Class Action in Brazil: Overview, Current Trends and Case Studies

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and

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1. Introduction

The objective of this article is the critical analysis of the primary tool for collective rights defense in Brazil: the class action lawsuit that is part of the Brazil's microsystem for collective litigation.[2] The key question is whether the country's class action system has satisfactorily served its purpose of deterring and punishing rights violations by large businesses in Brazil. Our hypothesis is that such tool has proved insufficient as a remedy for infringements of the rights of third parties (consumers, workers, investors, and even government organs) by private companies.

For the benefit of an international readership, the article will start by briefly outlining the Brazilian judicial system. This will include explanations of the relevant instruments necessary for an understanding of the procedural dynamics of major collective litigation in the country. In order to test our hypothesis, we present two case studies (in the fields of telecommunications and pharmaceuticals).[3]

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[2] There exist both general and special types of class actions in Brazil. General class actions are the subject of this analysis. They are the ones that most resembles its United States counterpart and that are designed for the reparation of harms caused by large private and public organizations. Types of special class action lawsuits include the Direct Action of Unconstitutionality (Ação Direta de Inconstitucionalidade or ADI), Claim of Non-Compliance with a Fundamental Precept (*Arguição de Descumprimento de Preceito Fundamental* or ADPF), Declaratory Action for Constitutionality (*Ação Declaratória de Constitucionalidade*, or ADC), the Direct Action of Unconstitutionality by Omission (*Ação Direta de Inconstitucionalidade por Omissão*), and collective writs of mandamus or injunction (*Mandado de Injunção Coletivo* and *Mandado de Segurança Coletivo*), among others.

[3] For a more detailed treatment of the case study on residential telephone service fees, see the doctoral dissertation of Helena Refosco, published in Portuguese under the title *Ação Coletiva e Democratização do Acesso à Justiça* (2018).

2. The Legal Regime for Class Actions in Brazil

Brazil is a federal state in which national and state court systems coexist with specialized bodies (labor, electoral and military courts). Legislation regulating procedural law is incumbent exclusively upon the federal government.[4] As a general rule, cases involving national interests, authorities and state-owned enterprises are adjudicated in federal courts and the rest fall to state courts. Both state and federal courts handle class action lawsuits. The structure of the legal system is the same in all of the branches of the judicial system. Cases first go to courts of first instance (the equivalent to trial courts in common law systems) where single judges hand down decisions. Appeals go to courts of second instance (appeal courts) in which panels of judges review the initial decision. After the initial appeal, some cases may go to the Superior Court of Justice (*Superior Tribunal de Justiça*, usually referred to by its acronym STJ), whose primary responsibility is reviewing the legal reasoning, not the facts, of the case to make sure federal legislation has been interpreted correctly. Lastly, the Supreme Court (*Supremo Tribunal Federal,* or STF) serves the dual purposes of court of final review and constitutional court in Brazil. The 1988 Federal Constitution established this structure.[5]

A military dictatorship that severely restricted the exercise of civil and political rights ruled Brazil from 1965 until 1985. A relevant question is whether the transition back to democracy that started in earnest with the promulgation of the 1988 Constitution has been achieved or whether the process that has now lasted three decades continues to unfold slowly.[6] It could be argued, relying on the theory of pact-making among elites elaborated by O'Donnell and Schmitter to illustrate the transitions from authoritarian to democratic regimes,[7] that only the pact involving the military leaders was fully achieved in Brazil, leading to the end of military rule and the transfer of political power from the military to the political class. As a result, the 1988 Constitution represents a partially realized political pact, and there is no economic pact to speak of, for that would require significant reduction in economic inequality since the return to democracy, which has not occurred.

[4] Article 22, I of the Federal Constitution.
[5] Articles 92 and 126.
[6] *See* Carlos Portugal Gouvêa, *Presidential Supremacy and Democracy in Latin America: Introducing the Problem of Social Inequality in Institutional Design*, 28 Revista da Faculdade de Direito do Sul de Minas 27 (2009).
[7] We use the term 'pact making among elites' in the sense proposed by Guillermo O'Donnell & Philippe Schmitter, *Transitions from Authoritarian Rule: Tentative Conclusions about Uncertain Democracies* (1986).

Social demand for participation and democratization at the beginning of the political transition led to the 1985 Law of Public Civil Action (Lei da Ação Civil Pública, or LACP).[8] Its purpose was to incorporate into the Brazilian legal system mechanisms for collective rights defense against violations by private actors, mechanisms that were subsequently reinforced by the 1988 Constitution. Before 1985, only the limited mechanisms established by the Law of Popular Action protected collective rights.[9] Ironically, 'popular actions' provided only a legal tool to prevent harmful actions committed by government bodies, but not those carried out by private agents. Yet, the Law of Popular Action is still relevant because the current law is interpreted analogically and used to regulate aspects of procedural law for collective litigation in general. From it comes, for example, the 5-year statute of limitations for class action lawsuits.[10]

The Brazilian law drew inspiration from the U.S. class action, albeit indirectly, via Italy,[11] and was more limited in scope. That is because the LACP initially designed the instrument to deal with collective action in specific areas. The law was gradually amended to cover any diffuse or collective interest, and also more specific issues, such as urban policies, racial, ethnic or religious issues, and the protection of historic and cultural patrimony.

The system for collective rights defense that the LACP created was eventually complemented by the Consumer Defense Code (CDC)[12] that Brazil implemented in 1990. Despite the name's suggestion, this law established regulations related to all collective procedures, not only those related to consumer demands. The code unnecessarily divides collective rights into three categories: diffuse, collective, and 'homogenous' individual rights.[13] This division does not derive from the United States class action system and will be thoroughly criticized in the first case study.

The Federal Constitution of 1988, promulgated following the restoration of democracy in Brazil, expanded and placed much importance on the collective protection of rights. It broadened

[8] "*Lei da Ação Civil Pública*," Federal Law No. 7.347 of July 24, 1985.
[9] "*Lei da Ação Popular*," Federal Law No. 4.717 of June 29, 1965.
[10] This understanding was forged during an episode of intense, repetitive litigation related to measures implemented by the government to halt hyperinflation in the 1990s. Still, its jurisprudential grounding remains unsettled, for the Superior Court of Justice has recently overruled this understanding (Special Appeal No. 1.736.091/PE, Rapporteur Justice Nancy Andrighi, 14 May 2019). In any case, the Superior Court of Justice has yet to clarify whether the filing of a class action suspends the statute of limitation for individual claims. The question was raised during the wave of litigation mentioned, yet the Court has not provided an unequivocal answer. *See* Helena Campos Refosco, *Ação Coletiva e Democratização do Acesso à Justiça* 266 (2018).
[11] Antonio Gidi, *A Class Action como Instrumento de Tutela Coletiva dos Direitos: as Ações Coletivas em uma Perspectiva Comparada* 17 (2007).
[12] Law No. 8.078 of September 11, 1990.
[13] Article 81 of the CDC.

the range of available legal recourse in addition to bestowing constitutional rank on the general class action and some of the special class actions. The Constitution also granted general standing for associations and trade unions to litigate for the rights of their associates and the professions that they represent.

The Constitution also endowed citizens with new rights against government interference, contributing to a rise in litigation. In the 1990s, the Constitution was amended to legalize the privatization of important public utilities (telephone service and electric power, among others). Once privatized, these fell under the purview of new regulatory agencies. The regulated services also led to a significant rise in litigation—a dynamic exemplified in the first case study examining disputes over telecommunication services. These developments contributed to a crisis of legitimacy for the country's judiciary. The ensuing flood of lawsuits, some of which still await resolution, severely aggravated the backlog of unresolved cases in Brazilian courts.

Hence, at the outset of the twenty-first century, influenced by the World Bank's Justice Reform directives,[14] Brazil initiated an ambitious project for judicial reform. Although one of those directives called for an overhaul of the class action system in order to streamline and unify it,[15] ultimately the procedural reforms were limited to improving the system for adjudicating individual claims, primarily by reinforcing the binding nature of precedents. Many still believe that the system for adjudicating collective claims must be improved, but there is no consensus on what exactly should be modified.

Reforming the system for collective right defense could help reduce the staggering judicial backlog in Brazil. According to official data, in Brazil, a country with 210 million inhabitants,[16] "[the] Judicial Branch ended the year 2017 with 80.1 million cases pending final judgment."[17]

Moreover, Brazil is a country of stark inequality[18] where completely distinct social and economic systems operate for different sectors of the population. By consequence, the systematic exclusion from the enjoyment of basic rights leads to the paradoxical situation in which access to

[14] *See* Helena Refosco, *supra* note 9 at 39-112

[15] Brazil, *Segundo Pacto Republicano de Estado por um Sistema de Justiça mais Acessível, Ágil e Efetivo* (2009), http://www.planalto.gov.br/ccivil_03/Outros/IIpacto.htm. See directive 3.2.

[16] Source: Brazilian Institute of Geography and Statistics – IBGE, https://www.ibge.gov.br/apps/populacao/projecao/index.html (last access 12 June 2019).

[17] Brazil, *Justiça em Números 2018: ano-base 2017* 73 (2018).

[18] According to figures from the World Bank, the Gini coefficient for Brazil in 2017 was 53.3, which places the country among the most unequal countries in the world and the most unequal country with a similar level of industrialization. *See* https://data.worldbank.org/indicator/si.pov.gini.

the court system is effectively blocked for much of the population; it nevertheless remains flooded to the point of paralysis with litigation.[19] On one side, it is overloaded with lawsuits related to the public, banking, and telecommunication sectors. These are indicative of regulatory difficulties[20] and defective institutional design that combine to incentivize individual claims. On the other side, especially in the area of consumer protection, access to the justice system is extremely restricted. Brazil possesses a Public Defender's Office that provides free legal assistance to needy individuals in both state and federal courts, but the provision of legal assistance alone does not render the justice system accessible. The cost of access to the courts goes beyond lawyer's fees and retainers. Even for people whose income is above the threshold for free legal assistance, the cost of transportation, missing work, and other expenses are often determinant impediments.[21]

The sluggishness of the judiciary is also constantly mentioned as a factor that discourages them from bringing their disputes to court.[22] Taken together, it becomes clear that, despite the judicial backlog, access to the court system is deficient, which should be deeply troubling for any democracy.

The figures suggest that streamlining the system is necessary, especially with regard to class actions. Lawyers in private practice could contribute to a solution, but, unfortunately, the current system does not provide sufficient incentives, particularly in terms of remuneration, for lawyers to take up class action lawsuits.

The virtual lack in the Brazilian legal system of an equivalent to pretrial discovery also complicates the situation. The Public Prosecutor's Office (*Ministério Público*), at both the federal and state level, is the only institution with the capacity to request information before filing lawsuits using a tool called the 'public civil inquiry' (*inquérito civil público*). Although this tool has become prominent in the Brazilian class action system,[23] the institutional design that confers it to the Public

[19] The research project "Panorama do Acesso à Justiça" (Panorama of Access to Justice) provides a portrait of the exclusion in which the poor and least educated either do not know that courts can help resolve their conflicts or do not seek access to the courts because of factors such as distance, fear, or expense. Brazil. Conselho Nacional de Justiça, *Panorama de Acesso à Justiça no Brasil, 2004 a 2009* 14 (2011), http://www.cnj.jus.br/images/pesquisas-judiciarias/Publicacoes/relat_panorama_acesso_pnad2009.pdf.

[20] For instance, in the banking área, *see* the doctoral thesis of Jean-Paul Veiga da Rocha, *A Capacidade Normativa de Conjuntura no Direito Econômico: o Déficit Democrático da Regulação Financeira* (2004), http://www.teses.usp.br/teses/disponiveis/2/2133/tde-12022015-204835/pt-br.php.

[21] *See* Helena Refosco, *supra* note 9 at 129.

[22] Luciana Gross Cunha et al., *Relatório ICJ Brasil - 2º e 3º trimestres / 2014* 13 (2015).

[23] Sociedade Brasileira de Direito Público - SBDP, *Ações Coletivas no Brasil: Temas, Atores e Desafios da Tutela Coletiva* (2017).

Prosecutor's Office alone limits the options of other actors with the legal standing to make collective claims, as will be demonstrated in the case studies. For if the Public Prosecutor's Office does not take interest in a particular class action lawsuit, or simply botches the lawsuit, the private agents involved in the defense of their rights are left with few means to impel the judicial process.

Another facet of the Brazilian legal system that does not directly relate to collective rights defense but does have a direct impact on it is the absence of punitive damage awards. Punitive damage awards could be the most efficient means to deter offenders with ample economic power and would furnish the incentive missing for private lawyers and potential plaintiffs to pursue collective claims in court because the chances of obtaining a significant punitive damage award are much greater with a single class action than through multiple individual lawsuits. In Brazil, however, civil responsibility is almost strictly compensatory and is therefore substantially limited to the calculation of actual harm caused.[24]

From this general overview of the Brazilian system, we will move to the case studies in which other facets of class action lawsuits in Brazil will be examined more deeply. To avoid repetition, more thorough attention will be given to the first case study on residential telephone service fees than on the second case study on abusive pricing by government pharmaceutical suppliers. We selected litigation pertaining to residential telephone service in order to illustrate the obstacles that hinder collective litigation amassing private individual claims, whereas we chose the case of abusive pricing of pharmaceuticals to illustrate the obstacles that are present in collective litigation led by the Public Prosecutor's Office.

3. Residential Telephone Service Fees

3.1 The Background behind Lawsuits Challenging Service Fees

As was mentioned earlier, under the leadership of President Fernando Henrique Cardoso, a wave of privatization swept Brazil in the 1990s, the telecommunications sector included. As a result, it became necessary to create independent regulatory agencies, such as the National Agency of Telecommunications, or Anatel, as it is known in Brazil. Establishing the fee structure for telecommunication services was one of the competences attributed to Anatel.[25] Prices for local

[24] Articles 927 and 944 of the Civil Code.
[25] Article 103 of Law no. 9472/1997.

phone calls and basic landline service rose dramatically between 1994 and 2004,[26] at a pace approximately double the rate of inflation (according to the data of IPC-10 and IGP-DI gathered by the Getulio Vargas Foundation).[27]

In 2003, President Luiz Inácio Lula da Silva took issue with the contractual provisions for fee adjustments following the IGP-DI,[28] because he considered this index abusive. His Minister of Communications instructed Anatel to freeze the fee at the current rate until a new agreement with the phone companies could be reached, one that would be fair and in line with the public interest and include as a parameter a different consumer price index, the IPCA.[29] The president of the regulatory agency, believing the contract with the suppliers was clear in this regard, ignored the instructions and authorized the fee increase. Because of his action, the issue was no longer merely the reduction or increase in the fee. The move called into question the very legitimacy of the regulatory agency and the stability of telecommunications regulatory policy. The ensuing reaction of the Minister of Communication helped push the dispute into the courts,[30] as his report explicitly criticized the fee structure for impeding universal access to telephone service by permitting excessive manipulation of the subscription fee, "an item that weighs heavily on the monthly budget of low-income clients".[31]

Starting in 2004, the number of lawsuits challenging the subscription fee for residential telephone service rose exponentially. Thousands of consumers filed lawsuits in the state of São Paulo alone, in addition to 26 collective claims.[32] Although some of these cases are still being processed in the court system, the litigation hit its peak between 2004 and 2008.

[26] Kazuo Watanabe et al., *Tutela Judicial dos Interesses Metaindividuais: Ações Coletivas* (2007).
[27] Luciano dos Santos Danni, *Análise do Efeito das Reformas Regulatórias e Privatização dos Serviços Públicos no Brasil – Eletricidade e Telefonia*, in *Regulação de Serviços Públicos e Controle Externo* 416 (2008).
[28] This is the General Price Index (*Índice Geral de Preços - Disponibilidade Interna*) calculated by the Getulio Vargas Foundation.
[29] IPCA stands for *Índice Nacional de Preços ao Consumidor Amplo* and is calculated monthly by the Brazilian Institute of Geography and Statistics (IBGE).
[30] Minister Teixeira disagreed with the decision of Anatel and accused the regulator of surrendering to the phone service suppliers. He went on to suggest that unhappy citizens challenge the fee increase in court with the help of civil society organizations. Text available in Portuguese at http://www1.folha.uol.com.br/fsp/dinheiro/fi0211200420.htm.
[31] Kazuo Watanabe et al., *supra* note 26.
[32] *Id.*

We selected this cases study because of its relevance in terms of the telling quantity of individual and class action lawsuits adjudicated[33] and the number of practical problems that the contentious litigation reveals.

3.2 Applicable Jurisdictional Factors

An example of the practical problems faced has to do with the Brazilian federal system and how it complicates court jurisdiction and legal standing of the parties in class action lawsuits. Because individual claims oppose consumers to the telephone companies, there is no perceived need for the regulatory agency to participate as a passive defendant in the lawsuit. In the case of a class action, however, added difficulty results from the transposition from the individual to collective claim context. In this case study, after many years of class action litigation, throughout which the actions and documents were forwarded to federal courts on the understanding that Anatel was a party to the lawsuit, the STJ reversed this understanding, declaring the regulatory agency's inclusion illegitimate, on the grounds that the ruling on the class actions would not directly affect Anatel's interests.

The STJ's ruling disregards the fact that, if the class action challenges the policy for fee structuring that pertains the technical competence of the regulatory agency, it is important for the agency to participate in the trial. Its participation adds an extra level of expertise to ensure the best legal decision is taken. Its participation also increases the chances of reaching a satisfactory agreement whose terms can be incorporated into policy to improve the norms in the sector.[34] It is worth noting that the STJ, in later cases unrelated to the ones in question here, adopted conflicting positions regarding Anatel's passive participation in class action lawsuits.[35] Up to now, no binding

[33] In the state of São Paulo alone, 95,000 individual claims have been filed since 2005 in addition to 25 class action lawsuits. Id. at 74.

[34] Lawsuits should improve market dynamics by serving an important regulatory function. They can even be useful to the regulatory agency itself, which often confronts limits on its power and competences. In cases where the lawsuit challenges non-compliance with regulations, the regulator should support the collective action since its own capacity to oblige compliance with the regulation is clearly limited by economic and political factors. Moreover, a study of class action lawsuits has revealed that business leaders in the United States rethink and revise their practices when challenged by lawsuits that they believe have merit (*see* Deborah Hensler et al., supra note 64 at 119). The creation of an institutional space for debate over companies' business decisions and regulatory policies issued by governmental agencies should be contemplated, for the lack of such a forum is keenly felt in Brazil and is an indication of its institutional immaturity. Businesses and regulators alike need a legal forum to carry out tests of proportionality and gauge the reasonableness of their actions—especially in terms of motives and effects yet without disregarding the technical aspects of the law.

[35] *See*, e.g., "*Agravo Regimental*" at Special Appeal 1502179/PE, Rapporteur Justice Herman Benjamin, 19 December 2016.

precedent regulates this important mater, nor do the previous decisions on the subject offer a consistent interpretation.

The structuring of the Brazilian federation into 26 states and a federal district also compounds the uncertainty regarding collective litigation. There is an ambiguous norm that requires decisions in civil class actions to be *erga omnes*, applicable to all, **within the limits of the territorial competence of the deciding court**, except when the claim is deemed groundless for lack of proof, in which case any legitimate party may undertake another lawsuit with an identical claim after gathering the necessary evidence.[36]

The reference to the "limits of territorial competence" was inserted in the law by the federal government to attempt to limit the potential consequences of the litigation for the federal treasury.[37] The norm thus appears to limit the effective scope of the decision in a class action to the territorial jurisdiction of the court that issues it—which if true would generate endless debate over the exact confines of that territorial jurisdiction, given the multiplicity of administrative boundaries in the Brazilian court system. This would deprive Brazilian class action lawsuits of any national efficacy despite the material harm done at the national level and, in fact, the norm is considered null in most of the Brazilian jurisprudence.[38] Unfortunately, in this case the STJ applied the ambiguous norm criticized here, unduly limiting the reach of the class action lawsuits, as will be shown in the following section.

3.3 Dysfunctional Procedural Categorization in Class Action Lawsuits

In section 2, we mentioned the ontological categorization of collective rights into three types introduced by the CDC. This segmentation, non existent in the United States system,[39] compartmentalizes the rights, which makes their comprehension and treatment in the collective process more difficult. The added difficulty it creates for defending homogenous individual rights—rights that the law considers divisible and thus justiciable through individual claims, as in

[36] Article 16 of the LACP.
[37] Law No. 9.494 of September 10, 1997 appended the norm in question to the LACP.
[38] This is because the law in question was limited to modifying Article 16 of the LACP, not Article 93 of the CDC, which regulates class actions for harms caused at the national level. *See* Daniela Monteiro Gabbay, *Ações Coletivas e Contencioso de Massa: o Caso da Assinatura Básica de Telefonia Fixa* 125, in *Estratégias Processuais na Advocacia Empresarial* (Carlos Alberto Carmona & Sidnei Amendoeira Junior eds., 2011).
[39] Antonio Gidi explains that the existent categories in American civil procedure law are "eminently pragmatic" and bear no resemblance to the abstract categories contemplated in Brazilian law that employs the concepts of diffuse rights, collective rights, and homogenous individual rights. *See* Antonio Gidi, *supra* note 10 at 15.

the present example where residential telephone service fees are paid individually—has serious practical repercussions.

Concretely, there was a controversy about the jurisdiction that should adjudicate the class national level actions. Initially, the STJ categorically granted the suspension of all the lawsuits pending their urgent resolution in the federal court in Brasília, whose competency it reaffirmed.

At the final ruling, however, the majority opinion, referring to the divisibility of the individual homogenous rights and the preeminence of the individual claims over the collective claims, maintained that the class actions were completely independent from each other and from the individual claims. The opinion refuted both any sort of aggregation of the claims and the suspension of the individual claims unless solicited by the individual plaintiffs themselves. The court also stated the inadequacy of the procedural instrument used to provoke it to decide on the issue.

It is worth clarifying that that, unfortunately, there is no certification of the class action in the Brazilian civil procedure. In practice, this means that there is persistent uncertainty about the boundaries of the lawsuit, whether in terms of the classes of people affected by the outcome or the territories in which the beneficiaries are situated. In the present case, an inappropriate device was used to define the scope of collective action precisely because of the lack of an instrument that would allow such delimitation at an appropriate time.

Regarding the merits of the decision, it is important to note that the STJ subsequently ruled that, in the case of repetitive lawsuits related to the anti-inflationary measures that were part of the government's economic policy, individual claims could be suspended ex-officio.[40] This innovation was grounded in the allegation that treating a collective dispute as a "macrodispute" justified suspending, albeit ex-officio, individual claims until a collective resolution applicable to the conflict underlying all the claims could be reached. This change, which has not been adopted in all similar circumstances, should be incorporated explicitly into legislation along with the adoption of a general rule for limited suspension of individual claims. The foreseeability provided by the *a priori* establishment of the one-year term for the suspension of individual claims would be positive and consistent with the term contemplated in Articles 980 and 1037 section 4 of the Brazilian Civil Procedure Code.[41] This period of time during which the individual claims are suspended should

[40] STJ, Special Appeal No. 1.110.549 – RS, 2nd Panel, Rapporteur Justice Sidnei Beneti, 28 October 2009.
[41] Federal Law No. 13.105 of March 16, 2015.

also be open to extension in substantiated, exceptional cases. The rule for limited suspension of individual claims balances (i) the public interest in prioritizing the class action because it economizes scarce public resources that are otherwise consumed adjudicating the individual claims with (ii) the private interest in obtaining a judgment in individual claims in accordance with the constitutional guarantee of a timely trial.

Returning to the case study, the majority opinion did not only rule against suspending the individual lawsuits while the class actions were processed. It went on to state that, since the protection of homogenous individual rights was at stake, both the nature of the plaintiff[42] and the territorial limits of the court's competence restricted the reach of the class action, such that the decision of each judge would only comprise *res judicata* in their administrative area.

The categorization of collectively actionable rights adopted by Brazilian law has no practical utility and should be eliminated. In addition to the countless practical difficulties it introduces, it requires personal interpretations of the nature of the "homogenous" individual rights in question. This weakens the collective mechanism for rights protection, effectively reducing access to justice. The truth is that, regardless the elegant attempt to separate collectively actionable interests into categories, in practice there is inherent tension between collective and individual interests no matter what the interest is. The perspectives vary in accordance with the values of each individual and even with time, making the attempt to construct a framework for them futile.

Fortunately, with specific regards to the rule limiting the subjective reach of decisions applicable to homogenous individual rights, the STJ took up the matter again in the following years. It ended up modifying the decision just described, ruling the norm ineffective in a binding precedent[43] for all the Brazilian judiciary to follow.[44]

It is hoped that further retrogression in this matter will not occur, because the absence of clear criteria for competence and the scope of *res judicata* has seriously damaged the credibility and the

[42] A municipal government office, following this reasoning, could not represent anyone who did not live in that municipality.

[43] According to the STJ, the former restrictive interpretation voided the practical utility of the class action and blurred dissimilar concepts, for territorial competence limits the exercise of jurisdiction, not the effect or efficacy of a decision, which, as is commonly known, relate to the limits of the dispute and the legal questions decided.

[44] The STJ ruled on the question of repetitive litigation in Special Appeal No. 1243887/PR on 19 October 2011. Repetitive appeals are those that reflect a multiplicity of extraordinary or special appeals (appeals that can be lodged after the first or second appeals have been denied) that are based on an identical legal question. While they are considered, all pending trials, individual or collective, that impinge on the legal question in the national territory are suspended. The ruling of the high courts (STJ or STF) then has the force of binding precedent to be applied throughout the Brazilian judiciary (Articles 1036-1041 of the Civil Procedure Code).

proper operation of the class action system. Legislation establishing clear, broad criteria for competence and *res judicata* would instill collective litigation with greater legal certainty.

3.4 Procedural Promptness, Priority and Aggregation in Class Actions

In terms of trial speed, class actions make their way through the legal system much more slowly than individual claims. Perhaps it is because of the doubts they provoke (notoriously with regard to the competence to adjudicate them, as described above), or perhaps it is because they are given less priority. In 2007, when the STJ handed down the first binding precedents affirming the legality of the basic subscription fee for residential phone service,[45] the class action lawsuits were still in trial courts (courts of first instance).[46]

In the dissenting opinion, STJ Justice Herman Benjamin commented on the impropriety of the judiciary's handling of the lawsuits. He criticized the decision to use an individual claim, filed by a vulnerable consumer, as the basis for the precedent it established, which ran counter to the welfarist spirit of the 1988 Constitution. Even though the Court was aware of class actions on the same question, it inverted the logic of the collective system and, instead of using a class action to determine a claim preclusion *erga omnes*, took up an individual claim out of pragmatic expedience. Justice Benjamin pointedly observed the paradox of using an individual claim—a context that favors extremely powerful defendants accustomed to litigation (the telephone service provider)—as the basis for a ruling that effectively precludes the claims of thousands of other individual and collective lawsuits against the same entity.

Justice Benjamin emphasized the significance of the strategy deployed by the defendant, a repeat player,[47] and the advantages it perceived from the choice of an individual claim. He declared that the favorable ruling had more to do with strategy than merit, complaining that the decision was legal in its form but that it, whether intentionally or not, had the effect of impairing both access to justice and debate over the legal question. Benjamin's opinion demonstrated the defects of the institutional design for the resolution of collective claims in the Brazilian system. Prioritizing class actions could mitigate the problem and would also be appropriate because the decision in a class action lawsuit covers a collective claim, not only a demand by a single individual. Moreover,

[45] STJ, Special Appeal No. 911.802/RS, 1st Panel, Rapporteur Justice José Delgado, 24 October 2007.
[46] Kazuo Watanabe et al., *supra* note 26 at 73.
[47] For understanding the concept of repeat players and one-shotters, *see* Marc Galanter, *Why the 'Haves' Come out Ahead: Speculations on the Limits of Legal Change*, 9 Law & Society Review 95, 121 (1974).

giving preference to class actions would encourage other potential plaintiffs to wait for the judiciary to rule on the more complex case before deciding whether to file an individual claim. Conceding priority in such circumstances is not unheard of in the Brazilian judicial tradition,[48] and should be clearly determined by the law.

Furthermore, class actions with national applicability should be aggregated and adjudicated together, in order to combine the strengths and arguments of the plaintiffs. Doing so facilitates the defense of collective interests and does not prejudice those of defendants. Divergent or inconsistent decisions in class actions affect more people and thus their effect is potentially more noxious than divergent decisions in individual lawsuits. Plainly, whenever possible, all lawsuits involving collective rights, including those pertaining to the already criticized category of homogenous individual rights, should be combined and considered together.

The same reasoning cannot be applied to individual disputes, however, because of the difficulty it would create for plaintiffs scattered across a country as large as Brazil, that are entitled to facilitated defense of their interests as consumers and vulnerable individuals. Therefore, in order to attend to the interests of parties in lawsuits who lack sufficient means, assigning competence to a local court to try individual claims is justified.

3.5 Notification, Incentives and the Institutional Design of Class Actions

This case sheds light on the notification requirements and institutional incentives established by Brazilian law to bring class actions.

Class action notice, in Brazil, is primarily confined to official publications that reach a limited public almost entirely comprised of legal professionals.[49] In our case, this restricted publicity of the class actions was insufficient for interested parties to join while the lawsuit was still underway. Information about the class actions was missing even within the primary institutions representing the plaintiffs. The Public Prosecutor's Offices that had filed some of the class actions could not provide accurate or reliable information regarding the number of class actions filed or the subject

[48] Article 1037, Section 4, of the Civil Procedure Code establishes that repetitive extraordinary or special appeals, as well as habeas corpus, have priority over other appeals.

[49] Article 94 of the CDC stipulates that once a class action is filed, an announcement must be published in the official outlet so that interested parties can join as co-plaintiffs without the burden of ample disclosure through social media for consumer defense organizations.

matter of the litigation.[50] What this case shows is that the institution most involved in the Brazilian class action system—the Public Prosecutor's Office—does not dispose of internal controls for the class actions filed by its officials.

At the time, official registries that potentially interested parties could consult for information about class actions did not exist. Currently there is a provision for the National Registry of Collective Actions contemplated in the Joint Resolution from February 2011 by the National Council of Justice (CNJ) and the National Council of the Public Prosecutor's Office (CNMP). The data that would permit the registry to perform its function, however, has not been entered.[51] Fully implementing the registry is fundamental for not only improving the administration and management of the lawsuits but also so that citizens can follow the lawsuits that interest them, learning about the process and decisions and restraining from filing unnecessary individual lawsuits.

In contrast to the difficulty of finding information about class actions, the possibility of filing individual claims was duly disclosed. The case study reveals that lawyers interested in representing individual plaintiffs broadly publicized the supposedly high chance of success of these lawsuits through several communication media.[52] The disparity between the publicity given to individual and class action lawsuits calls attention to the difference between the financial incentives behind each.

As a rule in Brazil, except in cases where the beneficiary receives free legal assistance, each party bears its own share of the costs and actions as the lawsuit plays out. For example, each party pays the honoraria of the expert witnesses it chooses to call to testify. Whoever loses the case is responsible for the court fees, which correspond to the costs and expenses covered by the winning party as well as the lawyers' fees and are determined by the judge following the criteria established

[50] Kazuo Watanabe et al., *supra* note 26 at 11. This study indicates that neither the Public Prosecutor's Office nor Brazilian courts dispose of the necessary information for an empirical analysis of the issue: *Id.* at 24. Civil inquiries represent the primary instrument for collecting evidence before a class action is filed. Conduct adjustment agreements are tools placed at the disposal of the Public Prosecutor's Office that allow them to engage and commit the interested parties to adjust their behavior in accordance with legal requirements through the threat of sanction.

[51] Unfortunately, instead of fully implementing this registry, the CNJ and CNMP decided to create new one, the National Observatory on Highly Complex Environmental, Economic, and Social Questions of Major Impact (*Observatório Nacional sobre Questões Ambientais, Econômicas e Sociais de Alta Complexidade e Grande Impacto e Repercussão*). It contains information about the class actions arising from two recent dam failures (the Fundão Dam and the Mina do Córrego do Feijão Dam, commonly referred to in the press as Mariana and Brumadinho). *See* http://observatorionacional.cnj.jus.br/observatorionacional/index.php (last access 9 July 2019).

[52] Kazuo Watanabe et al., *supra* note 26 at 76.

by the Civil Procedure Code.[53] If the case is settled, the parties are free to negotiate the division of the costs, court and lawyer fees according to their will.

For class actions, in contrast, the law waives the plaintiff's responsibility to cover the initial court fees, expert witness honoraria and any other expenses. Nor does the plaintiff have to pay the trial costs if the class action is dismissed — unless the court finds that a civil organization have acted in bad faith.[54] In the case of a successful suit, the law does not discuss the value to be paid to the lawyers representing the class action, nor does it contemplate settlement between the parties, except for conduct adjustment agreements approved by the Public Prosecutor's Office or when damages for acts of ethnic discrimination are assessed.

The lack of a clear rule regulating lawyer fees has meant that these tend to be fixed along the phases of the lawsuit. They are fixed in the first phase to compensate the lawyers for the preparatory phase that ends when the trial judge adjudicates the class action. In the event of the claim being granted, the judge issues a generic ruling that does not stipulate the value of the award for the co-plaintiffs nor the form of payment.[55] After this ruling, each of the aggrieved co-plaintiffs requests to the court the amount due to them in an specific incident – each of these claims can be contested by the defendant. The value of the lawyer fees is determined for each lawyer depending on the number of plaintiffs and incidents of wrongdoing they represented.

As is plain to see, Brazil's legal system remains bureaucratic and ineffective. This is compounded by the common understanding that it is necessary, even if the court grants the class action, for each aggrieved party to file individual claims specifying the incidents for which they are due because the awards are so general and ineffective. By consequence, much of what is gained by class actions in terms of efficiency and inclusion in the preparatory phase of the lawsuit is lost in the execution of the damage award, especially if the values involved are not significant. In the current system, collective awards are exceptional. They occur only when individual awards have already been handed down (which does not free a co-plaintiff from the need to contract a lawyer

[53] As a general rule, Article 85, § 2 of the Civil Procedure Code holds that lawyers' fees will be fixed between a minimum of ten and a maximum of twenty percent of the value of the award, of the economic profit perceived or, when measuring it is not possible, of the updated value of the claim, keeping in mind (1) the degree of diligence of the professional, (2) the location where the service was provided, (3) the nature and importance of the claim and (4) the work performed by the lawyer and the time required for it.

[54] Article 18 of the LACP contemplates only the hypothesis that civil organizations, and not public bodies, act in bad faith.

[55] Article 95 of the CDC simply states that, in the event of the claim being upheld, the award will be generic, and the defendant will be responsible for the harms caused.

to obtain their share of the collective award)[56] or if, after a year from the date of judgment, a number of the aggrieved parties compatible with the seriousness of the harm have not received their share. In that case, it may be solicited for the Fund for the Defense of Diffuse Rights (FDD).[57]

There are also a large number of subdivisions within the two primary phases of the class action process that, combined with the lack of clarity regarding lawyer fees already described, may explain why judges traditionally assign quite modest remuneration. The amount does not bear any relation to the potential or actual award, which further aggravates the lack of incentives for lawyers to take up collective causes.

3.6 Joining a Class Action

In Brazil, joining a class action depends on the object of the lawsuit and the category of the collective right involved—diffuse, collective, or homogenous individual rights.[58] As a general rule, favorable decisions benefit people who do not actively participate in the lawsuits as co-plaintiffs and definitely those who do. People who file individual claims upon learning of a class action, however, must request the suspension of their individual lawsuit in order to take part in the award of the class action.[59]

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[56] Article 98 of the CDC establishes that the execution of an award can be collective, when requested by the legitimate parties in accordance with the terms of Article 82, including victims whose awards were already determined, regardless other pending awards.

[57] Pursuant to Law No 9.008/1995, and Articles 13 of the LACP and 100 of the CDC, The FDD is the recipient of values derived, among other sources, from condemnations in class actions, and its resources must be applied in defense of diffuse and collective interests. Because it is a public fund, the use of resources depends on their inclusion in the federal budget. In the last seven years, the contingency reached 98.5% of the R $ 2.3 billion destined to the FDD. Recently, the Federal Court granted an injunction ordering the Union to stop contingenting FDD resources and to allocate all the money to the compulsory purposes (Case 5008138-68.2017.4.03.6105 of the 6th Federal Court of Campinas). Unfortunately, in the case of agreements with the Public Prosecution Service, especially in the Conduct Adjustment Terms, the destination for other entities has been understood as legitimate, which may raise doubts about any conflict of interest of those involved - in the same line of criticism that are made to cy pres in U.S. class action settlements (see, v.g., Wasserman, Rhonda. "Cy Pres in Class Action Settlements." S. Cal. L. Rev. 88 (2014)).

[58] According to Article 103 of the CDC, *res judicata* will depend on the result of the lawsuit and the nature of the right involved: if the right is diffuse, collective, or individual, *res judicata* will be (i) *erga omnes* unless the claim is dismissed for insufficient evidence, in which case anyone else with legal standing can attempt another lawsuit with the same argument using new evidence, or (ii) *ultra partes*, but limited to the group, category or class except when dismissed for insufficient evidence as described in (i), when involving the hypothesis contemplated in clause II of Article 81, or (iii) *erga omnes*, only if the lawsuit is granted, to benefit all the victims and their successors, in the hypothesis of clause III of Article 81.

[59] Art. 104 of the CDC.

Because of the difficulty of clearly distinguishing between the three categories of collectively actionable rights, ideally, the artificial and troublesome distinction should be abandoned and the regime for class actions unified. Moreover, a solution should be found for the disincentives that discourage people from taking part in class actions. One such disincentive is the risk that co-plaintiffs face if the class action is dismissed. Dismissal means that the judgment comprises *res judicata* for all of the co-plaintiffs, but not for people who abstained from joining as co-plaintiffs.[60] People who do not join the class action as co-plaintiffs thus obtain the benefit if the suit is successful but not the full disadvantage of an unsuccessful class action.[61] This design feature encourages passive free-riding over active participation in class actions.

Adopting the opt-out (or automatic inclusion) system would strengthen the class action by extending the reach of the decision to a greater number of people affected by a particular lawsuit. This system deserves serious consideration in Brazil. It serves the public interest (by facilitating compensatory awards for harm caused, creating disincentives for harmful behavior by large bureaucratic organizations and bolstering society's estimation of the legal system's effectiveness) and also the interests of repeat players, in that it offers an efficient path to global peace.

The opt-in system may be considered appropriate when certain conditions are present, for example, when the class size is small and its members easily identified to facilitate the sharing of information. Requiring an active attitude—an opt-in system—in order for members of a class to receive compensation for an illicit offense, however, aggravates a pre-existing defect of the Brazilian class action system: its low degree of effectiveness. As Richard Thaler and Cass Sunstein have shown,[62] people tend to adopt the attitudes that involve the fewest obstacles, a trait that discourages them from participating in class actions and deprives them from their benefits.

In the U.S., critics of the opt-out system focus on the co-plaintiff's lack of control over the lawyers representing the case and the risk of collusion or disadvantageous settlements to which companies agree in order to minimize their financial exposure, considering that, to a certain degree, the size of the class might actually endanger the solvency of companies.

[60] Article 103, § 2, CDC.
[61] Teori Albino Zavascki, *Processo Coletivo: Tutela de Direitos Coletivos e Tutela Coletiva de Direitos* (2005).
[62] Richard H. Thaler & Cass R. Sunstein, *Nudge: Improving Decisions about Health, Wealth, and Happiness* (2008).

Some countries have adopted systems that combine opt-out and opt-in class actions, the former being for residual cases in which the amount of damage per person is small.[63] In light of the purpose of this paper, which is to identify mechanisms to improve Brazil's class action system, priority should be given to aggregating the power of potential litigants, stimulating public debate and attaining better results in terms of damage awards. Hence, the opt-out system would remain preferable as a general rule. Future experience could provide valid exceptions to ground opt-in alternatives. But adopting a general opt-in regime would be extremely important to stimulate collective litigation in Brazil.

3.7 Evidence System

Another Brazilian system's deficiency that affected the outcome of the basic land-line phone subscription fees' litigation is the lack of an adequate system for the discovery of facts. This feature enabled the defendant, a repeat player, to argue that a decision in favor of the class action would cause the collapse of the telephone service or make it impossible for the providers to meet their obligations. In summary, since the system is based on the idea that all evidence shall be provided by the plaintiff, the defendant can present groundless claims without substantive proof, only to create a doubt with regards to the original claims of the plaintiff.

While such threats may often influence judges in practice, they are rarely backed-up by proof in lawsuits, especially in individual claims such as those that preceded the class action lawsuits against the increased residential telephone service fees. This is a major issue, since such individual claims may create negative precedents affecting the class actions filed with regards to the same issue. The idea that the full burden of proof lies on the plaintiff is clearly incompatible with the collective litigation system. Since in collective litigation it is clear that the public interest is at stake, and certain proof require very specialized knowledge, in individual cases, the idea that the burden of proof lies with the plaintiff is still very strong in case law. This creates what we will describe as being the "scarecrow strategy", which is to present a groundless argument, based, for example, on unsubstantiated economic allegations. The effect of such "scarecrow strategy" is to lead to a ruling for lack of proof, which may be effective in many cases in which the period of the

[63] This is the case in Denmark, Norway, Sweden and Israel. *See* Ada Pellegrini Grinover et al., *O Processo Coletivo nos Países de Civil Law e Common Law: Uma Análise de Direito Comparado* 240 (2nd ed., 2008).

statute of limitation might have already extinguished, transforming a ruling based on lack of proof on a definitive victory for the defendants.

The Brazilian legal system significantly differs from the United States system in terms of the expected role of the judge. In the U.S., it is expected that the judge will exert an active role in structural litigation, abandoning a passive judicial posture.[64] In Brazil, conversely, the general expectation is that the judge will take a passive role in the production of evidence, only deciding what proof is admissible or not, considering the documents, expert opinions and testimony provided by the parties in the lawsuit, regardless of the adequacy of representation – which the judge is not expected to supervise. The pre-trial discovery phase is also much more limited in scope in Brazil, besides being more formalistic, requiring close oversight by the judge.

The Brazilian system is thus prone to error in two important ways. The first involves the insufficient system for collecting evidence itself, and the second is the compounding effect of this defect on complex litigations. This second effect results from the complex play between individual and collective claims. Basically, individual claims with much more limited evidence, usually subject to the "scarecrow strategy" mentioned above, may be ruled first, and, as a result, impact negatively in the rulings applicable to class actions. Such problem becomes particularly clear in claims in which financial and economic considerations are central, such as in the case present case of the telephone service fee studied herein. In this particular case, as it will be analyzed in further detail below, an individual claim created the precedent for the decisions in all of the class actions, without taking into consideration the full economic implications of the decision by upholding the legality of the increase in the phone services fees.

3.8 Remedial Phase and Settlements

We have already expressed our criticism about the generic decisions in Brazilian class actions that require at least one, and, sometimes, more than one legal proceedings to make a class action effective. The multiplication of thousands of claims that ensues the generic rulings overwhelms the court system, slowing other legal proceedings. Moreover, overflowing dockets generally push the judiciary towards more conservative positions, reducing the prospect of driving social change

[64] *See* Fiss, Owen M. "Foreword: The forms of justice." Harv. L. Rev. 93 (1979); Chayes, Abram. "The role of the judge in public law litigation." Harv. L. Rev. 89 (1975).

through the courts.[65] The legislator, as the "architect of options,"[66] must consider the incentives that the institutional design (or its flaws) creates in the interest of favoring legal debate in the broadest sense. The impact of the system's pull towards conservativism is especially felt in consumer law, for modern society is increasingly reliant on contracts of adhesion whose bias towards large corporations has been upheld by the courts.

In the U.S., there is always the promise of a comprehensive agreement that can serve as an incentive for the company to accept settlements that benefit the group. This global agreement does not threaten to unleash a storm of similar lawsuits as often occurs in Brazil when a class action is successful. In Brazil, there are limited possibilities for out-of-court settlements to class actions.

A notable exception occurred in 2017 in the context of the largest repetitive litigation in Brazil's history. Stemming from the unorthodox measures implemented by the government to combat hyperinflation in the 1980s and 90s,[67] the representatives of the plaintiffs and those of the banks (Febraban and Consif) reached and signed an agreement in 2017 through the mediation and with the approval of Brazil's Attorney General and Central Bank. The agreement determined the amount to be paid by the banks to savings account holders due to the deficient inflation adjustments that occurred as a consequence of the "Bresser," "Verão" and "Collor II" economic plans.

The agreement (i) set a 5-year statute of limitations for class actions, matching the Superior Court of Justice's decision in the case of the economic plans.[68] This ruling had overturned the

[65] For this argument, *see* Marc Galanter, *Why the 'Haves' Come out Ahead: Speculations on the Limits of Legal Change*, 9 Law & Society Review 95, 121 (1974); Kennedy, Duncan. A Critique of Adjudication [fin de siècle]. Harvard University Press, 2009.

[66] *See* Richard H. Thaler & Cass R. Sunstein, *supra* note 62.

[67] Various drastic economic measures were implemented during the 1980s and 90s to stave off hyperinflation, including the freezing of financial assets and personal bank accounts. According to the plaintiffs and their representatives, the percentage rate used by banks to determine how much money remained in their savings accounts following the measures was lower than it should have been.

[68] The STJ justified its change of opinion by noting the lack of any statute of limitations for class actions and recommended applying analogically the 5-year term contemplated in Article 21 of Law no. 4717/65 (Special Appeal No. 1.070.896/SC, Rapporteur Justice Luis Felipe Salomão, 4 August 2010). For contrary decisions, *see*: Special Appeal 200.827/SP, Rapporteur Justice Carlos Alberto Menezes Direito, 9 December 2002; Special Appeal No. 761.114/RS, Rapporteur Justice Nancy Andrighi, 3 August 2006; Special Appeal No. 331374/SP, Rapporteur Justice Francisco Falcão, 17 June 2003. Because of the STJ's new understanding, the holders of savings accounts who were waiting for a favorable decision in the class action lawsuits filed their individual claims arguing that the statute of limitations for individual claims was suspended when the class actions were accepted. In response to this argument, some judges held that savings account holders who had not filed individual claims within the 20-year statute of limitations could not benefit from the suspension of the statute of limitations caused by the class action since each has its own distinct statute of limitations (Special Appeal 22.484/RS, Rapporteur Justice Minister Ricardo Villas Bôas Cueva, 5 December 2014) while other judges held that the class action did suspend the statute of limitations for individual claims (Special Appeal 1426620/RS, Rapporteur Justice Marco Aurélio Bellizze, 12 August 2015). The shift in the STJ's position on the statute of limitations indicates the degree of institutional uncertainty that continues

previous understanding that the statute of limitations for individual claims and class actions should be the same and should be determined by the quality of the claim and not the type of lawsuit employed to make it.

By approving the agreement in 2018, the STF affirmed the capacity of private entities with legal standing to settle class actions out of court as well as the legitimacy of contingency fees assigned on the value of the settlement amount. Neither practice is contemplated in current law or was even considered legally possible prior to this case.

4. Abuse of Dominant Position to Purchase Medications

This case study focuses on the abuse of dominant market position in the pharmaceutical industry. Cases involving the purchases of medications by Brazilian public health organizations illustrate the difficulty that the judiciary has in dealing with economic issues and the risks of the lack of expertise of the Public Prosecutor's Office in these matters. Before going into the details, we will examine the institutional problem that stems from the protagonist role played by the Public Prosecutor's Office in the Brazilian class action system. This problem involves the expectation that the Public Prosecutor's Office is the most legitimate institution for the collective defense of rights in the courts.

4.1 The Primacy of the Public Prosecutor's Office in Class Actions

This primacy has a legal foundation in certain instances and is merely customary in others.[69] In any case, the academic debate over the institutional configuration for the defense of collective interests requires further development. Certain institutional characteristics of the Public Prosecutor's Office suggest that it should not be the only institution—in practice or in theory—that is responsible for public interest litigation in Brazil.[70]

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to surround the issue. Although it is obvious that the system should have a clear response for both the statute of limitations and tolling, one does not yet exist.

[69] Rogério Bastos Arantes, *Ministério Público e Política no Brasil* (2002). Natalia Langenegger, *Legitimidade Ativa de Pessoas Físicas em Ações Coletivas: Incentivos e Desincentivos Institucionais* 33 (2014).

[70] Among these characteristics, Oscar Vilhena Vieira emphasizes the following: (i) It possesses utter autonomy to choose the cases it litigates; (ii) Mechanisms for democratic control or pressure from civil society are absent; (iii) It tends towards bureaucratization; (iv) Pronounced political partisanship can be seen in certain departments; There is considerable risk of co-optation by middle-class interests. [*Estado de Direito e Advocacia de Interesse Público* 360-61, in Estado de Direito e o desafio do desenvolvimento (Oscar Vilhena Vieira & Dimitri Dimoulis eds., 2011)].

Furthermore, it is not only in Brazil that this primacy has been questioned. In the early stages of creating systems for collective rights protection, many countries chose to assign their protection to government institutions such as the Public Prosecutor's Office. According to Mauro Cappelletti, the decision to do so has been a failure in most places, whether because of the private, albeit collective, nature of many collective rights, or because of the high degree of specialized expertise required, that the Public Prosecutor's Office rarely possesses.[71]

In this scenario, we would recommend beginning by expanding the competence to launch class actions. In the current system, only public offices or specialized private associations that are over a year old can initiate them.[72] This system only confers a secondary role to the affected parties and their lawyers who, as the U.S. experience demonstrates, possess the conditions and motivation to play a protagonist role in this type of litigation. Government institutions, even when displaying specialized units, often lack incentives for the officials to investigate claims deemed less relevant as deeply as they should. Although public institutions should have an efficiency advantage from repeated litigation experience, their staff's training tends to be of a general nature (partly deriving from the type of process and examinations the institutions use to select employees), which implies additional marginal costs if the officials must acquire more specialized knowledge of public and regulatory policies. In this scenario, it is not difficult to imagine that less than optimal investment will be made in acquiring the additional information, since the cost of acquiring complex information will be borne by the individual, while the results of the investment primarily benefit the collective.

Antonio Herman Benjamin has also made critical observations, seeing risks for the institution in terms of: (i) Indifference towards certain types of lawsuits; (ii) Exposure to political pressure; (iii) Institutional capture; (iv) Limited human and material resources. [*A Insurreição da Aldeia Global Contra o Processo Civil Clássico: Apontamentos sobre a Opressão e a Libertação Judiciais do Meio Ambiente e do Consumidor* 357, in *Ação Civil Pública (Lei 7.347/85 - Reminiscências e reflexões após dez anos de aplicação)* (Édis Milaré ed., 1995).]

[71] Mauro Cappelletti, *Access to Justice as a Theoretical Approach to Law and a Practical Programme for Reform*, 109 S. African L.J 22 (1992). For a critique of the technique adopted in Brazil, that restricts the right to speak for collectivities to certain entities, such as the Public Prosecutor's Office, whose officials do not need to demonstrate the necessary knowledge of the concrete situation to sue, whereas groups are alienated from the right to speak for themselves, *see*: Sérgio Cruz Arenhart, *Processos Estruturais no Direito Brasileiro: Reflexões a Partir do Caso da ACP do Carvão*, Revista de Processo Comparado (2015).

[72] Article 5 of the LACP establishes that the following organizations have the legal standing to file class actions: the Public Prosecutor's Office, the Public Defender's Office, federal, state, and municipal governments, state-owned or mixed-ownership enterprises or foundations, and associations that are over one year old following the terms of the law and whose objectives involve the protection of either public or social patrimony, the environment, consumers, economic order, open competition, the rights of racial, ethnic or religious groups, or artistic, aesthetic, historical, touristic, or scenic patrimony.

There is also a question of scarcity. As the number of public servants and the amount of resources available to them are finite, it would be logical to concentrate them on legal violations where there are not any market incentives for private lawyers to act. In Brazil, resistance to expanding the competence to initiate class action lawsuits stems from the fear that it would be abused, especially by lawyers exempted from paying court fees if the case is dismissed.[73]

To reduce the resistance to expanded standing, the law could attribute to the judge the power to evaluate the financial capacity of the representatives of the class and the seriousness of the claim. Only after confirming the claim's relevance and the litigant's financial need would the judge exempt the representatives of the class and their lawyers from responsibility for court fees. Also, to certify a class, the court verify that the choice of plaintiff and lawyer to represent the class are adequate prior to the initiation of proceedings. This mechanism should allow the judge, from the start of the lawsuit and whenever the need is perceived, to scrutinize carefully the technical and economic capacity of those who volunteer to represent the group, and whose duty it therefore is to perform these roles competently, seriously and credibly.

4.2 The Case of Abusive Pricing of Trastuzumab

In March 2015, the Law and Poverty Research Group (GDP) of the University of São Paulo School of Law (FDUSP) coordinated by Professors Calixto Salomão Filho and Carlos Portugal Gouvêa, presented the results of the group's empirical research entitled "Discrimination in the Access to Breast Cancer Medicine in Brazil" to the Federal Prosecutor's Office. Not long afterwards, Civil Inquiry no. 1.16.000.000699/2015-87 was opened in order to investigate possible irregularities in the sale of Trastuzumab (commercialized under the name of Herceptin®) by the pharmaceutical company Roche to state (as opposed to federal) health departments. The inquiry was to confirm whether the pricing practices were consistent with the sales made directly to the federal Ministry of Health.

On 1 June 2016, based on the results of that Civil Inquiry, the Federal Prosecutor's Office filed a class action in federal court along with a request for injunction for urgent relief against Roche's Brazilian subsidiary (*Produtos Roche Químicos e Farmacêuticos S.A.*), the Federal Union and the National Institute of Intellectual Property (INPI). The lawsuit was assigned to the 6th Civil Branch of the Judicial Section in the Federal District of Brasília.

[73] *See* Helena Refosco, *supra* note 9 at 105-109.

Trastuzumab (Herceptin®) is used in chemotherapy and radiation therapy for patients with breast cancer. It is distributed in Brazil by the Roche pharmaceutical laboratory, which holds exclusive patent rights for Trastuzumab from the INPI. In 2012, it was placed on the list of medicaments publicly available that are covered by the Integrated Health System (SUS) for initial treatment and locally advanced breast cancer, but not for the treatment of breast cancer that has reached the metastasis phase. The public health system only purchased the medicament for patients with late-stage breast cancer when the patient obtained a court order for it.[74] The Civil Inquiry revealed that Roche charged a much higher price for these irregular court-ordered purchases. Whereas the medicine sold on average for 3423 Brazilian Reals per unit to the Ministry of Health, the state departments of health that purchased it on court order were paying an average of 7192 Brazilian Reals per unit. This represents abusive exercise by Roche of its industrial property rights consistent with illicit discriminatory pricing made possible by the negotiating power of the buyer.[75] In other words, Roche's monopolistic market power in a scenario of weak public institutions enabled arbitrary profit maximization, for the abusive pricing only occurred when a court had ordered the purchase of the medicament. The abuse also violated the rights of all potential beneficiaries of medications covered by the Integrated Health System.

The Federal Prosecutor's Office thus requested, among other motions:

(a) An injunction for urgent relief (and its subsequent confirmation) ordering Roche to sell Trastuzumab to all Brazilian public health outlets for the same price that the Ministry of Health paid;

[74] The practice of resorting to the judiciary by individual litigation for access to medicines or treatments not covered by the public health system is widespread throughout Brazil, driving the system to provide expensive treatments, many not listed in the Unified Health System as adopted medicine to be provided freely to the population and many also not event approved by the National Health Agency for commercialization, and having as recipient of such judicial awards individuals who are, to a large degree, members of the middle class with access to private doctors and lawyers. *See* Carlos Portugal Gouvêa, *Social Rights Against the Poor*, 7 Vienna J. on Int'l Const. L. 454 (2013). For a critique on emancipating people as *rights holders*, *see* David W. Kennedy, *The International Human Rights Regime: Still Part of the Problem?*, in Examining Critical Perspectives on Human Rights 19 (Rob Dickinson, Elena Katselli, Colin Murray & Ole W. Pedersen eds., Cambridge Univ. Press 2012).

[75] To support its argument regarding price discrepancy, the Federal Prosecutor's Office compared Roche's sales of Trastuzumab to its government sales of Rituximab (commercial name MabThera®), a drug that is similar in use and in logistical considerations. The results of the analyses were consistent (although not sufficiently proven). The analysis confirmed that there was no significant increase in the price of the decentralized sales compared to the price of the drug sold directly to the Ministry of Health. This demonstrates that the differentiation in the price of Trastuzumab was not explained by the logistical complications that Roche had alleged in response to Civil Inquiry that preceded the Public Civil Action in question.

(b) An order requiring Roche to reimburse the material harms incurred by the state departments of health between 2012 and the date of the order equal to the amount they had paid Roche in excess of the price paid by the Ministry of Health, a sum estimated at approximately 107.1 million Brazilian Reals;

(c) Moral damages for the harm done to the patients who relied on the Integrated Health System equal to twice the value of the material harm described in (b); and

(d) Condemnation of the INPI for conceding a compulsory license to Roche for reasons of public interest and for abusing the economic power of its patent pursuant to Articles 68 and 71 of Federal Law 9.279 of May 14, 1996.

Roche alleged in its response that it had acted in strict conformity with the legislation in force and the resolutions of the Medication Market Regulation Chamber (CMED). It argued that there were legal and market-related circumstances that justified the difference in the price of the Herceptin® sold to state departments of health and to the Ministry of Health. Therefore, Roche had not committed any illicit anti-competitive act.

The justifying circumstances mentioned were, in sum: economies of scale; risk of defaulted payments from the state departments of health; sales logistics; distance between the locations of distribution and delivery of the medicament; and the variance in tax rates and the obligatory minimum discount (CAP) across states. The main argument was that the costs were driven up by the combination of the lower quantity of the sales and the shorter time Roche had to fill them to comply with the court orders, which forced it to modify its supply line. Roche also argued that the compulsory licensing requirements were not met, that only the Ministry of Health could challenge the price difference and that the judiciary did not possess the competence to judge the merit of this administrative matter.

On 7 August 2017, the judge denied the injunction for urgent relief on the grounds that the argument over the differentiation in prices because of logistical complications was disputed and therefore required additional evidence. The judge also declared that there was no proof that the prices charged by Roche were superior to those fixed by the CMED.

When informed of the judge's denial of the injunction for urgent relief and request for further proof, the Federal Prosecutor's Office responded that it had no additional proof to offer other than the evidence already presented in the case file that were the basis of its request. Here the Federal Prosecutor's Office undeniably missed an opportunity to broaden the debate over an extremely

important topic. In the first place, it was the first time an allegation of abusive pricing of medication based on dominant market position had been brought to court. In other words, experts in the area should have been brought in to testify, such as non-governmental organizations devoted to the subject or national and international research groups, not to mention countless other sources of specialized expertise. The wasted opportunity is truly deplorable for, had it the standing to represent the case, a civil society organization with experience in contentious litigation wouldn't have lost it. At the same time, the case displays the already criticized passive role of the judge in conducting the lawsuit, despite the obvious lack of adequacy of representation of the plaintiff.

On 22 August 2018, in accordance with Article 487, I of the Brazilian Civil Procedure Code, the class action was dismissed. The arguments presented by Roche were granted and the charges of abuse of intellectual property rights were deemed unfounded, as was the infraction of economic order based on exorbitant pricing in a monopolistic market. The decision evidenced the difficulties confronted by the judiciary when adjudicating class actions. Precisely because they involve aggregated dispute resolution, they do not fit the traditional structure for disputes that are easy to break down into elements. They often involve evidence that is economic in nature. In this case, refined knowledge of market economics is required to appreciate the evidence of abusive pricing and price discrepancy in analogical conditions, for price, within the economic system, itself aggregates all of the relevant information. Logistical costs, for example, are always secondary and cannot explain the price discrepancy of over 100% as in this case. Moreover, only the seller disposes of the information necessary to formulate an adequate explanation of the actual impact of logistical costs on the product's price.

In the case at hand, the trial judge, who failed to understand economic aspects of the case, was convinced by the strategy of Roche. The strategy consisted of, on one hand, abstaining from providing any concrete information about the logistical costs that could justify the difference in price and, on the other side, alleging that the burden of proof lay with the Federal Prosecutor's Office to show that no justification whatsoever for the discrepancy in price existed. That the strategy was successful is surprising to people well-versed in economic reasoning. In this case, the improbable became reality, for the judge followed the argumentation presented by Roche point by point.

On 14 November 2018, the Federal Prosecutor's Office appealed the decision, reiterating the same arguments contained in the statement of claim. After the defendant presented its

counterarguments, on 4 April 2019, the same Federal Prosecutor's Office, through another member (its regional official), delivered its opinion on the case.[76] The opinion covered in detail the lack of proof that led to the initial dismissal of the class action and ratified the arguments of that judgment. In other words, as unbelievable as it may appear, the Federal Prosecutor's Office, after appealing the dismissal of the class action that it had filed, was asked to produce an opinion on the case as if it were an independent consultant. If that in itself is surprising, then the result of the opinion is absolutely shocking, for the Federal Prosecutor's Office, to all effects the lawyer representing the class action, issued an opinion that rejected its own claims. It is difficult to imagine how the behavior of the Federal Prosecutor's Office could be explained to the citizens affected by the case's dismissal or to the civil society organizations that followed it. The Federal Prosecutor's Office's behavior delegitimizes its status as an organ for the prosecution of rights violations in the future. Who would reach out to a law firm in which one of the lawyers was liable to issue an opinion against a case that the firm is representing? Legally speaking, it is simply absurd and, moreover, a wanton allocation of public resources.

In response to the appalling scenario just described, we suggest there should be a mechanism allowing entities that bring cases to the Public Prosecutor's Office, such as the GDP, to take part in any class action that may ensue.[77] When the Public Prosecutor's Office's advocacy is defective, whether because of lack of resources or technical knowledge of the disputed issue, it should be able to collaborate with civil society organizations. This would serve to improve the technical quality of the Public Prosecutor's Office's arguments and avoid errors such as the failure to offer proof during the discovery phase.

5. Conclusion

To a certain degree, the incompleteness of Brazil's democratic transition is revealed by the unsatisfying quality of its system for the collective defense of rights. Nonetheless for notable

[76] Communication No. 334/2019/GABPRR47-APMS (Opinion).

[77] The Civil Procedure Code has a provision (art. 138) in the sense that the judge may, considering the relevance of the matter, the specificity of the subject matter of the claim or the social repercussion of the controversy, solicit or admit the participation of a natural or legal person, specialized agency or entity, with adequate representation, to join the lawsuit. The powers of amicus curiae are defined by the judge in the decision requesting or admitting intervention. Unfortunately, however, the law does not provide incentives for such participation, which for this reason turns out to be unusual.

exceptions,[78] the judiciary usually displays a reactionary posture towards class actions. Not surprisingly, the case law related to different legal aspects of class actions, such as statutes of limitations, legal standing and effective jurisdiction, has been restricted in a way that has favored the continuing epidemic of individual claims in Brazil.

The case studies have proven right our hypothesis that the Brazilian class action is insufficient as a remedy for infringements of the rights of third parties by private companies. As a consequence, Brazilian population – specially the poorest – is left without adequate means for the protections of it's collective rights against mass violations by private companies. Businesses can calculate with precision the degree of misbehavior they can maintain, for an immense segment of the population does not have access to justice. There exists, therefore, an enormous stimulus for companies to generate negative externalities. The effect of low-level harms caused to consumers can reach tragic proportions. For instance, in less than five years, two huge environmental disasters related to dam failures have taken place, without the affected population being compensated yet. The failure at Mariana in 2015 released a record level of toxins into the surrounding rivers, whereas Brumadinho's dam collapse caused great loss of human and natural life.

Legislative reforms are necessary to roll back the conservative interpretations imposed by the judiciary in many areas, as we have seen throughout this chapter. New laws on their own, however, will not solve the problems, nor will they relieve the judiciary of its responsibility to participate more effectively in shoring up legal certainty. Otherwise, we will be forced to live like eternal prisoners of the same story that repeats itself every time legislative reforms comes up against a conservative justice system.[79]

Legislative reform of the class action system would need to symbolize a change of mentality. In light of the spreading epidemic of individual claims in Brazil, and in order to avoid its perpetuation, the legislation must be altered to give greater legal standing to initiate class actions

[78] An example of a notable exception was the granting of the collective habeas corpus order filed on behalf of all women prisoners that were pregnant, or mothers of children and disabled persons under her care. (STF, Habeas Corpus No. 143.641 – SP, 2nd Panel, Rapporteur Justice Ricardo Lewandowski, 20 February 2018.

[79] This posture of the judiciary we criticize brings to mind the warnings of Hirschl, who observed how the judiciary, reluctant to confront the other branches of government, seeks refuge in the 'safe zone' of individual rights, avoiding politically charged disputes involving the principles of federalism and the separation of power. Hirschl gives the example of Russia under the leadership of Boris Yeltsin, who suspended the Constitutional Court by decree. After reinstating it, the Court largely restrained itself to cases involving individual rights, avoiding politically sensitive cases, such as those involving disputes over the separation of powers. *See* Ran Hirschl, *The New Constitutionalism and the Judicialization of Pure Politics Worldwide*, 75 Fordham L. Rev. 752 (2006).

to private agents and to give judges greater freedom to supervise the procedures. Creating a mechanism of adequate compensation for private lawyers who take up class actions is essential, one that permits the payment of contingency fees, while at the same time incorporating a system for the certification of the class on an opt-out basis.

Another critical feature missing are specialized courts for collective causes, with fast-track capacity and support from other government offices including, for example, regulatory agencies. Class actions are inherently complex and require judges who feel it is their vocation to adjudicate them, which could occur if specialized courts were created. Judging class actions is undeniably more complex than ruling individual claims. By consequence, it would be mistaken to count the adjudication of a class action that affects millions of people the same as an individual claim when measuring a judge's productivity. Specialized courts could correct this and other distortions by incorporating differentiated objectives.

Adopting by judicial interpretation a shorter statute of limitations for class actions jeopardizes the class action system, which should have clear rules regarding statute of limitations and tolling. Similarly, the formalist distinction between diffuse, collective and homogenous individual rights has proven ineffective and troublesome. This distinction should be struck from the legislation.

Reforming legislation is a small but important step towards a better system for the protection of collective rights. However, there is much to be done in the realm of judicial culture as well as in developing critical thought in law schools. Hopefully then class actions will finally be able to perform the function for which they were meant: to expand access to justice, to reduce social inequality and, by consequence, to strengthen democracy.