

The Use of Defendant Class Actions to Protect Rights in the Internet¹.

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Summary: 1 – The Information Society. 2 – The case of MGM v. Grokster. 3 – Collective procedures in Brazil. 3.1 – Real parties in interest in class actions. 4 – Defendant class actions and bilateral class actions. 5 – The adequate representation in class actions. 5.1 – The judicial control of the real parties in interest in class actions. 5.1.1 – The Brazilian “pertinent matter” as one of the elements of the adequate representation. 5.1.2 – The constitutional principle of due process of law as a requisite of the adequate representation. 6 - Conclusion. Bibliographic References.

1 – The Information Society.

One of the most extraordinary advancement in the contemporary society has been the creation and diffusion of the Internet. To have an idea of the immeasurable growth of the users of the Internet is enough to reveal that in the United States, in four years, it has reached the number of 50 millions while to achieve this number, television took 13 years, personal computer 16 years, and the radio 38 years.²

The possibility of, from a computer connection, people communicate to each other, access banking data, accomplish business, all over the globe, is a phenomenon of integration and development of the civilization.

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² Data obtained from the “Brazilian Information Society Green Book”, p. 3. The book is the result of the work developed by the Brazilian Science and Technology Ministry containing the goals for the implementation of the Information Society Program and is formed by a consolidated summary of the applications of the Information Technologies.

The Information Society generates a new step in the relationship among nations, influencing political and economical systems and even the sovereignty of each the people.

The Information Society Program in Brazil intends to impose a shared responsibility among private initiative sectors (entrepreneurial and civil society) and the public sector, aiming at “integrating, coordinating and incentivizing actions for the use of communication and information technologies as a mean to contribute to the social inclusion of all Brazilian citizens in the new society and, at the same time, to contribute to the country economy to gain conditions to compete in the global market”.³

The great challenge is to make use of Internet to promote the enrichment of the modern culture within a human and ethic perspective and not just employs it as a technological device without aggregating better life conditions to the entire information society.

2 - The case of MGM v. Grokster

The Law operator much more than being alert to the mentioned phenomenon shall act affirmatively, proposing changes, trying to furnish normative elements for the relationships created by the Internet.

In this sense it is interesting to analyze a case recently decided by the United States Supreme Court.

The case involves, on one side, as plaintiffs, a group of music studios and other copyrights holders, and, on the other side, as defendants, companies that distribute free software that allow computer users to share electronic files through peer-to-peer

³ “Brazilian Information Society Green Book”, p. 10.

networks, so-called because the computers communicate directly with each other, not through central servers.⁴

The lawsuit had been filed as a bilateral class action.

The case is well known as Metro-Goldwyn-Mayer Studios Inc. and others *versus* Grokster, Ltd. and others (certiorari to the US Court of Appeals for The Ninth Circuit nº 04.480; decided on June 27th, 2005).

The plaintiffs brought the lawsuit seeking damages and an injunction alleging that respondents knowingly and intentionally distributed their software to enable users to infringe copyrighted works in violation of the Copyright Act.

The respondents alleged, as principal reason to their defense, that they had no control whatsoever of the uses of the software that they freely distributed.

The U.S. Court of Appeals for the Ninth Circuit (a federal Court of Appeals that corresponds to the Brazilian “Tribunal Regional Federal”) affirmed the District Court decision, granting the defendants summary judgment holding them not liable for the copyrights’ infringement.⁵

The decision was based on a precedent from the Supreme Court (Sony Corp. of America v. Universal City Studios, Inc., 464 U.S.) in which Sony has been able to show that the invention of the VCR did not have the purpose to violate copyrights or to increase the company profits by unlawful taping. As a matter of fact, in the defense of the Sony case, accepted by the Court, it has been demonstrated that the VCR principal use was time shifting, which means, one could tape a program for later viewing at a more convenient time.

⁴ Copyrights are used in the text in a broad way to refer to the author monetary rights, explored by him or any third party, Rules 28 to 45, of the Law nº 9.610, enacted on February, 2nd, 1998. Regarding the subject, see Sílvio de Salvo Venosa, *Direito Civil*, v. 3, pp. 303/320 and v. 5, pp. 581/600.

⁵ While the 7th Amendment to the United States Constitution establishes a jury trial right, a claim may be decided solely by a court of law by a summary proceeding whenever there are no questions of facts to be decided by the jury according to the Rule 56 of the Federal Rules of Civil Procedure and other States’ statutes provisions. See Friedenthal-Kane-Miller, *Civil procedure*, pp. 451/464 and pp. 490/548; Desseem, *Pretrial litigation*, pp. 291/312.

In the Sony case, the Supreme Court applied the “fair use” theory, as explained in the Syllabus of the MGM case: “Because the VCR was ‘capable of commercially significant non-infringing uses’, the Court held that Sony was not liable. *Id.*, at 442. This theory reflected patent law’s traditional staple article of commerce doctrine that distribution of a component of a patented device will not violate the patent if it is suitable for use in other ways. 35 U. S. C §271(c). The doctrine absolves the equivocal conduct of selling an item with lawful and unlawful uses and limits liability to instances of more acute fault”.

Discarding with the decision, the plaintiffs file a writ of certiorari and the Supreme Court held that: “Because substantial evidence supports MGM on all elements, summary judgment for respondents was error. On remand, reconsideration of MGM’s summary judgment motion will be in order”.⁶

The Court decided that the Ninth Circuit had misread the decision on Sony “to mean that when a product is capable of substantial lawful use, the producer cannot be held contributorily liable for third parties infringing use of it, even when an actual purpose to cause infringing use is shown, unless the distributors had specific knowledge of infringement at a time when they contributed to the infringement and failed to act upon that information”.

The grounds of the decision in the MGM case were that the defendants have a secondary liability on a theory of contributory or vicarious infringement because, as the Supreme Court explained: “when a widely shared product is used to commit

⁶ The *writ of certiorari* is a form of appeal to the Supreme Court of the United States. It is disciplined by the Rules 1254 and 1257 of the Title 28 of the United States Code and Rules 10 to 16 of the Rules of the Supreme Court of the United States. After the alteration made in 1988, the referred Rules 1254 and 1257 gave broad discretionary power to the Supreme Court to allow appeals under the *writs of certiorari* and to appreciate them only in cases involving relevant public interest issues and not issues concerning exclusively to the parties to the case. See Nowak-Rotunda, *Constitutional Law*, pp. 29/33; Williams, *Constitutional analysis*, pp. 16/22; Barron-Dienes, *Constitutional Law*, 15/6; Reynolds, *Judicial process*, pp. 36/47. The relevancy of the debating issue, functioning as a requisite to the admission of an appeal, has been created for the admission of the Brazilian Extraordinary Appeal by the Constitutional Amendment nº 45, of December, 12th, 2004, which created a new §3º to the Rule 102 of the Brazilian Federal Constitution, and has denominated it “general repercussion of the constitutional question”. This new requisite for the admission of the Extraordinary Appeal shall be regulated by federal law according to the constitutional rule, and it is similar to the “federal question relevancy requirement” established in the previous Federal Constitution. See, Nelson Rodrigues Netto, *Interposição conjunta de recurso extraordinário e de recurso especial*, pp. 22/25 and 38/41.

infringement, it may be impossible to enforce rights in the protected work effectively against all direct infringers, so that the only practical alternative is to go against the device's distributor (...)."

3 – Collective Procedures in Brazil

In 2005, we celebrated 20 years of the enactment of the Public Civil Action Law - PCAL (Law nº 7.347, enacted on July, 24th, 1985).

A long journey has been traveled to protect the collective rights, since the enactment of the Popular Action Law – PAL (Law nº 4.717, enacted on June, 29th, 1965), until the conception and definition of the diffuse rights, collectives rights *stricto sensu* and individually homogeneous rights in the Brazilian Consumer Code – BCC (Law nº 8.078, enacted on December, 12th, 1990), elevating the collective rights to a constitutional status as provided in various rules of the Brazilian Federal Constitution of 1988.

It seems to be valid to recognize the existence in the Brazilian juridical order of a “Brazilian collective procedure system”, which shall be heading toward to the development of a Brazilian Collective Procedure Code.^{7 8}

It is a moment to celebrate the victories achieved but also for reflection in order to implement aspects that still require a satisfactory solution.

One can not fails to mention the experience of more than a hundred years of the United States with class actions whose first federal statute – the Federal Rules of Equity – dates back to the year of 1842⁹, and the dimension of the relationships arising out of the Internet. Both are very strong arguments to validate the resort to the

⁷ In the text we use, indistinctly, the expression “collective rights” (“direitos coletivos”) to refer to the genus of which are species the “diffuse rights and interests”, the “collectives rights and interests *stricto sensu*” and the “individually homogeneous rights and interests” in accordance to the classification made by the Rule 81, I to III of the Brazilian Consumer Code.

⁸ Aluísio Gonçalves de Castro Mendes uses the expression “collective procedure system” with the same meaning as in the text, *O anteprojeto de Código Modelo de Processos Coletivos para os Países Ibero-Americanos e a legislação brasileira*, p. 8.

⁹ Robert Klonoff, *Class Actions and other Multi-Party Litigation*, p. 17.

“MGM v. Grokster” case as a paradigm for a critic consideration about some topics of the Brazilian class actions.

3.1 – Real Parties in Interest in Class Actions

In this essay our focus is toward to the preambulatory class actions’ issue involving violations of rights through the Internet: the real parties in interest.

The Rule 5, of the PCAL establishes that have standing to file a class action lawsuit [action lawsuits?] or to obtain a provisional remedy, the public prosecutors, the Union; the States (and shall be included the Federal District considering that it has equal status to the States within the Federation); the Municipalities; entities and agencies of the Public Administration; and, non-profitable associations legally constituted for at least one year (this latter requisite may be dispensed by court according to the Rule 5, §4) and which bylaws establishes as institutional purposes the defense of diffuse and collective rights.

Because the PCAL disciplines only the standing to file a lawsuit, a literal and strict interpretation may induce the understanding that the rule provides only for the real parties in interest to “file” a class action.

On the other side, the BCC disciplines the matter in a slightly different way, not having any rule that explicitly provides for the standing to bring a class action.

Firstly, the Rule 81 establishes that the consumers’ and other victims’ rights and interests “defense” shall be exercised either individually or collectively in court.

Following, the Rule 82 points out the real parties in interest for the aforementioned “defense”, including others than those stipulated in the PCAL, such as entities and agencies of the Public Administration, even if unincorporated.

It is important to recollect that the Public Civil Action Law – PCAL and the Brazilian Consumer Code – BCC function under a collective procedure system enforced by the Rule 21 of the PCAL and the Rule 90 of the BCC.

The abovementioned statutes do not designate the real party in interest to initiate the procedure; therefore there is no prohibition to plaintiffs' or defendants' class actions. It does not seem that providing for the "defense", the BCC had the intention to limit the meaning of the word to be used only for plaintiffs' classes, preventing the defense of claims of defendants' classes.¹⁰

We have to stress out that a restrictive interpretation of the term "defense" in the law, does not favor the primary goals of the class action: to increase the access to justice (moreover in relation to diffuse rights or in cases where the claims individually considered would be of insignificant value, the so-called "negative value suits"¹¹); judicial economy in terms of time and costs; juridical safety, *i.e.*, avoiding inconsistent or varying decisions with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class; and, deterrence and behavior modification.

The latter reasoning, deterrence and behavior modification, is pointed out as a very important goal of the class action procedures in the Anglo-Saxon's system of law.

The most audacious commentators show that deterrence of illegal behavior is not limited to cases where the class action is the sole remedy because the individual claim would be prohibitive to be litigated, and therefore, the illegal conduct would perpetuate.

Besides, these scholars show that this class action goal works as a pedagogic method to resolve collective conflicts and to prevent mass tort accidents.¹²

Other elements, as we shall see, work in favor for the recognition in court of a defendant class under the current Brazilian law. Nonetheless, the cornerstone of the matter is the adequacy of representation.

¹⁰ It seems to have the same opinion Ada Pellegrini Grinover, *Ações coletivas ibero-americanas: novas questões sobre legitimação e a coisa julgada*, p. 8.

¹¹ *Idem*, *ibidem*, p. 95.

¹² See David Rosenberg, *Decoupling Deterrence and Compensation Functions in Mass Tort Class Actions for Future Loss*, *passim*; Craig Jones, *Theory of class actions*, pp. 4, 27/37 and 38/63; Stephen Yeazell, *Civil procedure*, p. 968.

4 – Defendant Class Actions and Bilateral Class Actions

The example of the North-American judicial precedent abovementioned is related to a class action where in both poles sides of the procedural relationship there are representative parties of the classes in order to protect collective rights. In the United States this specie of lawsuit is designated as a “bilateral class action”.

The bilateral class action does not confuse with the Brazilian “ação dúplice” - duplicative lawsuit. The duplicative lawsuit is characterized by the possibility of any of the parties to the substantive relationship to occupy, indistinctively, any of the poles of the procedural relationship, by means that the defendant does not need (*rectius*: shall not) use the counterclaim in order to formulate a pleading against the plaintiff.¹³

The class action, as usually is described in Brazil, concerning the real party in interest, is the one lawsuit that has a class representative plaintiff suing a single defendant in court. In light of the facts, nothing impedes an inversion of positions: an individual plaintiff suing a defendant class. This specie of class action is designated as a “defendant class action”.

The inception of the bilateral class actions in Brazil goes back to the 1940’s, in Labor Law arena.¹⁴ Today, the Labor Laws Consolidation (Decree-law nº 5.452, enacted on May, 1st, 1943) disciplines the collective labor procedure (Rules 856 to 875), which constitutional basis are the Rule 114, III, and §2, of the Brazilian Federal Constitution, in the current version provided by the Constitutional Amendment nº 45, enacted on December, 8th, 2004.

Consequently, it seems correct to affirm that the Brazilian law does recognize plaintiffs’ and defendants’ class actions.

¹³ Nery-Nery, *Código de Processo Civil Comentado*, p. 1131, note 1 to Rule 915. Example of duplicative lawsuit is the possessory rights lawsuit: “Being a duplicative lawsuit, the possessory right lawsuit does not accept counterclaim. Hence, the litigation costs that could have been reimbursed and were not discriminated in the defense, shall not be granted by means of reviewing the judgment by appeal” (2º TACSP, Ap. nº 419-173-00/5, 9ª C., rel. Judge Radislau Lamotta, v.u., j. 26.06.1996, in, Alexandre de Paula, *Código de Processo Civil Anotado*, p. 3574, v. 4).

¹⁴ See Wilson de Souza Campos Batalha, *Direito processual das Coletividades e dos Grupos*, pp. 12/8.

Besides the considerations previously mentioned, other arguments shall be pointed out in order to reveal the legal possibility of pleading claims in a bilateral class action and in a defendant class action within the Brazilian law.

Thus, for example, the court's prerogative to dispense an association to be legally constituted for at least one year, whenever is shown relevant public interest by the dimension or the characteristics of the harm or injury or by the relevancy of the rights to be protected (Rule 82, § 1, of the BCC); the possibility of intervention whether with the claimant or the respondent in a public civil action (Rule 5, § 2, of the PCAL); the existence of consumers collective agreement between consumers' associations and suppliers' associations (Rule 107, of the BCC) which in case of a conflict shall be decided in court by means of a bilateral class action.¹⁵

Furthermore, there is no legal statute that impedes a defendant in a class action to file a lawsuit for an incidental claim such as to obtain an injunction or a declaratory relief, a counterclaim etc., or otherwise it would be violating the constitutional principle of access to the Judiciary (Rule 5, XXXV, of the Brazilian Federal Constitution).

5 – The Adequate Representation in Class Actions

5.1 – The Judicial Control of the Real Parties in Interest in Class Actions

The real parties in interest, as one of the requisites to bring an individual lawsuit under the Brazilian law, is not satisfactorily to the collective procedures of the class action.

There is no correspondence, at least a complete and perfect correspondence, among the ordinary and extraordinary real party in interest as studied in the classic civil law procedure, and, the real parties to sue or to be sued in the class actions.¹⁶

¹⁵ See Ada Pellegrini Grinover, ob.cit., pp. 7 e 8.

¹⁶ With the same opinion, José Marcelo Menezes Vigliar, *Alguns aspectos sobre a ineficácia do procedimento especial destinado aos interesses individuais homogêneos*, p. 326.

In order to reflect a legitimate procedure, observing the constitutional principle of due process of law, the *legitimatío ad causam* is not enough for the collective procedure. Another element is required: that the real party in interest effectively protects the interests of the class.

It is important to emphasize that the adequate representation in the class action procedure does not correspond to the meaning of process representation (*v.g.*, Rules 8 to 12, of the Brazilian Civil Procedure Code); nor of legal representation (Rules 115 to 120, of the Brazilian Civil Code); not even of conventional representation (*v.g.*, Rules 653 to 692, of the Brazilian Civil Code) concerning the substantive law.¹⁷

Thus, the “adequate representation” is a prerequisite to the class action and shall be understood as a special element of the real party in interest to sue or to be sued in the collective procedure in Brazil.

The North-American law, which has been one the sources for the Brazilian legislator and has also been the basis for the Brazilian scholars’ and courts’ work trying to confer a better efficacy to the Brazilian class actions, regulates rigorously the adequate representation of the class in a class action as well as the appointment of the class counsel.

The Federal Rules of Civil Procedure establishes:

“Rule 23. (a) Prerequisites to a Class Action: (*omissis*) (4) the representative parties will fairly and adequately protect the interest of the class”.

It is valid to point out that the Federal Rules of Civil Procedure, beyond being the statute that regulates the North-American federal courts, are often used by the States courts to justify their decisions and as a parameter for the development of the procedural law of the States.

¹⁷ With the same opinion, Antônio Gidi, *A representação adequada nas ações coletivas brasileiras: uma proposta*, pp. 61 e 62.

In light of the judicial precedents, commentators identify some elements that an adequate representative of the class should have: be a member of the class; have good knowledge of the claims; have credibility shown by honesty and good character; not having conflicts with the members of the class; have sufficient resources for the costs of the litigation.¹⁸

The Ibero-American Collective Procedures Model-Code, following the North-American pattern of judicial control of the adequate representation in a class action, establishes as a requisite to the class action the adequacy of the representative of the class (Rule 2, I). It also requires the evidence of social relevancy of the claim characterized by the nature of the claim or the characteristics of the harm or injury or the high number of harmed or injured people (Rule 2, II).¹⁹

The Rule 2, §2, establishes that the court analyzing the adequate representation shall verify: a) the credibility, capacity, prestige and experience of the representative; b) his or hers historical in protecting, in and out of court, the rights or interests of the class; c) his or hers conduct in previous class action litigations; d) the non-existence of conflicts between him or her and the class; e) time of legal constitution of the non-profitable association and its representative among the class.

The judicial control of the adequate representation must be exercised during the entire proceeding and in case of supervenient lack; unreasonable dismissal of the action; abandon of the action; the court must notify the office of the Attorney General and other class members to proceed with the lawsuit (Rule 2, §3, combined with Rule 3, §4).

Reproducing almost in the exact same way the rules of the Model-Code, the project of bill of the Brazilian Collective Procedures Code establishes the same requisites to the class action (Rule 20); conceives the same criteria to check the adequate representation of the class (Rule 20, §1); and, stipulates the same rules concerning the judicial control of the adequate representation and the judicial orders for the

¹⁸ Klonoff, ob. cit., pp. 48/56; Timothy Eble, *Federal Class Action Practice Manual* (Chapter 2, §14).

¹⁹ The Ibero-American Collective Procedures Model-Code has been created by the "Instituto Ibero-Americano de Direito Processual" and was approved during the "XIX Jornadas Ibero-Americanas de Direito Processual" held in Caracas, Venezuela in October, 2004.

continuance of the lawsuit in case of initial or supervenient lack of adequate representation of the class; unreasonable dismissal of the action; or abandon of the action (Rule 20, §3 combined with Rule 21, §4).²⁰

It is relevant to stress out, as we have already observed, that the legal institute of adequate representation to the class action does not correspond to the real parties in interest, the latter being established in another rules, respectively, Rule 3, of the Model-Code, and Rule 21, of the Brazilian project²¹.

Both documents conceive the defendant class action (respectively, Rules 35 to 38, of the Model-Code, and, Rules 39 to 42, of the Brazilian project). However, them both omit the bilateral class actions that shall be recognized as part of the collective procedure law and to be governed by the pertinent rules.

This model besides highly improving the treatment of the real parties in interest in the Brazilian class actions shall dissipate any doubt or resistance regarding the legal possibility of pleading with claims against a defendant class.

As it is emphasized in the Manual for Complex Litigation, to the contrary of what happens in an individual lawsuit procedure, “where the client chooses the lawyer, negotiate the terms of the engagement, and monitors the lawyer’s performance”, in

²⁰ See the justification to the project of bill of the Brazilian Collective Procedures Code by Professor Ada Pellegrini Grinover, *Rumo a um Código Brasileiro de Processos Coletivos*, pp. 11-16, in, *A Ação Civil Pública após 20 anos: efetividade e desafios*.

²¹ **“Rule 21. Standing to file a class action.** Class action may be concurrently filed by:

I – any person to defend diffuse rights or interests;

II – the member of the group, category or class to defend the collectives rights or interests and the individually homogeneous rights or interests;

III – the Public Prosecutors to defend diffuse and collective rights or interests as well as the the individually homogeneous rights or interests with social relevancy;

IV – the Union, the States, the Federal District and the Territories, the Municipalities to defend diffuse and collective rights or interests related to their functions;

V – the entities and agencies of the Public Administration, even if unincorporated, specifically created to defend the rights or interests protected by this Code;

VI – the unions to defend rights or interests related to their institutional purpose (subject matter);

VII – the political parties with representation in the National Congress, in the States Congress or in the Municipalities, in accordance to the object of the lawsuit, to defend rights or interests related to their institutional purposes (subject matter).

VIII – non-profitable associations legally constituted for at least one year and which bylaws establishes as institutional purposes the defense of rights or interests protected by this Code, regardless of authorization of all the members”.

the class action procedure the court shall supervise, “during the entire proceeding”, the adequacy of the representative party and of the class counsel.²²

In this sense, it is valid to affirm that the class counsel conducting the class action has a much higher responsibility to the members of the class than a lawyer in an individual lawsuit.

The issue had usually had the special attention of the North-American courts and in the 2003 Amendments to the Federal Rules of Civil Procedure created a subdivision (g) to the Rule 23 regulating in details the matter of the class counsel.

With almost the same contents of the Rule 23(a)(4) concerning the class representative, the subdivision (g)(2) establishes that “an attorney appointed to serve as class counsel must fairly and adequately represent the interest of the class”. And, “unless a statute provides otherwise, a court that certifies a class must appoint class counsel” [Rule 23(c)(1)(B) combined with Rule 23(g)(1)].

And the new subdivision (g)(1)(C) stipulates the issues that the court must and may consider in appointing the class counsel, serving also to inform class counsel seeking appointment, as explained by the notes of the Advisory Committee²³. The court must consider: a) the work counsel has done in identifying or investigating potential claims in the action; b) counsel’s experience in handling class actions, other complex litigation, and claims in type asserted in the action; d) counsel’s knowledge of the applicable law; and, e) the resources counsel will commit to representing the class. And the court may “consider any other matter pertinent to counsel’s ability of to fairly and adequately represent the interest of the class”, and “direct potential class counsel to provide information on any subject pertinent to the appointment and to propose terms for attorney fees and nontaxable costs”, and “make further orders in connection with the appointment”.

²² MCL 4th, § 21.271.

²³ FRCP, Foundation Press, 2005, p. 539.

In sum, the judicial control of the adequacy of the class representative provides that one person may conduct the lawsuit to defend diffuse, collective or individually homogeneous rights, whenever he or she is a member of the class.

Consequently, it does not impede a defendant class or even a bilateral classes once the fair and adequate protection of the interests of the class is presented and is evaluated by the court during the entire development of the lawsuit.

Hence, the exercise of citizenship is profoundly increased considering that any person may protect collective rights and interests since he or she evidences in court to be an adequate representative of the class.

Certainly, the protection of collective rights will not be restrict to certain legally established representatives, *a priori* designated by law, who may not represent fairly and adequately the interests of the class.

5.1.1 – The Brazilian ‘Pertinent Matter’ as one of the Elements of Adequate Representation

In the Brazilian “ação direta de inconstitucionalidade” and “ação declaratória de constitucionalidade” since other real parties in interest had been added by the Rule 103 of the Federal Constitution of 1988, the Supreme Court has required a special interest of some of the real parties in interest.²⁴ This qualified interest of some of the real parties in interest to file a “ação direta de inconstitucionalidade” or “ação declaratória de constitucionalidade” has been designated as “pertinent matter”.

The “pertinent matter”, as it arises out of the precedents from the Court, is considered a implicit requisite to the real party in interest, where the party must evidence the pertinence of its institutional purposes and the legal rules that are being challenged

²⁴ Both the “ação direta de inconstitucionalidade” and “ação declaratória de constitucionalidade” are lawsuits concerning the original jurisdiction of the Brazilian Supreme Court, whose parties in interest are established in *numerus clausus* in the Rule 103 of the Brazilian Federal Constitution. They are the two sides of a sword, one with the objective to declare that a statute is unconstitutional and the other one with objective to obtain a declaration that a statute is constitutional.

by means of the “ação direta de inconstitucionalidade” or “ação declaratória de constitucionalidade”.²⁵

The first decision that is known to have used the term “pertinent matter” was the one in the provisional measure related to the “ação direta de inconstitucionalidade” nº 1.115-DF, in the Plenary Court of the Brazilian Supreme Court, reporter Justice Néri da Silveira, decided on August, 24th, 1994.²⁶

The “pertinent matter” does not correspond to the adequate representation. It seems more correct to say that the “pertinent matter” belongs to the list of elements required for the class representative to fairly and adequately protect the class interests.

Accordingly, the Rule 5, II of the PCAL requires in order to bring a class action that entities and agencies of the Public Administration and non-profitable associations, establish in their bylaws as institutional purposes the protection of the environment, the consumers, the economic order, the free trading, the artistic, esthetical, historicals, touristic and landscaping values.

On the other hand, the Rule 82, III and IV of the BCC, requires the entities and agencies of the Public Administration and non-profitable associations establish in their bylaws as institutional purposes the protection of the rights and interests protected by the Brazilian Consumers Code.

²⁵ See Zeno Veloso, *Controle jurisdicional de constitucionalidade*, pp. 85/7; Rodrigo César Rebello Pinho, *Teoria Geral da Constituição e Direitos Fundamentais*, pp. 49/50; and, Araújo-Nunes, *Curso de Direito Constitucional*, pp. 39/40.

²⁶ The theme has been very well explained by the Brazilian Supreme Court in this decision: “Decision. ‘Ação direta de inconstitucionalidade - Adin’. National Union of Liberal Professionals. Lack of standing to bring a lawsuit. In the Adin nº 1.792, the same National Union of Liberal Professionals was declared lacking of standing to bring the lawsuit due to the lack of pertinent matter with the object of the lawsuit and its institutional purposes because it has been understood that the notary public do not fulfill the concept of liberal professionals. Being the pertinent matter a implicit requisite for the unions, among others, to standing to bring a lawsuit, which is not a statutory one but it is the constitutional interpretation of the Federal Constitution made by the Supreme Court, the mentioned requisite still exists nonetheless the veto to the sole paragraph of the Rule 2 of the Law 9.868, of November, 10th, 1999. Therefore, the precedent shall be applied. Direct unconstitutional lawsuit dismissed”. (Adin nº 2.482-MG, Plenary Court, reporter Justice Moreira Alves, v.u., decided on October, 2nd, 2002, DJ March, 25th, 2004, pp. 00032, ement. Vol.-02107-01, pp.00168)

In the same way, the Rule 21, IV to VIII, and the Rule 3, respectively, of the project of bill of the Brazilian Collective Procedures Code and the Ibero-American Collective Procedures Model- Code, require “pertinent matter” for the real parties in interest in order to bring class actions.

In relation to the public prosecutors, the Supreme Court has decided that the *Parquet* is not a real party in interest to file a class action in order to protect individually homogenous rights and interests, in accordance to the Rule 129, III, of the Federal Constitution.

The Court ruled that according to the abovementioned rule, the public prosecutors are a real party in interest only to file a class action to “protect public goods, the environment e other diffuse and collective rights or interests” (*rectius*: diffuse and collective rights *stricto sensu*).

In addition, the Court ruled that public prosecutors, in accordance to the Rule 127, *caput* of the Federal Constitution, are not a real party in interest for class actions if is not evidenced that the lawsuit subject matter is considered involving “social interests or nondisposable individual interests”.

In light of those considerations, the Court decided that the public prosecutors are not a real party in interest for the class action willing to challenge the collection of taxes or to obtain its refunding.

Subsequently, one can asseverate that the public prosecutors are not an adequate representative of the individually homogeneous rights holders for a class action when the class rights are not considered as “social interests or nondisposable individual interests”

Properly, the Court held that the legal relationship among the IRS and the taxpayers does not fit in the concept of a consumer’s relationship in order to allow the filing of a class action under the provisions of the Rule 1, *caput*, II, combined with Rule 21, of the PCAL. Equally, the Court ruled that the above referred situation correspond to “other nondisposable individually homogeneous rights or interests, in accordance to

the Rule 25, IV, (a), of the Law nº 8.625, enacted on February, 12th, 1993 – Public Prosecutors National Organic Law.²⁷

Explaining very well the matter is the following Supreme Court decision:

“The Public Prosecutors are not real party in interest to file a class action in order to challenge the collection of taxes or to obtain the refunding. The reason is that, in relation to taxes, there is not a consumer’s relationship among the IRS and the taxpayers, not even is possible to find any correspondence between the taxpayers rights and the *social interests or nondisposable individual interests*”. (emphasis in the original) (Ag.Reg. in the RE nº 248.191-2-SP, 2^a T., reporter Justice Carlos Velloso, v.u., decided on October, 1, 2002, DJ 25.10.2002, in, RT 809/178).²⁸

The Superior Justice Court (“Superior Tribunal de Justiça”) has followed the Supreme Court interpretation of the above referred rules of the PCAL and BCC.^{29 30}

The project of bill of the Brazilian Collective Procedures Code, among other elements for the adequate representation, requires of the public prosecutors “the correspondence between the rights of the class and the subject matter of the class action” (Rule 20, §2^o). The Model-Code does not regulate the theme.

5.1.2 – The Constitutional Principle of Due Process of Law as Requisite for the Adequate Representation

On purpose we have left for our last consideration the constitutional principle of the judicial control of the adequate representation in the class action.

²⁷ “Rule 25. In addition to the activities established in the Federal and States Constitutions, in its Institutional Law and other statutes, the Public Prosecutors shall: (*omissis*) IV – propose the civil investigation procedure and the class actions, in accordance to the law: a) to protect, prevent e repair harms to the environment, to the consumers, to assets and rights with artistical, esthetical, historicals, touristic or of landscape values and any other diffuse, collective or any *nondisposable* individual homogenous interests” (emphasis added).

²⁸ In the same way, the decisions in the RREE nº 195.056-PR (Plenary Court); nº 185.360-SP, nº 163.231-SP.

²⁹ STJ- Special Court, Pet. nº 1.093-RS in Ag.Reg., reporter Justice Nilson Naves, decided on October, 24th, 2002 *apud*, Theotônio Negrão, *Código de Processo Civil*, 36^a Ed., note 4c to Rule 1, of PCAL, p. 1061; STJ- 5^a T., Ag.Reg. in Resp. nº 404.656-RS, reporter Justice Gilson Dipp, decided on December, 17th, 2002, dismissed), *apud*, Negrão, ob. cit., note 4d to Rule 1 of PCAL, p. 1062.

³⁰ While the Supreme Court is the guardian of the Federal Constitution, the Superior Justice Court is the guardian of the federal law in Brazil.

This is undisputed the most significant and the highlight of the adequacy of representation in the North-American judicial precedents and in scholarly grounds.

Is it considered as fundamental principle in the North-American law that one cannot be bound by a judgment ruled in a lawsuit where one has not being a party to nor had an opportunity to intervene in the litigation.³¹

The 5th and the 14th Amendments to the United States Constitution rule, respectively, that no person shall be deprived of life, liberty, or property, without the due process of law.

The constitutional clause comprehends the so-called “substantive” and “procedural” due process of law. In a nutshell, this means that the substantive due process requires a valid reason to allow the Government to deprive someone of life, liberty, or property, while the procedural due process requires that this conduct shall be exercised in accordance to a certain and adequate procedure.³²

However, the due process of law is fulfilled when the interests of the members of a class are fairly and adequately protected by the class representative in a class action procedure thus they can be bound the decision.³³

The Brazilian Federal Constitution, Rule 5^o, LIV, in a very similar way states that: “nobody shall be deprived of liberty or property without the due process of law”.

Therefore, the valid conclusion is that the adequate representation in the collective procedure, which control is exercised by the court and *in concreto*, has as corollary the constitutional principle of the due process of law, because one shall only be bound in a collective procedure when he or she had been adequately represented.

³¹ International Shoe Co. v. Washington, 326 U.S. 310, 66 S.Ct 154, 90 L.Ed 95 (1945).

³² See Erwin Chemerinsky, *Constitutional law: Principles and Policies*, p. 419/470. In the Brazilian scenario, see Nelson Nery Júnior, *Princípios do processo civil na Constituição Federal*, 33/8; Ada Pellegrini Grinover, *As garantias constitucionais do direito de ação*, pp. 35/8.

³³ Califano v. Yamasaki, 442 U.S. 682, 700-701 99 S.Ct 2545, 61 L.Ed 2d 176 (1979); In re A.H. Robbins Co., Inc., 880 F.2d 709, 727 (4th Cir.), cert. denied, 493 U.S. 959, 110 S.Ct 377 (1989); e, Gen. Tel. Co. of Southwest v. Falcon, 457 U.S. 147, 102 S.Ct 2364, 72 L.Ed 2d 740 (1982).

6 – Conclusion

As final conclusion, we are not going to reproduce all the assertions proposed in this essay, but only emphasize that in lawsuits involving mass of individuals, the control of the real parties in interest shall be done by the judge in light of the specifics of the case, requiring that the class representative effectively protects the interests of the class, otherwise the constitutional principle of the due process of law will be violated.

Such situations actually happen, and might happen much more due to conflicts arising out of the utilization of the Internet.

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