owed to him, utilizing the same procedure provided for the traditional enforcement process.

In fact, as art. 95 of the Consumer's Protection Code shows, the decision in this type of demand must be (at least this is the literality of the statute) "generic", limiting itself to establish "the defendant's responsibility for the caused injury". After this decision, it is the victims' duty to request the settlement (about the specific sum he will obtain) and the enforcement of the judgment in his favor. Only in a residual manner does the representative plaintiff have the power to initiate a "collective" enforcement, claiming the values to the victims of the fact (arts. 97 and 98),[19] or asking the money to be directed to the fund of collective interests, determined by law (art. 100).[20]

Anyway, it is easy to realize that, by stimulating the participation of the individual injured persons in the Judicial proceeding – albeit only to postulate the decision's enforcement – the law favors the multiplication of the lawsuits (or at least part of it). Instead of a single lawsuit (which existed until the conclusion of the fist phase), the Judiciary will now have to deal with hundreds, sometimes thousands of individual enforcement claims, to fulfill the collective decision. To make matters even

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[18] *See* ARENHART, Sérgio Cruz. *A tutela coletiva de interesses individuais*. São Paulo: RT, 2013, p. 31-78.

[19] Which, however, due to the concrete difficulties for the calculation of the *quantum* due to each person and to the localization of the victim who will receive the amount, the practical application is scarce.

[20] What, however, may only happen after one year, counted from the moment of the final judgment, and as long as victims in number compatible to the seriousness of the damage have not been enabled.

worse, until not long ago there was a live debate related to the jurisdiction that should deal with all these (individual) lawsuits.[21]

Apart from this multiplication of lawsuits problem, the Brazilian solution generates also concerns about the litigation costs, which are exponentially multiplied due to this legislative option. After all, everyone knows that the enforcement phase is, for the Judiciary, the most expensive one, as in this country the acts to impose a judicial decision are practically totally conducted by Judiciary's auxiliary organs. When the law authorizes the individual activity (and, even, privilege them, to the detriment of the mass enforcement of the decision), it agrees with the waste of human, economic and structural resources, what clashes with all the criteria of reasonability and proportionality that one should utilize.[22]

More important than this, the Brazilian law, by splitting the process for the protection of the individual mass rights into a collective phase and an individual one, eliminates, in practice, all the advantages of the mass protection of these interests. This solution, in fact, neither gives an adequate answer to the individual rights of small economic value, nor guarantees the isonomy in the treatment of the several competing interests. By requiring the individual phase, it favors different solutions for each claim and revive the importance of the costs of the individual lawsuit for the judicial protection of the right. Finally, the biphasic model makes that the protection of individual mass rights to be subjected to the exact same regime as the protection of the individual rights by personal lawsuits, which, in the majority of times, is inadequate for this type of interest.[23]

One would believe that all these problems are minimized by the residual solution of the decision's collective enforcement. Nevertheless, it must be reminded

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[21] This is because, due to the presidential veto added to art. 97, sole paragraph, of the Consumer's Protection Code, many judicial decisions concluded in a first moment that the individual enforcement of the mass sentence should always be asked to the judge that adjudicated the cause. This opinion, as one can easily perceive, practically rendered the work of the judge responsible for that unit unfeasible.

[22] About the notion of proportionality in the sense used in the text, *See* CAPONI, Remo. "Il principio di proporzionalità nella giustizia civile: prime note sistematiche". *Rivista trimestrale di diritto e procedura civile*. Padova: CEDAM, 2011, vol. 65, n. 2, *passim*; ARENHART, Sérgio Cruz. *A tutela coletiva de interesses individuais,* ob. cit., p. 19-30.

[23] *See* ARENHART, Sérgio Cruz. MENDES, Aluisio Gonçalves de Castro. OSNA, Gustavo. "Cumprimento de sentenças coletivas: da pulverização à molecularização". *Revista de processo*. São Paulo: RT, ago-2013, vol. 222, p. 41 and ss.

that this alternative only exists when the individual injured persons would not present themselves to plead the individual enforcement or when the ones that actually have pleaded the enforcement of decision are not in a quantity compatible with the adequate judicial answer to the extension of the injury. And even when this solution is usable, the obstacles here are exactly the same verified with the enforcement of collective rights, examined above. The difficulty in the determination of the *quantum* and the inefficiency of the model of directing the money obtained to a public fund also make this answer inappropriate.

In conclusion, it is easy to observe the implications of this Brazilian solution for the due process clause. The obstacles created in relation to the guarantees of access to justice, of the right to evidence, of the right to be heard in an adversarial proceeding, and of a speed trial are clear, requiring an urgent reform of the approach of the national system to this subject.

4. The new tendencies of the Brazilian law on the subject of mass and collective compensation

Facing the insufficiency of the legal discipline of collective and mass compensation, Brazilian legal doctrine and jurisprudence have been doing their best to find new solutions that are better aligned to the protection of the collective interests and mass individual rights, without overlooking the defendant's procedural safeguards.

One of the tendencies that have been verified is the replacement of the pecuniary adjudication for the imposition of mandatory and prohibitory injunctions, to obtain compensation *in natura* of the rights to be protected.[24]

This solution has been elected as one of the great alternatives to the shortcomings of the pecuniary decision, both when dealing with collective rights and mass individual rights.

Its first obvious advantage is to eliminate the concrete risk that the judicial answer provided does not revert in favor to the right infringed. As it has been observed, this has always been, in Brazil, the problem of the public funds: its resources are not used for the recovery of the injured rights, but normally employed to

[24] *See* MARINONI, Luiz Guilherme. *Tutela específica*. São Paulo: RT, 2000, p. 159 and ss.

other purposes. With the imposition of mandatory and prohibitory injunctions, it is much easier for the judge and for the parties to control the judicial protection provided to the right, as well as the adaptation of the result obtained to the effective prevention or recovery of the injury.

Thus, nowadays, it is common that the filed collective lawsuit already encompass requests for compensation *in natura* (non-monetary relief), instead of damages. Jurisprudence, including from Higher Courts, in some cases, has endorsed this practice, understanding that this measure has higher reach and efficiency than the traditional adjudication linked to a pecuniary penalty.[25]

The consequences of this new dynamic for the guarantee of the due process of law are clear: the problem of the adequate compensation to collective rights is much more properly resolved.

Also, in relation to the mass individual rights,[26] this solution makes possible to reestablish its original finalities, lost with the biphasic model of the Brazilian law. The

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[25] An interesting example of this practice is the decision of the Brazilian Superior Court of Justice on the Recurso Especial 1.291.213/SC (3rd Judgment Panel. Rel. Min. Sidnei Beneti. DJe 25.09.12). In this case, it was examined the practice of a telephone company that, in an abusive manner and contrary to the interests of the consumers, offered a telephone service without alerting to the limitations of its use. In order to deal with the injury, the Court decided to impose the "Determination of the enforcement of the class action, with respect to the injury of the participants of the "LIG-MIX", during the period of duration of the undue increases: a) for individual pecuniary damages, through the return of the values effectively charged for long distance calls and cellular phones; b) for mass moral damages (pain and suffering), through a 5% discount from each bill, already discounted the value of the return of the participants of the aforementioned plan, for a period equal to the duration of the undue charges in each case; c) for diffuse moral damages (pain and suffering) through an installment to the Fund for Recovery of Harmed Properties of the State of Santa Catarina; d) preparation of a technical survey of the consumers and values to the operationalization of the discounts of both natures; e) information of the discounts, as a compensation for pecuniary and moral damages, in the telephone bills".

[26] In relation to the individual mass rights, it is noteworthy the experience of the 5th Court of the Federal Justice of Curitiba, in the enforcement proceedings No. 2007.70.00.004156-4. To avoid the complex system of individual enforcement indicated before, the judge of the process, Dr. Vicente de Paula Ataíde Jr., decided to create enforcement instruments through the imposition of mandatory injunctions. He ordered to the debtor to deposit, in accounts previously opened at Caixa Econômica Federal (official Brazilian banking institution, with branches in almost the whole country), a determinate value that would serve as compensation to the victims of a consortium company. After the deposit was done, he ordered that the victims were advised, through the press, so that, independently of any manifestation in the case file, they could go directly to the depositing banking institution to get the

adequate protection to small economic value rights is conserved, the equality is preserved, the judicial answer is accelerated and it is offered an optimized management for individual litigations, which are now adequately solved in a grouped manner.

On the other hand, the practice does not cause any harm to the defendant's procedural rights. The defendant has full participation in the implementation of these conducts, and may challenge eventual excessive measures. Moreover, these measures avoid the compensation's "excess" that might arise from the arbitrary establishment of moral damages or pecuniary damages for rights that, as said before, normally do not have economic value.

Finally, the technique received such a favorable acceptance from the national doctrine that it was expressly contemplated in a draft law, which is under way in the National Congress, for the alteration of the regimen of collective actions in general.[27]

Another technique whose use has been suggested in the Brazilian system, particularly for the mass individual rights, is the establishment, in the judgment, of a determined value for the compensation, or of objective criteria for determining of that value, or even the establishment of a minimum compensation's value.

The idea comes from the Model Code of Collective Litigation for Iberoamerica (art. 22), which serves as a suggestion for each country to create its own legislation related to collective proceedings. According to this Model Code, the judge must establish, in his decision, whenever possible, the value of the individual compensation of each member of the group, or a calculation formula to reach this value easily. Still in accordance with this Model Code, the members of the group who consider the obtained value insufficient could file an individual demand to obtain the *quantum* they consider adequate.

Even though this statute does not constitute law, the technique has been announced as an interesting solution to avoid the slow procedure of individual settlement, which, in principle, should follow the generic collective decision. In fact, the determination of the specific *quantum* of each individual person's compensation is, commonly, a very complex incident, which harms the timeliness of the

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value due to them. With this, he avoided innumerous individual decisions, accelerating the payment of the compensations owed and reaching the highest extension possible of reparation of caused damages.

[27] Articles 25 and 26, of the Bill No. 4484/12, being discussed by the Brazilian Chamber of Deputies.

jurisdictional answer and unreasonably aggravates the situation of the victim. Thus, with the use of the aforementioned technique, it is possible to curtail the satisfaction of the individual credits, offering a more adequate treatment to the victims of the harmful event.

In spite of these advantages, the use of this measure retains the defects of the use of individual enforcement of the collective decision – with the losses already indicated to the equality, to the access to Justice for low economic valued interests and to the optimized management of the judiciary service – besides creating a relevant debate on the preservation of the right to the due process from the defendant's perspective. In fact, in relation to the defendant, the measure, standardizing the value of the compensation, ends up ignoring the private issues of each member of the group, neglecting eventual defenses that might be specifically used against some of these individuals. As a rule, the defendant may be ordered to pay a value of compensation (damages) higher than it would be fair, simply because he cannot offer allegations against each singularized individual lawsuit that would be, in thesis, acceptable. Still more problematic, the possibility – determined in the Model Code and defended by part of the national doctrine – that the individual dissatisfied with the standard value established may question the *quantum* owed to him in his own suit generates clear imbalance between the parties. After all, it is not permitted to the defendant to discuss eventual excess in the compensation of determinate subjects, but these individuals may on their own authority, protest against the insufficiency of the value that was established for their compensation.

Thus, the technique, despite having its utility, also offers major challenges in terms of procedural guarantees. For this reason, its practice is still scarce in the national praxis.

One last measure that starts to emerge in Brazil and that also deserves reference is related to the use of *structural injunctions*. Even though the technique is not always linked to tort litigation, it is certain that it may perform this function, reason why we cannot forget its relevance.

As it is known, these measures – inspired in the North American experience[28] – are qualified because they imply multiple, provisory and partial solutions for

[28] CHAYES, Abram. "The role of the judge in public law litigation". *Harvard Law Review*. Vol. 89, n. 7, mai-1976, *passim*; RENDLEMAN, Doug. *Complex litigation: injunctions, structural remedies, and*

complex litigations, generating, almost always, the formation of a *microinstitucionality* inside the judicial process (reason why they are also called *institutional remedies*[29]).

Even though the technique is not explicitly regulated in the Brazilian law for broad utilization (although it is positively allowed in determinate fields of the private law), and despite its application may confront with several obstacles of positive law,[30] measures such as these have been employed as alternatives to the inefficiency of the traditional regime of compensation for damage, and also as a way to make possible certain decisions on hard cases against the Government or large companies. After all, in some cases, notwithstanding the inexistence of a general legal provision and the obstacles that the procedural legislation may oppose to these measures, it seems that the *structural injunctions* end up being the most feasible alternative to obtain the most adequate judicial protection to certain interests, without generating excessive loss for the defendant's interests.

As it has been said, the rare rules that would authorize measures like these are found in the Private Law. Specifically for the protection of the right to competition, Federal Law No. 12.529/11 (but, even before it, Federal Law No. 8.884/94) contains several instruments that, judicially or extra judicially, authorize the utilization of measures that interfere in acts of economic dominance and allow the creation of mechanisms for the follow up of those decisions. Thus, for example, art. 38, VII, of

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contempt. New York: Thompson Reuters Foundation Press, 2010, p. 498 and ss; FISS, Owen. "The forms of justice". *Harvard law review*. nov.-79, vol. 93, n. 1, p. 18-19. For a Brazilian bibliography on structural injunctions, *see* ARENHART, Sérgio Cruz. "Decisões estruturais no direito processual civil brasileiro". *Revista de Processo*. São Paulo: Revista dos Tribunais, nov-2013, n. 225, p. 389 and ss.; JOBIM, Marco Félix. *Medidas estruturantes – Da Suprema Corte Estadunidense ao Supremo Tribunal Federal*. Porto Alegre: Livraria do Advogado, 2013, *passim*; VIOLIN, Jordão. *Protagonismo judiciário e ação coletiva estrutural*. Salvador: JusPodium, 2013, *passim*.

[29] FLETCHER, William A. "The discretionary constitution: institutional remedies and judicial legitimacy". *The Yale law journal*. Yale, mar-82, vol. 91, n. 4, p. 635; EISENBERG, Theodore. YEAZELL, Stephen C. "The ordinary and the extraordinary in institutional litigation". *Harvard law review*. Jan-80, Vol. 93, n. 3, p. 465; LORENZETTI, Ricardo Luis. *Justicia colectiva*. Buenos Aires: Rubinzal-Culzoni Editores, 2010, esp. p. 182 and ss.

[30] Actually, the application of the measure in Brazil faces obstacles in several procedural precepts, such as the principles of demand, the burdens of the judgment, of the limits of *res judicata* and of the *unicity* of the sentence.

this statute (and, in the same manner, art. 61, § 2nd, VI), provides as a sanction to the practice of acts that violate the economic order the adoption of "any other act or providence necessary for the elimination of the harmful effects to the economic law". Art. 52, of this statute, in its turn, determines that "the fulfillment of the Court [in this case, an administrative court] decisions and of commitments and agreements signed in the terms of this Statute might, at the Court's criterion, be supervised by the Superintendency General with the respective forwarding of the case file, after the final decision of the Court".[31] Finally, the same legislation establishes, in several provisions (articles 96 and 102 to 111), the possibility of "judicial intervention" in a company, appointing a receiver who may have its role limited to the follow up of the fulfillment of the jurisdictional decision, or have a wider role, getting even to the extreme of legitimating him to assume the administration of the company (art. 107, § 2nd, of the statute).

In Brazilian Public Law – and in other fields of the Private Law – there are no similar rules that authorize such type of intervention. However, the necessity of protecting several divergent interests and preserving the public interest to the maximum gave rise, in some cases, to the use of mechanisms similar to *structural decisions*, even though many times without awareness of the Judiciary of the utilization of this technique.

The public health area has been fruitful in the awarding of *structural injunctions*.

In addition to cases in which medicines are given, under condition, for specific treatments – case that extrapolates the limits of the claim formulated by the plaintiff –, it is interesting to make reference to the decision made by the State Court of Rio Grande do Norte in relation to the "*Hospital Estadual de Referência e Atenção à Mulher de Mossoró"*.[32] In face of suspects of irregularity in the management

[31] Even though the rule deals, evidently, with the Administrative Court of Economic Defense (CADE), a branch of the Federal Government and not a judicial Court, *a fortiori* the utilization of these measures is also authorized to the jurisdiction, as we cannot imagine that some injunction to be imposed by an administrative organ, but not by the Judiciary. Furthermore, this conclusion is reinforced by the fact that the CADE decisions are subjected to judicial enforcement, what implies the conclusion of the implicit bestowal, also to the Judiciary, of an authorization for the utilization of those injunctions (art. 93 and ss., of the law).

[32] Case files No. 0800817-45.2013.8.20.0001, 5th Court of the Public Treasury of Natal.

agreement prepared with a private corporation, the judge decided to decree the judicial intervention on the hospital for the period of ninety days. The receiver had the responsibility of administering the health services of the hospital, and the duty to present monthly reports on the activities performed to the court, including data on the financial, accounting and property situation and any other information considered relevant.

On the other hand, the decreed intervention should not, according to the judicial decision, hinder the functioning of the hospital. For this reason, the preliminary decision also imposed to the state government of Rio Grande do Norte to continue "fully exercising its functions related to all it had been practicing before the injunction, especially related to the administrative proceedings, with the objective of releasing financial resources for the payment of the debts committed in relation to the aforementioned Hospital, besides permanently cooperating with the works of the appointed administrator, referring to this Public Treasury Court the information and questionings that may arise on the subject".

Later, this decision was modified, returning the administration of the hospital to the State of Rio Grande do Norte, because it was found the impossibility of enforcement of the contested management agreement. From this decision, however, an interlocutory appeal was presented, in which was decided the extension of the deadline of the judicial intervention (for 45 more days), obligating the State of Rio Grande do Norte to call the candidates approved in a public tender – to operate the hospital after the end of the deadline – and also imposing that a "schedule for the resumption of administrative management of the *Hospital Parteira Maria Correia* (*Hospital da Mulher*) be presented within the same deadline of 45 days, in the specific course of the extension of the intervention".[33]

Finally, verifying the impossibility of continuation of the outsourced management of that hospital, the 1st degree judge, responsible for the case, decided to extinguish the lawsuit, without appreciation of its merits, reestablishing the prerogative of the State of managing the service in question.

Even though the current decision is covered by multiple effects – with the recovery of damages caused being the smaller of the faced problems – it is certain that the manner in which the awarded protection was approached was essential for the

[33] State Court of Rio Grande do Norte, Interlocutory Appeal No. 2013.006336-3.

hospital to continue functioning, and, thus, providing the essential public service and generating resources to pay its debts. Hence, that shows the usefulness of the *structural injunction* on that particular case, what demonstrates the interest to explore the technique.

The field of environmental law has also revealed itself fertile in the practice of structural decisions.

Many decisions in environmental collective actions have imposed the obligation of subjecting any modification in the affected area to the prior manifestation (or orientation) of the environmental organ,[34] or the one of conditioning the practice of certain acts with environmental repercussion to the prior authorization of the environmental surveillance authority.[35]

In this field, it is especially interesting the lawsuit filed by the Federal Public Prosecutor's Office for the recovery of environmental damages caused by the exploration of coal in the coal mining district in the south of Santa Catarina.[36] The first decision of the case imposed to the defendants the duty to present "a project for the recovery of the region that forms the Coal Basin of the South of the State", that should indicate "the areas of waste deposits, areas mined in the open air and abandoned mines, as well as the de-sanding, the setting of banks, decontamination

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[34] Thus, for example, Regional Federal Court of the 4th Region (TRF4), Interlocutory Appeal No. 5020777-15.2013.404.0000, 4th Judgment Panel, Rel. Des. Federal Candido Alfredo Silva Leal Junior, D.E. 27/09/2013; TRF4, Interlocutory Appeal No. 5020184-83.2013.404.0000, 3rd Judgment Panel, Rel. Des. Federal Fernando Quadros da Silva, D.E. 05/09/2013; TRF4, Interlocutory Appeal No. 5018811-17.2013.404.0000, 4th Judgment Panel, Des. Federal Candido Alfredo Silva Leal Junior, D.E. 22/08/2013.

[35] "(…) 3. The solution of the suit demands more than a mere application of the text of the law, requiring from the judge to attempt to better adequate the interests in conflict. Even though the Public Administration must proceed to the apprehension of the wild animal and its re-inclusion in an environment that propitiate the coexistence with others of the same species, it is relevant the circumstance that wild animals that have been more than two decades away from their natural habitat. 4. It is adequate the conditioning of the concession and maintenance of the definite guardianship of the wild animals to the signing of a Term of Deposit with IBAMA, which will subject the author to the supervising of the fulfillment of the clauses of the aforementioned document and of the recommendations of the judicial expert" (TRF4, APELREEX 5036841-14.2011.404.7100, 4th Judgment Panel, Rel. Des. Federal Vivian Josete Pantaleão Caminha, D.E. 19/09/2013).

[36] Court files n. 93.8000533-4, being discussed at the Federal Court of Criciúma/SC, whose history is available online at *https://www.jfsc.jus.br/acpdocarvao/portal/conteudo_portal/conteudo.php?cat=35*.

and rectification of the water courses, besides other works that aim the softening of the damages suffered, mainly by the population of the municipality in which the extraction and processing takes place", among other remedies. After several procedural issues – lawsuit takes place since 1993 – it is currently in the enforcement phase, which has been spread in several different objectives.

The decision determined, originally in a very generic manner, the duties related to the environmental recovery sought. Only with the continuation of the decision's enforcement, were the obligations due by each defendant specified, as well as the liability of each one of them, and the definition of the acts to be performed by them. The enforcement is currently in its fourth phase, with the definition of strategies for the environmental recovery of the degraded area and the obtaining of some concrete results. The issue is still far from being definitely solved, but it is easy to see that the approach used is the only one capable of offering useful results, without harming the economic activity of the region.

It is natural that the many aspects concerning environmental litigation and the need for simultaneous protection of diverse interests make structural injunctions (and its decisions) even more necessary.

Decisions as these represent a great challenge for the national law. The lack of legal provision allied to its growing utilization by the Brazilian Judiciary require from the doctrine and jurisprudence a higher care and some thinking. It is necessary to establish parameters for the use of this technique, under the penalty of drifting to the pure discretion.

On the other hand, the risks of this technique for the due process of law are evident. Even though it offers, most of the time, the best possible protection to the interests, there is no doubt that it harms the sensitive points of the parties' procedural rights, transferring to the Judiciary not only to the main role in the lawsuit, but also in determining the rights at stake and their protection.

5. The particular issue of the *transportation in utilibus* of the *res judicata* and the due process of law

A subject that is of particular interest in the relationship between the collective action and the guarantee of the due process of law is the so-called "transportation *in utilibus*" of the collective *res judicata*. The theme is regulated by article 103, §§ 3rd and 4th of the Brazilian Consumer's Protection Code.

Basically, what is contemplated is that, even though the *res judicata* formed on collective rights only refers, obviously, to those interests, it can be "taken advantage of" in favor of the victims that might have suffered eventual reflexive consequences of that conduct.[37] Thus, these victims would be exempted from pleading individual lawsuits for damages, and may use the favorable collective decision (this regime is only used, according to the rule, for decisions about collective rights, and not for individual mass rights, where de decision already offers a protection to these victims) to claim their specific compensations. The same happens in Brazilian Law with an eventual criminal conviction sentence: here, too, the condemnation that recognizes a crime that damages the mass interest authorizes the execution of individual losses, exempting the individual victim of the crime from pleading his or her individual lawsuit for damages.

Incidentally, the inspiration of the precept is, actually, the regime – traditional in the Brazilian law – of accepting exceptional civil effects of the criminal condemnation sentence. Even though, as a rule, these spheres are independent, the Brazilian law establishes situations in which there is a true communication between them, so that a criminal sentence is suitable to be directly executed for the damages caused to the victim of the crime in a civil court. There is a side civil effect of the criminal sentences, which gives them the power of making unquestionable wrongful act and the imposition of civil liability, with the duty of compensating the damages caused to the victims of the fact.

Developing this idea, the Brazilian Consumer's Protection Code provides a similar reasoning, but authorizing that the provenience sentence of a lawsuit that

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[37] The legal provisions say: "§ 3rd. The effects of *res judicata* covered in art. 16, combined with art. 13 of Law No. 7,347, of July 24, 1985, will not reach the lawsuit for damages suffered personally, proposed individually or in the form covered in this code, but, if the pleading is granted , it will benefit the victims and their successors, who may proceed to the settlement and to the execution, in the terms of articles 96 to 99; § 4º The provisions contained in the prior paragraph apply to criminal conviction decisions".

discusses collective rights generate favorable effects to the individuals who may have suffered losses from the same conduct.

The rule represents a great advance for the situation of the victims, who will have their losses compensated in a faster and simpler manner. However, the implications of this precept for the lawsuits are serious, and not yet well developed by the Brazilian law.

On one hand, taking the precept literally, part of Brazilian doctrine concludes that the defendant of the collective proceeding (which handled collective rights), who was sentenced to repair losses to *this specific collective right*, will also be implicitly obliged to compensate any individual loss caused by his conduct, without having, however, the opportunity of arguing or challenging these individual losses. This orientation clearly implies a violation to the rights to an adequate defense and to be heard in an adversarial proceeding. The defendant is deprived of the opportunity of challenging the individual claims for compensation, whose enforcement shall happen *automatically* from the provenience sentence on the discussed mass right.

It seems that this interpretation cannot be sustained because it contrasts with the fundamental procedural guarantee, depriving the defendant of the right to be heard and to an adequate defense.

There remains, therefore, another interpretation for that rule. According to part of the national doctrine, the precept would be limited to making uncontroversial the occurrence of the conduct considered illicit, in a way causing the *res judicata* to extrapolate the limits of the claim to reach also the cause of action and, consequently, the reasoning of the judicial decision. Under such point of view, the only difference of the rule being examined is in making unarguable for the defendant – in other lawsuits – the unlawfulness of the conduct practiced by him, without making other issues also uncontroversial.

This other interpretation, although having the merit of giving to the rule a harmonious interpretation with the fundamental procedural guarantees, greatly reduces the utility of the precept. In fact, if its consequence is only of making uncontroversial the conduct already affirmed as illicit in the collective action, the victim's situation remains uncertain. The victim, in his own lawsuit, will have to demonstrate the occurrence of damages to him, and the linking of those damages to the unlawful conduct committed by the defendant (already sentenced in collective

proceeding). In this case, the victim will need a regular trial, with a full introductory phase and long procedural debate. In conclusion, the advantage obtained with the waiting for the sentence of the collective lawsuit on collective rights will be minimum, practically not justified.

However, it seems clear that the latter is the only feasible interpretation, under the penalty of becoming unconstitutional, for violation of the due process of law clause, the transportation *in utilibus* as a whole. Between the unconstitutional interpretation and the one that, within the limits of the fundamental procedural guarantees, confers small scope to an institute, it is evident that the latter is preferable.

6. The paths of the due Brazilian class action

To conclude, it can be reaffirmed the challenges that the collective proceedings impose to the classic paradigms of the Procedural Law. The Brazilian doctrine still needs to face diverse themes and several issues that remain open, and have been solved, case-by-case, by the national Courts.

Many themes call for careful attention and exclusive approach in the procedural area, requiring an almost complete reformulation of some procedural institutes.

Nevertheless, it is relevant to constantly realize that, despite the need of a reinterpretation of the guarantee of the due process of law in the collective level, one cannot distort the essence of the principle, violating it only for a greater effectiveness of the mass jurisdiction. It is necessary, also in this field, to find the balance that must guide every application of the procedural principles, offering the most complete protection to the rights that can be pursued in a class action, without annulling the rights of the opposing party and the defendant's procedural guarantees; realize the necessities of the protection of mass interests and mass individual interests while taking into account, in the same proportion, the values inherent to the participation in the lawsuit and to the legitimation by the procedure.

These are the challenges of the Brazilian collective proceedings, which will still require a lot of thinking and debate.