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Theme number 5

New Trends in Standing and *Res Iudicata* in Collective Suits

General Report
Civil Law

Ada Pellegrini Grinover

INTRODUCTION

1 - The national reports

We received 25 national and 2 transnational reports, as follows:

A - Europe

1 - Austria	Walter Rechberger
2 - Belgium	Piet Taelman
3 - Denmark	Eva Smith
4- France	Loïc Cadiet
5 - Germany	Burkhard Hess
6 - Italy	Andrea Giussani
7 - Norway	Tore Schei
8- Portugal	Carlos Manuel Ferreira da Silva
9 - Russia	Dmitry Maleshin
10 - Spain	José Luis Vázquez Sotelo
11 - Sweden	Henrik Lindblom
12 - Switzerland	Samuel P. Baumgartner
13 – The Netherlands	Daan Hasser
14 - The European Union	Sergio Chiarloni

B - Latin America

1 - Argentina	Enrique M. Falcón
2 - Brazil	Carlos Alberto Salles
3 - Chile	Cláudio Meneses Pacheco
4 - Colombia	Ramiro Bejarano Guzmán
5 - Costa Rica	Sergio Artavia Barrantes
6 - Mexico	José Ovalle Favela

7 – Paraguay
 8 - Peru
 9 - Uruguay
 10 - Venezuela

Rodolfo Eduardo Pedro
 Aníbal Quiroga Leon
 Santiago Pereira Campos
 Carlos J. Sarmiento Sosa

11 - The Model Code of Collective Suits for Iberian-America: Ada Pellegrini Grinover

C - Others

1 - Israel
 2 - Japan

Stephen Goldstein
 Masaaki Haga

I thank the national reporters so much for the cooperation in sending such thorough and detailed reports, which will be summarized in Part I of this text. Without them it would have been impossible to point out the new trends concerning standing and *res iudicata* in collective suits. The general reporter did not want to give up her account - despite being a summarized one - about the present situation of the collective suits in all the countries, as it constitutes a prolific material for the studies of comparative law. This justifies the length of this general report, which preserved the language of the various national reports.

2 - The structure of the general report

Firstly, I observe that the general report will not include the collective suits concerning labor relations involving unions and workers, common in almost every country. It will refer, then, to the collective suits regarding civil matters.

Part I of the general report will be a description and a summary of the national reports in their native languages. The work developed by the national reporters deserves to be totally taken into consideration because it shows an up-to-date view of the status of the collective suits in the countries of civil law. We apologize for writing such a long text but we did not mean to deprive the reader of all that relevant information.

After mentioning the transnational law (A), aimed at the European Union (A.1) and at the Model Code of Collective suits for Iberian-America (A.2), the laws, the jurisprudence and the doctrine of the various countries will be analyzed. The countries are grouped, not according to their geographical location but according to the following criteria:

B.1 - countries that have a system of collective suits;

B.2 - countries that have some provisions or techniques towards collective suits;

B.3 - countries that have sectorial laws towards collective suits (consumer, environment, etc.)

In topic C there will be a description of the bills in the different countries for the introduction of the systems of collective suits.

Part II of the general report will be the conclusion and it will point out the new trends for standing and *res iudicata* in collective suits, which was an outcome of the national reports.

PART I THE LAW, THE JURISPRUDENCE AND THE DOCTRINE

A - Transnational Law

A.1 - THE EUROPEAN UNION

(Missing)

A.2 - THE MODEL CODE OF COLLECTIVE SUITS FOR IBERIAN-AMERICA

(Missing)

B - National Law

B.1 - COUNTRIES THAT HAVE A SYSTEM OF COLLECTIVE SUITS

Brazil, Colombia, Israel, Norway, Portugal and Sweden plus the Catamarca Province (Argentina) are the countries and the province that have a real system of collective suits¹.

Their legal systems will be described following the chronological order

(Missing)

¹ It seems that China has a system of class actions for damages, but we have not received an answer for our contacts with the legal scholars from that country.

B.2 - COUNTRIES THAT HAVE SOME PROVISIONS OR TECHNIQUES CONCERNING COLLECTIVE SUITS

Although some countries do not have a real system of collective suits, those suits are based on constitutional and/or legal statutes for each and every matter, or on techniques concerning the individual procedure. Those countries are: Argentina, Belgium, Costa Rica, Denmark, Japan, Peru, Russia, The Netherlands, Uruguay and Venezuela. Their legal systems will be described following an order of techniques more or less improved and not following a geographical or alphabetical order.

(Missing)

B.3 - COUNTRIES THAT HAVE SECTORIAL LAWS CONCERNING COLLECTIVE SUITS

In some countries there are not any systems or sparse provisions on collective suits in general, but there are laws or sectorial statutes that consider collective suits for specific matters. Those countries will be analyzed following a geographical and alphabetical order. They are: Austria, Chile, France, Germany, Italy, Mexico, Paraguay, Spain, Switzerland and Venezuela.

(Missing)

C - BILLS

Several reports mention the bills or discussions about the introduction of systems of collective suits in their countries. They are: Austria, Belgium, Brazil, Costa Rica, Denmark, France, Italy, Japan and Switzerland. The bills will be examined following an order of probable approval, followed by the debates on the introduction of new laws.

(Missing)

PART II²

NEW TRENDS IN STANDING AND *RES IUDICATA* IN COLLECTIVE SUITS

1. THE BACKGROUND

“A chi appartiene l’aria che respiro?”

Mauro Cappelletti, Formazioni sociali e interessi di gruppo davanti alla giustizia civile, Riv.dir.proc.n.3, 1975, pp.372-3

In the countries of civil law, the study of collective or diffuse interests appeared, in the doctrine, during the seventies. Debates on the subject flourished in countries such as Germany, France and Italy. In Italy, Cappelletti, Denti, Proto Pisani, Vigoriti and Trocker anticipated the Pavia Congress of 1974, which discussed the fundamental aspects of the diffuse interests and precisely highlighted their distinguishing features:

- indefinite entitlement, indivisible object, placed halfway between the public and the private interests, peculiar to a mass society and a consequence of mass conflicts, full of political relevance and capable of transforming ingrained legal concepts, like the civil liability for causing damages in the place of civil liability for suffering damages, like the standing, the *res iudicata*, the power and the responsibility awarded to the judge and to the General Attorney, the classical sense of jurisdiction, action and process.

Soon the social dimension of those interests became clear. Another political and legal category was coming up, strange to the public and to the private interests. Public interest means the one that asserts itself in relation to the state and in which all citizens participate (interest in the public order, in the public security, in education) and that provokes conflicts between the individual person and the state. Private interests refer to the interests that every single individual person holds, in the classical dimension of the rights, by the establishment of a legal relation between creditor and debtor, clearly identified.

On the contrary, the diffuse interests, as community interests, are common to a group of people and to no one else. They are scattered and informal interests to the protection of collective necessities. In short, they may be referred to as quality of life. Mass interests that admit mass offences and that contrast groups, categories, class of people. They do not form a beam of parallel lines anymore, but a collection of lines that converge to a common and indivisible object. This includes the consumers’ interests, the environment, the

² In full.

users of the public services, the investors, the beneficiaries of the social welfare and all those who are part of a community and share their needs and expectations.

The recognition and the necessity to protect those interests determined what their political configuration should be. New ways of management of the public matters came up and the intermediate groups strengthened their position. An active management as a tool to rationalize the power which inaugurated a new type of decentralization, not restricted to the state any longer (like a political-administrative decentralization), but on social grounds, with tasks assigned to the intermediate bodies and to autonomous social classes, whose functions are specific. It is a new form of restriction to the power of the state. The unitary concept of sovereignty understood as the people's supreme power delegated to the state was limited by the social sovereignty granted to the natural and historical groups that constitute a nation.

Consequently, the theory of the public liberty coined a new "generation" of fundamental rights. The recognition of the rights of this third generation, represented by the rights of solidarity resulting from the social interests, were added to the classical rights of the first generation, represented by the traditional negative liberty typical of a liberal state, with the corresponding duty of abstention from the government. They were also added to the rights of the second generation, of economic and social nature, formed by positive liberty, with the corresponding duty of the state to *dare, facere* or *praestare*. Then, what at first seemed a mere interest was uplifted to the dimension of a real right, leading to the restructuring of the legal concepts so that they could fit the new reality.

However, to recognize the rights of solidarity was not enough. It was necessary for the legal system to adequately protect them, making them useful. A step had to be taken to change a simple declaration into a real protection of those new rights in order to definitely assure the recent acquisitions of citizenship. As it is the role of the procedural law to guard the threatened or violated rights, the restructuring of the system was mostly upon the procedure.

From an individualist procedural model to a social model, from abstract to concrete schemes, from static to dynamic ground, the procedure changed from individual to collective, sometimes getting its inspiration from the class actions in the common law, sometimes creating new techniques, more adherent to the social reality and to the underlying politics. And in this area Brazil has something to say.

More pragmatic, the Brazilian system began with theoretical exercises from the Italian doctrine of the seventies in order to build a jurisdictional system

that could be put into practice immediately and that protected the diffuse interests.

Since 1977 a revision of the constitutional popular action law of 1965 considered as "public asset" the goods and rights of artistic, esthetical, historical or tourist value.

Several popular actions to defend the diffuse interests related to the environment were brought to court. But the popular action could not cover the wide range of the protection of the diffuse interests, not even as far as the environment is concerned, since its practice is subordinated to the illegality that comes from the committed or omitted behavior of the government whereas the threat or the violation of the diffuse interests usually comes from private actions. On the other hand, the standing, exclusively conferred on the citizen, excluded the intermediate bodies, which were stronger and more prepared than the individual to fight against the environmental threat or harm.

In 1985 the law number 7347 came to light about the public civil action for the protection of the environment and of the consumer as far as indivisible assets and, consequently, diffuse interests were concerned. Later, the 1988 constitution pointed out in many provisions the relevance of the collective interests rising to a constitutional level the defense of all the diffuse and collective interests - without any limits to the matter - and making them an institutional task of the General Attorney, which is extremely autonomous and independent in Brazil (but allowing the law to increase the standing (article 129, II first paragraph); mentioning afterwards, the judicial and extrajudicial representation of the associative entities for the defense of their members (article 5, XXI); creating the collective injunction with the standing to sue of the political parties, the unions and the associations legally constituted, created since at least one year (article 5, LXX); finally, pointing out the purpose of the unions for the defense of the collective and individual rights and interests of the corresponding class (article 8, III) and highlighting the standing regarding the Indians and their communities and the organizations for the defense of their interests and rights (article 232).

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

damages in the North-American law and expand it beyond the scope of the condemnatory action, respecting the principles inherent to the civil law systems.

It was in this context that in Brazil the Consumer Defense Code (Law number 8078/90) appeared to crown the legislative work and to extend the scope of the public civil action law by determining its applicability to all the diffuse and collective interests and creating a new category of rights and interests, individual in their nature and approached as personal but dealt with by the civil justice as collective due to their common source, which awarded them the denomination of homogeneous individual rights. It must be mentioned that the procedural protection of the Consumer Defense Code comprehends the diffuse, collective, individual and homogeneous rights of any nature, even those which are not included in the consumer's relation, in accordance to the law.

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

That is why the sharp Brazilian legal scholar Barbosa Moreira remarked that the diffuse rights are ontologically collective whereas the homogeneous individual rights are collective just accidentally because, as far as the procedure is concerned, they may have a collective guidance.

One more remark shall be made: sometimes the diffuse rights belong to indeterminate and indeterminable people, since there is not any legal-binding relation that joins the members of the group. They are the rights concerning the quality of life like the environmental, the consumers, and the users of public services rights. But sometimes one cannot determine who is entitled to them, as the people are members of a group having some kind of legal connection - for instance, associations and legal entities – and they may be determinable. This legal relation can also be found between each member of the group and the adverse party, like a relation between the Treasury Department or a school and an individual person.

The first above mentioned rights are diffuse, strictly speaking, whereas the latter are named collective, also *stricto sensu*. Although the procedure for the diffuse and collective rights is alike, this remark needed to be made because as the terminology was frequently used in the reports that came from Iberian-American countries, the reader from other legal cultures might be in doubt.

Anyway, it is important to point out that there are two kinds of transindividual rights that are subject to collective suits: one of them is the diffuse rights (in some legal systems they are subdivided into diffuse and collective); the other kind is the ones we will call homogeneous individual rights, according to the Iberian-American terminology.

2 - THE NEW TRENDS

From the careful and detailed reports written by the national reporters it is possible to realize the new trends concerning the collective suits in several countries belonging to the civil law system. Twenty-six reports represent more than a mere sample and allow the total analysis of both the present situation (concerning the law, the doctrine and the jurisprudence) and the evolution that is happening in those countries. More than trends, maybe it is possible to consider, at least in some aspects, an evolutionary way.

First of all, it is important to remark that the collective suits in the civil law countries have reached neither a level of maturity nor the same level of development of the North-American class actions. But the tendency is towards the creation of real systems of collective suits in many countries.

Another important remark is that the civil law countries do not make use of the same techniques used in the class actions. They use their own statutes, which are more suitable to the principles of their procedural systems. The schemes related to the standing do not follow the North-American system and consider the entitlement to sue of the public departments and private institutions to be side by side. The public institutions are frequently seen as controllers of the collective suits and they are also given the possibility to take over the entitlement in case the suit is abandoned or in case of baseless giving up. There is not any proceeding that is similar to the pre-trial discovery (disclosure). For the protection of the homogeneous individual rights, one criticizes the *opt out* technique, considered by many as being unsuitable to the principles and guarantees of their procedure. They prefer either the *opt in* technique or a combination of both criteria, leaving the *opt out* for residual cases (usually for less valuable cases, in which the members of the group are not interested in taking part). The Iberian-American countries show a tendency towards the technique of the *res iudicata secundum eventum litis*.

Concerning the new trends, although the main goal of this general report is to focus on standing and *res iudicata*, it seems important to point out the trends existing in three other fields: i) the object of the collective suits, that is,

the rights to be protected (diffuse, collective and homogeneous individual rights); ii) suitable actions for the collective jurisdictional protection and iii) the schemes of the individual civil procedure used for the collective protection.

This is what follows.

2.1. Protected Rights

Some legal systems of civil law view only the protection of the diffuse and collective rights. They are: Austria, Chile, Peru, Uruguay and the Catamarca Province (Argentina). However, the report from Austria proclaims that the protection should be extended to the homogeneous individual rights.

Just homogeneous individual rights are object of collective suits in the Province of Rio Negro (Argentina) – where a law on diffuse and collective rights is ready to be enforced - and in the bills from Costa Rica and France. The Italian bills only care about the defense of those rights, but the already existing laws also focus on the protection of the diffuse and collective rights.

One can conclude, then, that the collective suits in most countries comprehend either the defense of the diffuse and collective rights or of the homogeneous individual rights.

Thus, we can say that the evolutionary way, more than a trend, shows the unmistakable awareness that the object of the collective protection shall comprehend not only the diffuse and collective rights, whose entitlement is indefinite and of a collective nature, but also the individual rights that belong to the members of the group, whenever they are homogeneous.

2.2 The suitable actions

The guidelines of the EU and only two countries contemplate the collective suits related exclusively to the obligation for someone to do or not to do something, such as the inhibitory action in Italy and in Switzerland. However, all the other countries as well as the bills in Italy contemplate all kinds of actions for the protection of the transindividual rights.

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

There is not any doubt, thus, that reality itself has already extended the collective jurisdictional protection to all kinds of litigations.

2.3 The schemes of the individual civil procedure used for the collective protection

Some countries that do not have real collective suits make use of the techniques of the individual civil procedure for the protection of the transindividual rights, with some innovations.

The joint actions are common in Austria, Belgium, Denmark (up to the moment DA is enforced, which is supposed to happen on January 1st, 2008), Japan (with the multiparty litigation), Russia, Switzerland and, just partially, in Paraguay.

Japan anticipates several other techniques to deal with the lack of collective suits: the appointed party, which consists in choosing a representative among the parties, who will be in charge of the litigation to benefit all the others; assigning a common attorney, which means that the parties agree to be defended by a single attorney, who organizes the group and whose members will be considered as parties. But for this, both doctrine and jurisprudence had to adapt the classical concepts of standing in order to file a suit.

The pilot action or test case or master proceeding is very much used and the denomination varies depending on the legal system. It allows that among several litigations only one is selected, which, in turn, will be judged by the court of Appeals and the decision will be applied to the other suits that had been suspended. Depending on the various systems, the force of the decisions of the pilot action will be different in relation to the other litigations. This method is used in Austria, Denmark (with the same remark above), Germany, Norway and Spain (only for the administrative contentious).

It seems, however, that the above mentioned techniques are suitable only for the protection of the homogeneous individual rights and not to the diffuse and collective rights.

Anyway, all those steps are a substitute for the countries that do not have real collective suits or for those that do not count on them for the protection of all rights, having to review all the traditional principles and concepts to try to adjust them to the reality of mass litigations. But most of the reporters of the mentioned states - except for the Germany's reporter who seems satisfied with the master proceeding - sincerely admitted that those methods are not enough

and adequate to face the effective jurisdictional protection of the transindividual rights.

The above mentioned considerations make Cappelletti's lesson more meaningful. During the seventies he warned that the scheme of the classical civil procedure, structured to help the individual litigations were not adequate to solve social claims in which mass issues were confronted.

Following this idea, the Spanish reporter is keen to criticize the insertion of some rules concerning the consumer class action in the *Código de Enjuiciamiento Civil*.

A tendency comes up: to give the collective suits a structure of their own, re-examining the provisions of the classical procedural law to adapt them to the effective protection of the transindividual rights.

2.4 The standing to sue

And here we are with the new trends concerning the standing to sue.

The choice is made between two options: i) to grant the standing exclusively to the individual person and/or associations, emphasizing the private standing; ii) to increase the standing schemes, which are distributed between the individual person and/or associations together with public departments (General Attorney, Ombudsman or Public Defender and other specific departments). In this case we can say we have the *mixed standing* (independent and autonomous).

The entitlement for the class action is given exclusively to the individual person and/or to private entities in countries such as France, Germany, Italy, Japan and Switzerland. In France, both in the legal system and in the bills, the standing is exclusive to "agrees" associations. In Japan, the consumers associations are subject to the First Minister's previous approval.

All the other countries choose a mixed standing, both in their existing legal system and in their bills. In some of those countries - Brazil, Israel and Portugal, for example - besides the Model Code of Collective suits for Iberian - America, the public departments are granted powers to supervise the suit - unless they are a party - and sometimes, they are entitled to be a party in the suit in cases of baseless giving up, if the litigation is abandoned or even to enforce the decision (specially if we consider the General Attorney, the Ombudsman or the Public Defender). Mexico adopts only the private standing for the agrarian actions and only the public standing for the consumer's protection. The national reporter criticized the latter.

The private standing, similar to the North - American class actions, is based on the fear that its opening may lead to abuse. The mixed standing responds to the expectation that a larger number of people will be able to have access to the judiciary as well as to the principle of the universality of the jurisdiction, which means not only more and more people, but also more and more kinds of actions being taken to court. And to avoid probable abuse, there are adequate resorts, like the control of the public departments (existing in several countries) and the heavy fees for bad faith litigation (as for example, in the Model Code of Collective suits for Iberian-America and in the Brazilian legal system).

The tendency is, without a doubt, for the opening of the schemes of the standing to sue to wider segments of the society and to their representatives: the individual person, the social classes, the public entities in charge of the transindividual rights, other public entities in charge of the protection of the several different benefits for the quality of life - including the public corporations. Very clear examples are the Model Code of Collective suits for Iberian- America and the Bill of the Brazilian Code.

Once again we shall remember Mauro Cappelletti's lesson that considers the choice of a single legitimated (the individual person, associations, the General Attorney, public agencies) insufficient for the real protection of the transindividual rights. He showed at the time and based on his experience that the most effective way was the "*soluzioni composte, articolate, flessibili*", always controlled by the public departments.

2.5 The adequacy of representation

Adequacy of representation is another method of control to avoid the possible abuse that may happen when filing a class action. Originated in the North-American law, it is a prerequisite regarding seriousness, credibility, technical and even economic capacity of the one who is entitled to be a party in a class action. It is particularly important in the legal systems that extend the *res iudicata* to third parties, without any temperance. However, it is also useful for other systems, especially when they transfer the standing to the individual person and to associations and when they anticipate the defendant class action.

The adequacy of representation may be appraised by *the judge*, case by case (just like it happens in the North-American class actions) or it may depend on a *legal provision* that puts limits to the rule of the standing. Then, for example, the associations can only move to sue as far as they fulfill some legal

requirements or a criterion of social relevance is established even for the standing to sue of the public departments.

The broader the standing, the more essential the prerequisite of the adequacy of representation is. The more the *res iudicata* is extended to the third parties - as in the *opt out* system (see below) - the more necessary the control should be. As a matter of fact, in the collective suits there is an unmistakable correlation between the standing schemes and the system of the *res iudicata*.

However, only some systems adopt the criterion of prerequisite appraisal by *the judge*. The Model Code of Collective suits for Iberian-America clearly states this. Uruguay adopts it. In Argentina it was established by the jurisprudence. The Brazilian bill, which extends the standing to sue to the individual person, requires, in this case, the appraisal by the judge of the adequacy of representation. The reporter from Chile emphasizes how necessary it is for their system to adopt this criterion.

Having another denomination, the prerequisite of the adequacy of representation is usually accepted in the civil law systems - in the sense of *conditio sine qua non* determined by *law* so that the legitimated may move to sue. Examples are: Austria, Belgium, Chile, Colombia, France, Italy, Portugal, Sweden, Switzerland, The Netherlands and the Catamarca Province in Argentina.

To sum up, there is a strong tendency of the civil law countries to recognize the prerequisite of the adequacy of representation, as a legal disposition, and in just a few countries it is appraised by the judge.

2.6 The defendant class action

The defendant class action ought to be understood as a suit moved not by the group, but against the group. It corresponds to the one in the North-American legal system and is certainly not as much used as the class action even in the countries where it is adopted. However, one cannot discharge the fact that the group may appear as the defendant in the litigation, which may be individual or collective. As a matter of fact, in labor relations the union is frequently the defendant in the suits.

Examples of defendant class actions can be found in many countries. The suits against organized groups of soccer team fans, of inhibitory or condemnatory nature, are an example. The suits brought against associations of manufacturers of products considered harmful and their associates (and not the association) that are obliged to print warnings on the labels are another

example. The claims against professional categories for their members to refrain from showing messages that are offensive to other professions can also be an illustrative example.

The possibility of having defendant class actions is proceeding in the countries of civil law. They are expressly contemplated in Israel, in Norway, in the Model Code of Collective suits for Iberian-America, and in the Austrian and Brazilian bills. The reporters from Colombia and Paraguay informed that even though they are not clearly stated, they are a consequence of the system. In Venezuela they have been accepted by the jurisprudence. In the legal systems of Argentina and Chile, the doctrine recognizes their existence.

But obviously one cannot speak about a generalized tendency for their use in the future. The reporter from France informed that they were discharged on purpose from the bills and the same happened in the bills from Italy.

For sure the experience towards the collective suits in the countries of civil law, or at least in most of them, is not consolidated yet. It is possible that, as time goes by, reality will show the usefulness of the defendant class actions. But, certainly, right now, the concerns of most of our countries are far from them.

2.7 The *res iudicata*: diffuse and collective rights

In relation to the litigation that involves the protection of the diffuse and collective rights, of indivisible nature, the *res iudicata* cannot have any other effect except *erga omnes*. The satisfaction of the interest of one of the community members means the satisfaction of all the other members. As well, the denial of the interest of one of them means the denial for all. This is what happens in the cases of environmental harm redress caused to the good indivisibly considered or in the withdrawal of a harmful product from the market or in the discontinuance of a misleading advertisement.

But the *res iudicata erga omnes* may have a temperance, as it happens in some Iberian-American countries: in case the action is denied because the evidence is insufficient, the decision does not constitute *res iudicata* and an identical suit may be brought again based on new evidence (by another legitimated, according to the doctrine from Portugal and Costa Rica - about the bill - or even by the same legitimated, according to the Brazilian doctrine).

The reporter from Portugal is against this rule because he considers it contrary to the principle of the parties' equality. The rule comes from the Brazilian law (popular action of 1965) and is strongly approved by the doctrine

as an effective safeguard against a possible collusion between plaintiff and defendant, both of them being aiming at the *res iudicata erga omnes*, unfavorable to the plaintiff and achieved by means of insufficient evidence. As a matter of fact, the Portuguese reporter admitted that, in this case, the forecast is useful, but criticized its generalization. Anyway, from the law of the popular action, the rule became part of the Brazilian micro system of collective suits and was adopted by the Model Code of Collective suits for Iberian - America. But only Brazil (in the legal system and in the bill), the Costa Rica bill, Portugal and Uruguay adopted the rule as well as the jurisprudence from Colombia.

Therefore, one cannot speak about a real tendency, not even among the Iberian-American countries, towards the adoption of the *res iudicata secundum eventum litis*, as a temperance for the *erga omnes* force of the decision, in the case of the protection of the diffuse and collective rights.

2.8 The *Res Iudicata*: homogeneous individual rights

In the field of the *res iudicata* in the collective suits to defend the homogeneous individual rights, the position of the civil law countries is clearly divided into two branches. In one side the Iberian-American countries (except for Colombia, Portugal and the Catamarca Province in Argentina) that adopt the technique of the *res iudicata secundum eventum litis*. In the other side, the other countries, that choose the *opt in*, the *opt out*, or *both*. Portugal joins the *opt out* criterion with the *res iudicata secundum eventum litis* in the same sense analyzed above (2.7) with strong criticism by the reporter, who calls the system of his country "unusual". Maybe one can assure that the *opt out* criterion, intended to give the effects to the decision in a suit for the protection of the homogeneous individual rights, is not compatible with the rule of the inexistent *res iudicata* when the decision denies the litigation towards the diffuse and collective rights because the evidence was insufficient.

We shall analyze the *opt out* and the *opt in* criteria.

2.8.1 - The *opt out* criterion

As known, the *opt out* criterion allows every individual, member of a class, to request in court their exclusion from the class action in order to be considered a third party and not subject to the *res iudicata*. The other members who did not choose the option of exclusion are deemed to be parties and they are subject to the effects of the *res iudicata*, independently of being positive or

negative. The system demands that the litigation shall be widely advertised by means of all mass media and, whenever possible, even personally so that the members of the class who are not willing to be subject to the *res iudicata*, favorable or unfavorable, may use their right to *opt out* and give up the litigation.

This criterion is severely criticized in many countries because, after all, the *res iudicata* will reach people who did not participate in the litigation and may even cause them some damage. The reporters from Austria and France as well as the Portuguese doctrine totally reject the institution because they assure it is not in accordance with the general principles and the guarantees of procedure in their respective countries. There, one should respect the idea that only those who had the opportunity to be heard, that is, the party subject to the adversary system may be submitted to the effects of the *res iudicata*. Moreover one may question the misleading system of fake notices, in which there is not the presumption of taking full notice of the litigation by all those who are interested in it.

And, in fact, the adoption of the *opt out* criterion isolated is rare in the countries of civil law. It is followed just in The Netherlands, Portugal and in one of the bills from Italy. We should make it clear that the bill mentioned by Austria has not chosen between the *opt out* and the *opt in* yet.

2.8.2 - The *opt in* criterion

It is well known that the *opt in* criterion makes it possible for the members of the group, duly notified, to voluntarily join the class action and to become parties. Therefore, the *res iudicata*, favorable or unfavorable, will reach them. Those who do not express their wish to be included in the litigation will not be reached by the *res iudicata* and, thus, will not have any advantage or disadvantage from it. It is also essential that the litigation be widely advertised so that the prospective parties may express their wish to be included in the litigation.

Considering the above mentioned criticism towards the *opt out* criterion - which really seems to weaken the guarantees of the adversary system as well as the limitation of the *res iudicata* to the parties - some countries of civil law prefer the *opt in* criterion: Colombia (although the reporter criticizes the system), France, Germany and Sweden.

But the reporter from Denmark presents some elements that show that in many cases the members of the groups may feel discouraged to opt for their inclusion in the litigation.

And, in fact, it seems that the choice for the *opt in* may, in many cases, empty the collective suits and frustrate their ideals - specially towards solving, once and for all, all the mass litigations and, this way, avoiding their increase, contradictory decisions and the fragmentation of the jurisdictional protection.

2.8.3. - A combination of *opt in* and *opt out*

Maybe because of the criticism to the *opt out* criterion and the risks of failure of the *opt in*, some countries match both criteria: Israel, Norway, Switzerland and the bill from Denmark. Frequently in those countries they prefer the *opt in* and leave the *opt out* for residual cases, especially for less valuable cases, in which the members of the group do not look forward to being included in the litigation.

2.8.4. - The *res iudicata secundum eventum litis*

The option of the Iberian- American countries is totally different. Considering that great part of the population lacks information and is unaware of their rights, added to communication problems, the distance, the poor means of transportation, the difficulty to move a lawsuit, the barriers to contract a lawyer, those countries (except Colombia and Portugal) discharge both the *opt in* and the *opt out*, following a totally different line from the one we have seen so far, which is the line of the *res iudicata secundum eventum litis*, only to benefit and not to cause any damage to the members of the group. Or better, the *res iudicata*, collectively speaking, acts *erga omnes* both if the claim is accepted or denied, preventing a new collective litigation to be moved by anyone who is entitled to. However, in the plan of the individual claims, the favorable *res iudicata* may be immediately enforced and the next step is the liquidation and the execution of the decision. An unfavorable *res iudicata* does not prevent individual and personal claims from being moved by the members of the group.

There is criticism to the *res iudicata secundum eventum litis* from the traditional procedural doctrine. We are aware that the above mentioned solution favors the members of the group who, after losing a collective suit, may be a plaintiff in a new lawsuit (while the defendant who won the collective suit may be the defendant again on individual grounds). But this is a conscious choice. Instead of causing any harm due to an unfavorable decision to the member of the group who could not decide to be excluded using the *opt out* technique and instead of running the risk of having the collective suits emptied by the *opt in*

technique, most of Iberian-American countries preferred to favor the members of the group by exercising the principle of real equality (and not only formal), according to which the unequal must be treated distinctly. And, certainly, the members of a class whose fundamental principles were disrespected deserve a distinct treatment typical of the people who are vulnerable, organizationally speaking.

In practice, the above mentioned solution is not as bad as it may seem at first. If the collective suit is lost, there is still the possibility of the individual claim, this is for sure. But an unfavorable decision in the collective suit will be a powerful precedent and may be used by the defendant, not to prevent that an individual claim is filed as it would happen in the case of the *res iudicata*, but to influence the new judge's decision. By the way, when the collective suit is dismissed, the defendant have already exercised as completely as possible all the procedural rights - including the evidence - and the individual claims will be about the same *causa petendi*, which the defendant has already won.

Anyway, even in the doctrine, the old disapproval towards the *res iudicata secundum eventum litis* has been disappearing, as it is shown by Allorio, in Italy, in the sixties. The legislation of several countries like Italy and Germany uses the *res iudicata secundum litis* whenever the decision reaches third parties as in the case of annulment of an assembly and not in the case of declaring it valid. Finally, it is important to remember Chiovenda, who teaches us that the principle of restricting the decision to the parties means that the third parties cannot suffer any loss or harm because of that decision, but they may on the contrary be benefited by it.

Anyway, the choice for the *res iudicata secundum eventum litis* just to favor and not to harm the personal claims is important in Latin America. This criterion is adopted by the Model Code of Collective Suits for Iberian- America, Brazil (in the legal system and in the bill) Province of Rio Negro (Argentina) and Peru. The reporters of several countries proclaim the adoption of the same model (except for the Colombian reporter, who prefers the local existing legal system).

2.9 -The *res iudicata secundum probationem*

Except for the typical cases of annulment of the decision passed in the *rem iudicatam* established in all codes of procedural law, including the possibility of new evidence, to authorize the *iudicium recissorium*, some countries in Latin America determine in their class action systems that the new

evidence supervening the decision and impossible to have been produced in the extinct lawsuit - as long as it is relevant to modify its result - may give rise to a new lawsuit, identical to the previous one and based on the new evidence. This is the *res iudicata secundum probationem*. According to it, the *res iudicata* deals exclusively with the evidence which the decision is based on. This is not an exclusive hypothesis for the collective suits and an example is the DNA exam, which may modify the decision of a former paternity suit.

To move a new suit it is taken into consideration a preclusion time of two years, from the moment of the common notice that the new evidence exists.

We are aware that the provision is not necessary in all legal systems because there are countries like Italy, where the time for the *revocazione straordinaria*, based on the discovery of the new evidence, does not start at the moment of the transit in *rem iudicatam* of the decision to be annulled, but at the moment of the obtaining of the new evidence.

But as many South-American legal systems determine an initial deadline for the *iudicium rescissorium* from the moment of the transit in *rem iudicatam*, the solution of the *res iudicata secundum probationem* may be interesting. It is adopted by the Model Code of Collective suits for Iberian- America, by Colombia and by the Brazilian bill.

2.10 - The collective *res iudicata* to benefit the individual claims

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

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

For example: if in the decision it was admitted that there was environmental damage, indivisibly considered, and determined that the defendant should repair it, the people who individually suffered the same damage may make use of the collective *res iudicata* to shorten the procedural steps whose aim is to obtain a compensation for the personal damage. It seemed to Liebman when he wrote about the Old Italian regime of the transfer of the penal *res iudicata* to the civil area to compensate an *ex delicto* damage, that in this case, there would be an extension of the penal *res iudicata* to the

reasons, which would be “*abnorme*”. The Brazilian doctrine chooses to explain this phenomenon - both concerning the effectiveness of the penal *res iudicata* in the field of civil compensation and concerning the effectiveness of the *res iudicata* in the collective suit for the defense of the diffuse and collective rights to benefit the individual claims of damages compensation - as an objective amplification of the litigation object. Therefore, when the judge declares “I condemn you to reconstitute the environment”, he is implicitly declaring that he is also condemning to compensate the victims of the environmental damage.

The awareness of the possibility of transferring the collective *res iudicata* to benefit the individual claims is, without a doubt, a tendency to be considered among the civil law countries. The reports from the following countries mentioned this criterion: Germany, Italy and Switzerland in Europe. In Latin America, besides the disposition expressed in the Model Code of Collective suits for Iberian- America, we also have the reports from Brazil (legal system and the bill), Chile, Costa Rica, Uruguay, Venezuela and Province of Rio Negro (Argentina)

2.11. The transnational law and the systems of the States

2.11.1. The context of the European Union

In the questionnaire to the reporters of the European Union countries we asked if, in their understanding, the EU should show the states the way to be followed in the national law concerning the protection of all diffuse and collective rights as well as of the homogeneous individual rights and not only of specific areas - as the EU has done so far. The answers were few and divergent.

Against the possibility of an intervention of the EU, the reporter from Belgium reminds that Great Britain, the Netherlands and Belgium have just established rules for the collective suits and it would be convenient that the effects of the new law were evaluated firstly, before considering a uniform legal system. However, the same reporter also reminds that in the EU, the judges from different states are competent to apply the national rules to the various matters; so, in his opinion, a European legislation able to internationally coordinate the collective suits should be adopted.

Even the reporter from Israel, who does not belong to the EU is against establishing guidelines to the collective suits in the states.

The reasons were, basically, that the states should be free to develop their own collective suits and that several of those countries had just had their

laws enacted. This way, it would be too early to establish rules and even principles to be followed by all of them.

But the reporters from The Netherlands see advantages in the EU crossbordering principles for the class actions for damages and the reporter from Spain thinks that the EU should take actions in order to start the use of collective suits in the states. Anyway, the reporter from the EU reminds us that their action is a mere subsidiary one towards the legal system of each state and that the guidance on collective suits published by them would give them discretionary powers to legislate. Even concerning the standing to sue the guidance is very open and does not show any precise scheme. The same goes for the *res iudicata*, which was not even mentioned in the texts.

According to this, it is impossible to see a tendency towards the EU tracing principles and rules for the states in order for them to legislate in the matter of collective suits.

2.11.2. - The influence of Model Code of Collective Suits for Iberian America in the national legal systems

Regarding the general guidelines on collective suits the position of the Iberian- American countries towards the Model Code is totally different from the situation of the EU countries. They consider it an adequate repository of principles and rules to boost the reforms.

Of course the guidelines of the EU are imposed to the states whereas the Model Code, as its name says, does not have any coercive force and allows each country to adopt it if and however they wish. In fact, several Iberian-American reporters (specifically the ones from Colombia, Mexico, Pataguay, Peru, Portugal, Spain and Uruguay) support, entirely or with a few exceptions, the principles and rules of the Code and consider it a model to be followed for the legislative reforms in their countries.

The outcome of this position is the future possibility of having a more consistent and less dissonant Iberian-American procedural system of collective suits. It obviously does not mean that there should be uniformity but there should be a possible harmonization and the freedom for each state to adjust the Model Code to their own national reality.

This harmonization seems to be a trend that may become real in a long term period.

3. CONCLUSIONS

As this general report is already too long it is high time that it will be concluded. It pointed out the tendencies that are emerging towards the collective suits in the countries of civil law and, depending on the topic, we can talk about an evolutionary way.

The conclusion is as follows:

1 - The present situation of the collective suits in the civil law countries. The collective suits in the countries of civil law have not attained to the same level of maturity and evolution of the North-American class actions, but the tendency is that more and more countries shall create real class action systems.

2 - The techniques of the common law and of the civil law. The civil law countries do not adopt the same techniques used in the North-American class actions, creating their own legal resorts, more adjustable to the principles of their legal systems.

3 - Protected rights. There is a strong tendency in the civil law countries towards the idea that the jurisdictional collective protection should comprehend the diffuse and collective rights as well as the homogeneous individual rights. On other hand, in the last case, the jurisdictional protection is wider than that one of the North-American class action for damages, of a condemnatory nature, as mentioned in the next conclusion.

4. Suitable actions. The concern with the effectiveness of the collective suits shows a tendency to contemplate the jurisdictional protection as broadly as possible. There is a clear evolutionary way, which is leading from the concept of a merely inhibitory protection to the use of all possible kinds of actions: condemnatory, constitutive and declaratory actions.

5 - New schemes for the collective suits. - There is in the civil law countries a clear evolutionary way to quit the concepts of the classical and individual civil procedure which are inadequate to face the mass conflicts. For the collective suits they are starting new schemes of their own that need to re-examine the traditional concepts. The standing and the *res iudicata* are the most illustrative examples in this matter.

6 - The standing to sue. Very few countries attribute the standing to sue only to the individual person and/or to private entities like the associations. There is in this field a clear tendency to the opening of the standing to institutions and public agencies, with some control by specialized public departments.

7 - The adequacy of representation. The countries that adopt the prerequisite of the adequacy of representation to be appraised by the *judge*, case by case, as in the North-American class actions, are rare. However, many civil law countries attribute to the *law* the establishment of prerequisites, without which there is not standing. And this is exactly the adequacy of representation, although the denomination is not given. Thus, one can detect, in the civil law countries the tendency to observe the adequacy of representation by means of criteria predetermined by the law.

8. The defendant class action. The defendant class action is still very rare in the civil law countries and it is not possible to show a tendency for its use.

9. The *res iudicata*: diffuse and collective rights. The *res iudicata erga omnes* is constant rule in relation to the decision, favorable or unfavorable, for the diffuse and collective rights. There are some Iberian-American countries that limit the force of the rule when the decision denies the claim because the evidence is insufficient. In this case an identical claim may be brought based on that evidence. But it is hard to talk about a real tendency in this sense.

10. The *res iudicata*: homogeneous individual rights. There are two opposite trends in this field. The Iberian-American countries (except for Colombia, Portugal and the Catamarca Province in Argentina), in general, prefer the *res iudicata secundum eventum litis* just to favor and not to harm the individual claims. This way, the collective decision that denies the claim will not be as obstacle for the victims to move another suit making use of the individual reparation action. In the other countries the tendency is towards the adoption of the *opt in* criterion or a combination of the *opt out* but for residual cases, usually less valuable cases.

11. The *res iudicata secundum probationem*. Apparently there is no tendency towards the use of the *res iudicata secundum probationem*, which permits that the claim is brought again, within a period of two years from the

notice of the new evidence which did not exist at the time of the first lawsuit and, therefore, could not have been produced.

12. The collective *res iudicata* to benefit the individual claims. There is a considerable trend in civil law countries towards the effectiveness of the favorable decision concerning the diffuse and collective rights which is used to shorten the individual procedure whenever there is a claim for compensation.

13. The EU and the collective suits. The opinions are divided: part of the reporters who analyzed the matter is against the adoption of guidelines from the EU leading the participating countries to legislate over collective suits, in non-specific areas, and they prefer to let the states make their own decisions about the subject. Part of the reporters supports the idea of a guideline from the EU. So, it is impossible to detect any trend in this field, even because the answers were few.

14. The influence of the Model Code of Collective Suits for Iberian-America over the national laws. There is a clear tendency in the Iberian-American countries to adopt, except for a few remarks, the principles and rules of the Model Code for their national reforms. It is possible to foresee then, even in a long term period, that in those countries there will be a harmonization of principles and rules as far as the collective suits are concerned.

15. Final comments. Finally, one can assure that there is a clear evolutionary line in the situation of the collective suits in the civil law countries. This evolution has been going on for 30 years and today's effervescent legislative, doctrinaire and jurisprudential situation shows that there is a future for the jurisdictional protection of the transindividual rights. Of course, some maturity shall be attained for some concepts - the *res iudicata* in itself, mainly for the protection of the homogeneous individual rights, the *res iudicata secundum probationem*, the defendant class action, etc. However, the present situation shows that the collective suits have lately been elaborated according to the particular model of *civil law*. This makes them different from the techniques of the North-American class actions and points towards solutions that are more suitable to the principles of the Roman-Germanic legal system.

It is worth throwing attention onto the fact that there is a common effort to accept and solve the challenge of new lawsuits. Meetings like this one, which are more and more held everywhere, will be helpful to compare legal systems and experiences, and show the best ways to evolve towards the matter.

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Ada Pellegrini Grinover

Professor of Procedural Law at Universidade de São Paulo

Chair of Instituto Brasileiro de Direito Processual