

**CLASS ACTIONS, GROUP LITIGATION AND OTHER AGGREGATIVE PROCEDURES
IN LATIN AMERICA: A GENERAL OVERVIEW**
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This article offers a synopsis on the current status of class actions, and other forms of aggregative and collective litigation that exist in Latin America. In light of the limited scope of this article, my goal is to simply present a general report that highlights the differences and similarities in procedural rules and legal practices regarding the use of remedies against collective harms. Special attention is given to those countries that have developed a legal framework for the protection of individual and collective rights through different forms of aggregative processes, with particular focus on the potential for and the obstacles that affect the various forms of collective litigation in the region.

I. The Context: Public Debate and Collective Litigation

Class actions and other aggregative mechanisms for the protection of individual and collective rights are scarcely regulated in Latin America. Out of the twenty countries that form the region,¹ only Brazil,² Chile³ and Colombia⁴ have adopted special legislation pertaining to some form of consumer representative litigation, including class actions. In some other countries like Argentina, aggregative litigation is not expressly regulated by statute,⁵ but during recent years, courts have increasingly afforded some protection to groups of individuals who have suffered certain collective harms.

The scant regulation of class actions does not mean that large scale accidents or mass injuries do not occur in Latin America, or that there is no awareness about risky behavior in that region of the world. To the contrary, citizens from Latin American countries –like people from elsewhere- are increasingly exposed to occupational harms, environmental risks, damages arising from defective products, mass accidents, and financial injuries at unprecedented scales. The extraordinary reach of modern communication systems and the global impact of commerce, makes it virtually impossible for anybody in the world not to be aware about -and become a potential target of- the risks associated with the manufacturing and worldwide distribution of myriads of consumer products, including

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medical devices and pharmaceutical drugs, the provision of financial and other types of services geared to the general public, as well as the increased risks associated with the different forms of mass transportation and the exposure to multiple environmental harms.

Another sign of the awareness with these phenomena is the ongoing public debate that has taken place in Latin America (Maurino et. al., 2005; Gidi & Ferrer, 2003a) on the need for regulating and protecting what are commonly known as *third generation rights* (Vasak, 1979), a legal category that relates to the idea of social solidarity and calls for a more active participation of the state in protecting the rights of socially identifiable groups of citizens. (Perez Luño, 2006)

II. From the traditional defense of Individual rights to the constitutional protection of collective interests: *Interdictos*, Joinder and the Writ of *Amparo*.

Latin American countries embody twenty different legal systems with distinctive institutions, processes and rules, but which follow the same legal tradition (civil law tradition) (Merryman & Perez-Perdomo, 2007) deeply rooted in their shared status as former colonies of Spain and Portugal between the sixteenth and nineteenth centuries.

Among the most salient features of the countries that follow this legal tradition, one could mention the importance given to codification. Codification has not been an exclusive phenomenon of Civil law tradition countries, but the preeminence given to codes has (Merryman & Perez-Perdomo, 2007). Until very recently, the operation of the legal systems in civil law tradition countries gravitated around their Civil Codes,⁶ which have traditionally contained exhaustive rules that define and regulate individual rights and their protection, but have also given marginal importance to rights of collective nature. After all, the exaltation of the individual was one of the cardinal principles of the French Revolution, which had a direct impact on the configuration of Latin American legal systems during the eighteenth and nineteenth centuries.

Interdictos

The Civil Codes of most Latin American countries have traditionally included provisions for the protection against environmental harms and other similar risks, but only to the extent that they have an impact on the sphere of individual property rights.

Accordingly, the different Codes of Civil Procedure have adopted the necessary procedural mechanisms to grant judicial protection by way of summary injunctions known as *Interdictos*.⁷ These procedural remedies, however, can only provide a limited protection since they usually result in some form of *declaratory* or *injunctive relief* that simply requires the defendant to refrain herself from doing certain acts, or a mandate to perform a specific activity, but without granting any monetary reparation to the victim. Parties seeking compensation for damages, have to file a separate lawsuit in civil courts and follow the ordinary lengthy procedure, which decision would only have *res iudicata* effect on the intervening parties. Interdictos, as the vast majority of the litigation that takes place in Latin American civil courts, are one-on-one processes that only involve two contending parties asserting rights of limited nature, thus making them unsuitable for pursuing claims by a large group of individuals.

Joinder

There are, of course, *joinder (litisconsorcio)* rules in Latin American Codes of Civil Procedure that allow several parties situated in an identical factual or legal position to have standing and assert their claims (*litisconsorcio activo*), or present their defense (*litisconsorcio pasivo*) in the same civil action. With some subtle variations, the different Codes of Civil Procedure recognize permissive joinder (*litisconsorcio facultativo*)⁸ and compulsory joinder (*litisconsorcio necesario*), depending on the factual situation's meeting of the different joinder tests.

Joinder rules in Latin America, do not allow any form of representative litigation, and can only be applied to *civil* disputes involving claims between *private parties* affecting their individual legal spheres. Disputes involving public parties, or related to the protection of *public interests* are subject to an entire different regime that falls into the realm of administrative law and are channeled through special procedures handled by administrative courts.

The objective of joinder rules –as with most other forms of party intervention- is to promote efficiency, but their application is only possible when the number of intervening parties is relatively small. Another limitation of joinder proceedings is that the decision rendered on the merits has *res iudicata* effects only among the direct parties to the

litigation, and does not extend to other potential victims or individuals situated in similar factual or legal situations.

The Writ of Amparo

The *Writ of Amparo* (*Mandato de Seguranca* in Brazil) is a judicial remedy devised to protect citizens against the actions or omissions of public or private entities that violate their constitutional rights. The Amparo was originally established by the 1841 Constitution of the Republic of Yucatan (now a province of Mexico) as a limited action against direct infractions committed by government agencies in detriment of individual constitutional guarantees. This remedy was expanded by the 1857 Mexican Constitution, which broadened its scope to judicial acts. The Amparo was then included in the 1917 Federal Constitution, which shifted its focus from the protection of individual rights to those of more social or collective nature.

By the twentieth century, the Writ of Amparo was already adopted by most Latin American legal systems, both in the form of general constitutional provisions,⁹ and also through special legislation that further developed its procedure, effects and scope.

Even though, in general terms, Amparo affords the same kind of protection throughout the region, countries have adopted different variations of it. For example, in some legal systems, Amparo is basically implemented in the form of *habeas corpus*, a remedy devised to protect individual citizens against unlawful imprisonment. In others, Amparo can be only asserted against state or public agencies for a *direct* violation of *any* fundamental right, provided that such right is expressly mentioned by the constitution.¹⁰

A broader and more recent variation of Amparo, allows it to be also used as a remedy against *indirect* violations of fundamental rights, that is, of those rights not expressly protected by the constitution but regulated by statute. Moreover, in certain jurisdictions, Amparo has been extended to violations incurred by private entities or individuals, and may also be exercised (*Amparo Colectivo*) on behalf of other –absent- individuals or socially defined groups situated in similar position to the plaintiff (*collective interests*), and even on behalf of the general population (*diffuse interests*), thus expanding the traditional notion of standing (*legitimation ad causam*). As a result, in the latter case the decision rendered on the merits will have general effects (*erga omnes*) and not only on

the intervening parties. *Amparo Colectivo* is, perhaps, the closest resemblance that most Latin American countries have to the notion of representative litigation. However, there is an important limitation: the outcome of amparo proceedings merely entails -like in the *interdictos*- a declaratory judgment, or perhaps an order to reestablish the existing state of things to the time previous to the alleged violation, and it excludes any form of monetary relief or compensation for damages, for which the parties would have to pursue ordinary litigation in a separate forum.

III. Risk Prevention in the Consumer's Protection Era

Constitutional Protection of Consumers' Rights

The interest of Latin American governments in preventing risky behavior may be traced back to the mid-1980s, when as part of the various institutional reform processes that took place throughout the region, virtually all of the newly-reformed constitutions adopted principles that expressly protected the collective and individual spheres of members of different social groups (*intereses colectivos*), and also established guarantees for the protection of broader interests, such as those related to the environment, public health and economic welfare (*intereses difusos*). These constitutional reform processes also shifted the center of gravity from Civil Codes to Constitutions (Merryman & Perez-Perdomo, 2007) and also, from the first (civil and political) and second generation rights (social, economic and cultural) that focused on the individual, to the third wave of rights that gave more importance to the defense of collective interests.

At the forefront of this movement is the protection of consumer rights, envisioned as a strategy to empower individual citizens in their imbalanced relationships with those who control the production, commercialization and distribution of services and goods; and the adoption of effective legal mechanisms intended to compensate harms suffered by large groups of individuals.

To this date, at least thirteen Latin American constitutions contain general provisions that provide some level of protection to consumers.¹¹ These provide the foundations for specialized legislation that regulates the different means for the compensation of harms arising from defective products, faulty services, poor quality control, deceiving publicity and monopolistic practices. An even greater number of countries have passed Consumer

Protection Acts (CPA) as part of a growing infrastructure that include the creation of administrative agencies, ombudsmen and defense groups vested with duties that range from policymaking to advocacy on behalf of consumers in both administrative and judicial processes.

Notwithstanding these important initiatives, Latin American countries are still far behind –as compared with other regions of the world- in terms of implementing effective vehicles for the protection against collective harms. With very few exceptions, consumer protection laws are conceived in very general and abstract terms, and the powers granted to consumer protection agencies -even though ample in theory- are generally limited to their involvement in administrative or judicial proceedings that often result in the imposition of small fines or other symbolic sanctions with little or no deterrent effect on the violators, and which lack the ability to effectively compensate victims.

Some general procedural rules traditionally adopted in Latin American legal systems, like the prohibition of contingency fee arrangements, the inexistence of punitive damages and the prevalence of the loser-pays-all rule regarding lawyers' fees, are also credited for imposing additional obstacles that impede the growth of consumer representative litigation in the region. (Gomez, 2005)

Like Migratory Birds

The lack of effective remedies and the existence of several important shortcomings within Latin American jurisdictions, in conjunction with the perceived advantages of other legal systems has fueled a migratory wave of claimants from Latin America to the United States (Gómez, 2005) where the use of civil litigation as a tool for regulating risk behavior and for compensating harms that affect large groups of citizens has achieved a high level of sophistication, resulting in part from the confluence of certain economic, intellectual, procedural, and political factors.(Nagareda, 2007)

As a result, during the last decade, Latin American citizens have viewed the possibility of pursuing their claims in U.S. courts as a panacea, and have found in the U.S. class actions an appropriate vehicle to channel their claims. The general perception seems to be that the number of mass tort cases filed in U.S. courts by foreign plaintiff is on the rise.¹²

Not all foreign cases, however, make it to the American courts, as they are –arguably- subject to a stricter scrutiny than the one faced in their own jurisdictions, and are more carefully screened and selected by U.S. counsel to determine their cases’ feasibility from the legal and financial viewpoints. Even though we don’t know the precise number of Latin American cases that have been rejected in a given period of time by U.S. counsel or how many -after passing their tests- have been dismissed by U.S. courts on forum non conveniens’ grounds; based on our observation of recent high-profile cases, the possibilities for rejection and subsequent remand of foreign cases to their home countries seems to be high, which in addition to other obstacles (Gómez, 2005) makes litigation in the U.S. an unstable long-term solution for Latin American plaintiffs.

Having these difficulties in mind, an increasing number of consumer advocacy groups, grass roots organizations, government agencies, and political actors throughout Latin America are currently lobbying for the regulation of class actions (Gidi, 2005; Maurino et. al. 2005), and proposals for convergence towards the American model of group litigation seem to be gaining popularity around the region.

IV. The Regulation of Representative Litigation in Latin America.

Brazil

The enactment of the Consumer Defense Code (CDC) of 1990 placed Brazil at the forefront of the movement to promote class actions in Latin America (Londoño, 2001; Pellegrini, 2003), by allowing the aggregation of large numbers of individual claims arising from identical factual circumstances or which are connected through a legal situation common to a group, class or category of individuals (art. 81). Consistent with the constitutional vision that deemed the protection of consumer rights a duty of the state (Constitution, art. 5), the CDC vested in the Attorney General’s office, standing to sue on behalf of private plaintiffs in collective actions of any kind, regardless of the private or public nature of the claims. However, the CDC also allows the intervention of other party representatives -like consumer associations- on behalf of claimants, but subjects them to close scrutiny and to fulfilling several requisites, in order to ensure that they represent the class in a fair and proper manner. (art. 92) The CDC also enables the filing of claims

against multiple defendants, by allowing plaintiff to pierce the corporate veil of different entities and consolidate claims against them in a single suit.

In order to allow potential victims to opt-in, the CDC established a public notice system (art. 94). It also expanded the *res iudicata* effects of the decision rendered in the declaratory phase to the general population (*erga omnes*) or to any potential members of the group, class or category of plaintiff (*ultra partes*) (art. 103).

In more general terms, the CDC has broadened the traditional notion of liability arising from defective products and faulty services, by shifting the traditional burden of proof and relieving the plaintiff from having to establish the defendant's culpability.¹³ Another aspect that stimulates the filing of claims is the inclusion of a rule exempting plaintiffs from paying court fees and other related expenses. (art. 87) The CDC also established the standards for commercial publicity, abusive clauses, and more importantly, it expressly provided that the class action remedy was to be used for the protection of any rights, and not only for the guarantee of those related to consumer relations, thus opening the use of aggregative procedures to other areas.

Colombia

The protection of collective interests in Colombia can be traced back to the traditional declaratory relief actions set forth in the country's Civil Code (art. 1,005) more than a century ago. (Sarmiento, 1988: 57) These provisions, however, are of a very broad scope and do not regulate procedural aspects. As a result, the protection of collective rights could only be pursued through individual litigation. More recent legislation like the Consumer Statute of 1982 (Decree #3,466), the Environmental Protection Act of 1989 (Public Law #9, 1989), and the Constitutional reform of 1991, created the bases for regulating aggregative procedures for the defense of private rights and public interests.

In 1998, the Colombian Congress passed a statute (*Ley 472 de Acciones Populares y de Grupo*; hereinafter, Law 472) intended to develop the provision contained in article 88 of the 1991 Constitution, which mentioned the importance of protecting collective and public interests as well as certain individual rights from exposure to different kinds of harm. Law 472 establishes two different types of actions. First, the *popular action*, a form of injunctive or declaratory relief for the violations to the public interest (art. 2), which is

related to a broad range of situations, from the protection of a healthy environment, to the preservation of the public decorum, ecologic balance, the preservation of natural resources, the utilization of public spaces, public safety, and the guarantee of equal access to public services.

Pursuant to article 13 of the statute, popular actions may be brought by any citizen or group of citizens without needing to demonstrate any direct harm, and -unlike all other judicial remedies- without legal representation. The statute also grants the Ombudsman's Office (*Defensoria del Pueblo*) standing to intervene on behalf of the state's general interest, and gives plaintiff the opportunity to request a waiver of court fees and other expenses connected to the proceedings (art. 19). In this circumstance, litigation costs are paid from a special *Fund for the Defense of Collective Rights and Interests* (art. 70) also regulated by the same statute. Due to its public interest scope and even though the defendant may be a private entity, popular actions must be decided by administrative courts (art. 16). The decision rendered on the merits will have general effects (*erga omnes*) and prevailing plaintiffs are entitled to a success fee that ranges between the equivalents of 10 and 150 times the minimum wages.

The second type of remedy included in Law 472 is the *Group Action*, which is very similar to the American class action in the sense that it is used to enable large groups of individuals to aggregate their claims when these arise from facts or law common to the group, class or category. (art. 46) Contrary to what occurs in the case of popular actions, group actions arise from personal injuries or damages occurred as a result of the violation of individual rights, and their objective is to seek compensation from those damages. (art. 46) In terms of the *numerosity* requirement, the statute requires that the class is formed by at least twenty members (art. 46), who may intervene directly in the litigation or through a class representative. Group actions also require the involvement of lawyers, whose actions are coordinated via a steering committee led by whoever represents the largest number of victims. (art. 49) The role as lead counsel has an important impact in terms of fee allocation, as according to article 64(6), the lead counsel is entitled to a share equal to ten percent of the total pool awarded to the victims. Given the interest of the state in protecting consumer's and similar types of rights, the statute also allows the

Ombudsman's office to intervene in the class proceedings under certain circumstances (art. 48).

Potential class members are notified of the lawsuit through a public notice (art. 53), and are given an opportunity to opt-in anytime before the conclusion of the evidentiary phase (*lapso probatorio*), or within a period of twenty days after the final decision on the merits has been rendered. (art. 55) There is also an opportunity to be excluded (opt-out) from the group action.

The statute also provides that, immediately after the opt-out phase, the judge shall hold a settlement hearing in order to promote an agreement between the parties, with the ombudsman acting as a mediator. (art. 61) If no settlement is reached, the proceedings continue and the final decision will have *res iudicata* effects between the intervening parties and all those class members who did not opt-out. (art. 66) The allocation of the individual awards established in the final decision is administered by the *Fund for the Defense of Collective Rights and Interests*, which is under the supervision of the Ombudsman's office. (art. 72).

Chile

In 2004, Chile passed a reform of its 1997 Consumer Law (Law 19,995 of 2004) expanding the protection of consumer rights with the establishment of three types of remedies: actions on behalf of the collective interests of a defined group of consumers linked to the defendant by a contract, actions on behalf of diffuse interests (undefined groups of consumers), and individual actions.

The collective and diffuse interests' actions may be brought by the National Consumer Service (SERNAC), by a consumer association duly organized under the Consumer Law, or by a group of no less than fifty individuals, which is the *numerosity* threshold. (art. 51,1,c) Like in the case of the Colombian popular actions, the Chilean consumer statute does not require the intervention of lawyers in the proceedings (art. 50,c). However, when counsel are present, the statute gives the presiding judge power to require the plaintiffs to appoint one of them as the lead counsel (art. 51,7). In terms of opportunities to intervene, the statute establishes an opt-in procedure (art. 51, 3) for those

were not part of the original group of claimants, and also allows for the organization of plaintiffs in different sub-classes (art. 53,a).

Argentina

While Brazil has been at the vanguard of the class action movement in Latin America, Argentina can be considered the pioneer of public interest litigation in the region. Starting with several important Supreme Court decisions during the 1980s that expanded the use of the writ of Amparo to the protection of *diffuse and collective interests*, and the passage of the Union Associations' Law (*Ley de Asociaciones Sindicales*) that gave unions and other workers' organizations the power to initiate claims for the defense of their members' individual rights (art. 47), Argentina has made its way to enabling effective remedies for the protection of individual and collective rights.

One important statute that is worth mentioning is the Consumer Protection Law (Law 24,240 of 1993) which establishes the existence of consumers' associations that among other powers, have standing to sue on behalf of individual and collective victims. One shortcoming, however, is the lack of special procedural rules to this effect, thus leaving plaintiffs to rely on Collective Amparo proceedings. Another statute that also promotes collective litigation is the General Environmental Law (Law 25,675) which creates special remedies for the protection of the environment that can be initiated by any citizen (art. 19) or by the Ombudsman acting as representative of the general public. The decision rendered in these procedures has, like in the Brazilian and Colombian actions, *res iudicata* effects *erga omnes*. Litigation under the General Environmental Law is generally funded by the *Fund for Environmental Compensation* (art. 34). A special class action statute has been introduced in the Argentinean Congress, but it has not been approved as of yet.

Mexico, Peru, and Uruguay

The passage of Brazil's CDC served as inspiration to other Latin American countries interested in expanding their consumer protection systems and adopting procedural remedies for the defense of individual and collective rights. To this date, the majority of the Latin American countries have legislation that protects collective rights to various

degrees, but aside from the cases of Brazil, Colombia and Chile, none have implemented special procedural rules for representative litigation. The tendency is to use Amparo proceedings as the way to obtain declaratory and injunctive relief. Regarding the latter, Mexico has established an injunctive relief action for environmental protection in its General Statute for Environmental Protection and Ecological Balance (1988). Standing to sue is vested on the General Prosecutor's Office, which acts on behalf of groups of victims that are in turn allowed to participate in the proceedings as party intervenors. A similar action is established in the Federal Law for Consumer Protection (1992).

Peru and Uruguay have similar provisions regarding environmental protection, as well as the preservation of historic and cultural assets. These two countries mention the protection of these collective rights in their Codes of Civil Procedure (Peruvian Code of Civil Procedure, art. 82; Uruguayan General Procedural Code, art. 42) but fail to develop the actions geared to protect them, which has led plaintiffs to rely on traditional forms of litigation, or judicially-developed Amparo proceedings.

Endnotes

¹ In defining *Latin America*, I follow the common usage of the term, which considers as such the region comprised by the twenty countries of the American continent where Spanish and Portuguese language is widely spoken and that share common historical roots as former Spanish and Portuguese colonies. These countries are: Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Cuba, Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Puerto Rico, Uruguay and Venezuela. In spite of its common historical and cultural roots with the rest of the region, we have excluded Puerto Rico from our study in light of its inclusion as part of the legal system of the United States.

² See, Brazil, Consumer Defense Code, Federal law 8078-90.

³ See, Chile, Public Act 19,955 of 2004.

⁴ See, Colombia, Act 478 of 1998 enacted to develop article 88 of the Political Constitution of Colombia with regard to the use of Popular and Group Litigation.

⁵ It is important to mention, however, that on April of 2007 a Class Action Statute was introduced for discussion in the Argentinean Congress. Notwithstanding, this bill has not been passed as of yet.

⁶ A process that can be traced back to Justinian's *Corpus Iuris Civilis*, and more recently to the *Code Napoleon* (1804), which exerted direct influence on virtually all the national civil codes adopted by the then newly-formed Latin American nations during the nineteenth century.

⁷ These *interdictos* are remnants of ancient Roman law, and were adopted in Latin America by way of the European civil codes that served as their model.

⁸ Cite, Latin American Codes. This is similar to the "permissive joinder" established in rule 20(a) of the Federal Rules of Civil Procedure.

⁹ See, Constitutions of Argentina (1994), Bolivia (1967), Brazil (1934), Costa Rica (1989), El Salvador (1991), Guatemala (1985), Honduras (1982), Mexico (1917), Nicaragua (1987), Panama (1983), Paraguay (1992), Peru (1993), Uruguay (1984), and Venezuela (1999).

¹⁰ Some Latin American constitutions have recently included a mechanism specifically intended to protect the right to privacy and handling of personal information (*habeas data*), which -with the exception of Argentina. See, Constitution, Art. 43- is treated separately from the Amparo, in spite of their similarity.

See, Brazilian Constitution, art. 5; Paraguayan Constitution, art. 135; Peruvian Constitution, art. 200, section 3; Ecuadorian Constitution, art. 95; Colombian Constitution, art. 86; and Venezuelan Constitution, art. 27.

¹¹ These are, the Constitutions of: Argentina (art. 42), Brazil (art. 5), Colombia (art. 78), Costa Rica (art. 46), Ecuador (art. 92), El Salvador (art. 101), Guatemala (Art. 119, 130), Honduras (art. 331, 347), Nicaragua (art. 105), Panama (art. 279), Paraguay (art. 72), Peru (art. 65), and Venezuela (art. 117).

¹² Unfortunately, there are no reliable data to tell us exactly how many cases are filed in a given period of time, where are these plaintiffs from, and more importantly, if filing their claims in the U.S. is really paying off.

¹³ Article 12. National or foreign manufacturers, producers, constructors, and importers are liable, regardless of the existence of culpability, for the redress of damages caused to consumers by defects from design, manufacture, construction, assembly, formula, handling, presentation or packaging of products, as well as for the improper or incomplete information about their use and risks.

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