

PETRONIO CALMON*

PUBLIC CIVIL ACTION IN BRAZILIAN LAW

ABSTRACT. The paper reviews the forms of collective action in the Brazilian legal system. The Brazilian system provides two types of collective actions: those aimed at protecting collective and widespread rights and those aimed at protecting homogeneous individual rights. The positive discipline is mainly contained in the law on the so-called public civil action (Law 7.347 of 24 July 1985), in the consumer defense code (Law 8.078 of 11 September 1990) and, subsidiarily, in the Brazilian civil procedure code. These three regulatory bills, applying the constitutional precepts, which aim at guaranteeing the efficiency of procedural techniques and the respect of the fair trial, provide a set of differentiated protections, which allow for the defense of any inter-individual or individual collective right.

CONTENT. 1. Brazil and its political and legal foundations. – 1.1. Comparative law: basic notion. – 1.2. Brazil: its history and its law. – 1.3. Single justice, single judge of first instance. – 1.4. Control of constitutionality of laws. – 1.5. Judicial review. – 1.6. Interim protection. – 1.7. Public prosecutor: separate and independent career. – 2. Brazil's public civil action law. – 2.1. Defense of diffuse interests: history. – 2.2. Diffuse rights: concepts. – 2.3. Third generation fundamental rights. – 2.4. Legislative recognition of diffuse rights. – 2.5. Diffuse rights in the Italian Constitution. – 2.6. Diffuse rights in the Brazilian Constitution. – 2.7 Collective rights as subspecies of diffuse rights: definition in Brazilian law. – 2.8. Homogeneous individual rights. – 2.9. Heterogeneous legal situations. – 3. The protection of diffuse, collective and individual homogeneous rights. – 3.1. A political solution. – 3.2. The subsidiarity of the judiciary. – 4. The Brazilian system of collective actions. – 4.1. The laws. – 4.2. The scope of application. – 4.3. Legitimation to act. – 4.4. Legitimation of associations. – 4.5. The public civil inquiry and its filing. – 4.6. Popular initiative, judges' duty and request for information. – 4.7. Self-complaint before or during trial. – 4.8 Jurisdiction. – 4.9. Precautionary measures. – 4.10. Defense fund for diffuse rights. – 4.11. Costs, fees and civil liability. – 4.12. Res judicata erga omnes secundum eventum litis. – 4.13. Action for the defense of homogeneous individual rights. – 4.14. The Brazilian public prosecutor as agent for public civil actions.

* Professor of Procedural Law at the University of Brasília (UnB).

1. *Brazil and its political and legal foundations*

1.1. *Comparative law: basic notion*

René David teaches that comparative law has three essential functions: (i) to enlighten jurists as to the function and meaning of law, using the experience of all nations for this purpose; (ii) to facilitate the organization of international society by showing the possibilities of agreement and suggesting formulas for the regulation of international relations; and (iii) to enable jurists of different nations, with regard to their domestic rights, to consider their improvement, freeing them from routine.¹ The foundation of the French professor's thought is found in the sentence, 'There are differences between rights, and the study of a given law implies an awareness of the structural differences that may exist between that law and our own'.² The French professor's concern reminds us of a very significant example: the constitutionality review of laws.³

Brazilian civil procedural legislation in the last three decades of the 20th century was greatly inspired by Italian doctrine. But some of the Italian lessons accepted by Brazil to date have not become a legislative reality in Italy, or have emerged timidly.

¹ René David, *Os grandes sistemas do direito contemporâneo* (3rd edn, Martins Fontes 1996) 14.

² Since this work is initially intended for foreign readers, we begin with a brief summary of Brazil's history and brief explanations of its legal structure, which are essential for understanding any legal issue in another country.

³ In Italy this control is concentrated and the decisions of the Constitutional Court have *erga omnes* effects, as the law deemed unconstitutional simply ceases to exist. In Brazil, constitutionality review is diffuse, so any judge must cease applying a law if he or she deems it unconstitutional. There is also a system of centralized control, exercised by the *Supremo Tribunal Federal*, but numerically the system of diffuse control prevails. In this system, one or more judges may consider a law unconstitutional and not apply it in the cases they judge, while other judges may have a different interpretation and apply the same law in their cases. Different interpretations of the same law thrive until (but not always) the *Supremo Tribunal Federal* has the final say. This system does not only exist in Brazil. In the United States, for example, the system is similar. The example is needed by foreign jurists, who cannot simply learn about a certain law in force in Brazil. Rather, they need to see whether judges in general are applying it or consider it unconstitutional. This is not an easy research. The foreign author, therefore, can only produce statements about Brazilian law if he or she is thoroughly familiar with the prevailing jurisprudence, which is a very difficult task. The golden rule of comparative law is to know well the country with which you are making the comparison, trying to thoroughly understand its history, culture and how each legal institution is understood and communicated. Translating is not enough.

The most striking example of this phenomenon concerns the very subject of this paper, since the Brazilian law on public civil action dates back to 1985 and was very much inspired by Italian doctrine of the previous decade. In Italy, on the other hand, legislation on the subject is only recently emerging.⁴

Following the golden rule of comparative law, the introduction of this article will consist of a brief presentation of Brazil, its history and legal system. At this point, the organization of Justice, the control of constitutionality of laws, the intervention of the ordinary (single) judiciary in public administration, and the role of the public prosecutor will be highlighted.

1.2. Brazil: its history and its law

The history of Brazil predates 22 April 1500, the day when the Portuguese Pedro Álvares Cabral landed on the coast of the present state of Bahia. The period of colonization lasted 322 years, and throughout this time ‘Kingdom Ordinances’ were in effect in Brazil. The aforementioned ordinances were a symbiosis of Roman law and canon law, as Portugal was always loyal and submissive to the Church, never departing from it. The domination of the Portuguese empire over vast tracts of land in South America, Africa and Asia strengthened its codification and jurisdiction. Dominion means imposing laws and the judicial system. Since Rome and since time immemorial it has been so.

Independent Brazil did not deviate from this system, for when the Prince of Portugal, Pedro I, proclaimed independence, Brazil was no longer a colony but part of the United Kingdom of Portugal, Brazil and the Algarve. On 15 November 1889, a military coup deposed the emperor and imposed republican rule. With the republic came great transformations. Brazilian republicans were inspired by the United States of America to form a Brazil renewed in its central institutions, but retained the *civil law* system inherited from continental Europe. Thus was born the Brazilian Republic with judges judging according to written laws, but with a Supreme Court composed of judges for life, with single justice and widespread control of constitutionality, as well as the possibility for judges to intervene in administrative acts (judicial review).

⁴ Especially Law 31 of 12 April 2019.

Brazil's political history, like that of almost all Latin American countries, is marked by the various interruptions of democracy. Brazil's current Constitution is the seventh in its history. After the peaceful end of the military regime, the President of the Republic convened a constituent assembly, which drafted and approved the text after numerous debates. Thus, on 5 October 1988, the new Brazilian Constitution was promulgated, a modern text, full of references to fundamental and social, individual, collective (widespread) rights. This Constitution is still in force today, despite having already had more than a hundred amendments.

As we mentioned above, Brazil is a country of written law (civil law), embedded in the Romano-Germanic law family (René David). Being a country composed of federated states, one might imagine that the laws of each of these states would prevail over federal laws (as in the United States of America, Germany, Switzerland and Argentina); but in Brazil the federation is very limited in the legislative field. The laws of the federated states deal mainly with taxes and the administration itself, having little influence on the lives of citizens and businesses. The limited legislative competence of the federated states is, as a rule, subject to general rules of a national character, approved by the central parliament. Thus, the civil, criminal, civil trial, criminal trial, commercial and other codes of equal importance are laws passed by the Union Parliament, of uniform application throughout Brazil.

Federated states are strong only in their relations with the civil service and the police, where there is no submission to the central power.

The Brazilian Constitution establishes three independent and autonomous powers in a system of checks and balances: Executive Power, Legislative Power, and Judicial Power. The Public Prosecutor's Office does not fall under any of these powers and enjoys complete autonomy, as we will explain below.

Although Brazil followed the tradition of continental Europe in relation to the system of written laws and strong codification, when the monarchy was abolished, the political winds from the United States blew strongly on the Brazilian republicans, to the point that the new Constitution organized the Brazilian state with the same characteristics as the North American country: republic, federation, unified judiciary, judicial review and widespread control of the constitutionality of laws. Republicans decided to call the country the United States of Brazil. This name prevailed until 1967,

when the country began to be called the Federative Republic of Brazil. As noted above, the organization of the Brazilian republic did not follow the European model of constitutional courts, but a supreme court was created along the lines of the North American one, the Federal Supreme Court, an organ of the judiciary.

Each federated state administers its own Justice, in total autonomy. In Brazil, there are twenty-six states and the capital Brasilia, known as the Federal District. Therefore, there are twenty-seven separate appellate courts and autonomies. Likewise and with full independence, each state has its own prosecutor.

While legislation is mostly centralized in the Union Parliament, the judiciary is completely separate, with the predominance of judges from the federated states. A striking feature of Brazilian justice is its administrative and financial autonomy. Each judge independently administers his or her own auxiliary services. The parliament of each state approves the court's proposed budget, and the executive is obliged to pay the corresponding amount monthly. With this money, the judiciary itself takes care of the construction and maintenance of buildings, support services, and the payment of judges and judicial assistants. In short, judges not only judge but also administer justice. There is no interference from the executive branch.

1.3. Single justice, single judge of first instance

There is no special system of administrative justice in Brazil. The same court that adjudicates conflicts between private parties also adjudicates conflicts between them and the public administration. There is also no distinction between subjective right and legitimate interest in the sense in which Italian law distinguishes them; therefore, there is nothing like the Council of State. There are appellate courts and a superior court, similar in theory to the Italian Court of Cassation.

Despite European influence, particularly Iberian influence, throughout Brazil's history all civil and criminal cases have been and are tried by a single judge. Each judge is a judicial body. The exceptions are the *Tribunal do Júri*, for malicious crimes against life (similar to the jurisdiction of the Italian *Corte d'Assise*); and military tribunals.⁵

⁵ These exceptions, likewise, are the only exceptions to the rule of the *toga* judge. In both jury and military courts,

The judges of first instance are all tenured, accessing their careers through a competition open to all law graduates for at least three years and who are lawyers or hold positions for which a law degree is required. The rule, then, is that there are no first instance courts, only monocratic judges. Hence the tradition of allowing appeals against all decisions of first instance judges, not just judgments. All appeals against the (always monocratic) court of first instance are decided by the appellate courts.

First instance judges are promoted to appellate courts by seniority and merit. To advance in his or her career and have higher incomes, the judge must actually be a judge of second instance, acting in the appellate courts. There is an appellate court in each of the federal states and in the Federal District (*Tribunal de Justiça*). For federal justice, there are six appellate courts (*Tribunal Regional Federal*).

1.4. Control of constitutionality of laws

The first competence of the *Supremo Tribunal Federal* (STF) is to exercise abstract and concentrated control over the constitutionality of laws. In this system (like the Austrian system) certain legitimized parties (Attorney General of the Republic, President of the Republic, political parties, Bar Association, among others) can bring a direct action aimed at declaring the constitutionality or unconstitutionality of a given federal or federated state law. The STF will decide in principle whether the specified law is unconstitutional or will give an interpretation of it in accordance with the constitutional text, being able to modulate the effects of its decision over time between the enactment of the law and the decision on the constitutionality of the regulation.

The second important attribute of the Brazilian Supreme Court is to decide appeals against the judgments of appellate and superior courts to rule on the constitutionality of the decision in the particular case, which obviously includes the examination and final decision about the specific case. In this case, the STF does not merely decide on the constitutional issue, but judges the case in its entirety.

This second attribution stems from the widespread review of constitutionality,

judgments are delivered by laymen with very brief investiture. Members of these collegial bodies receive no remuneration, but both are presided over by a judge who is a member of the career judiciary.

since in Brazil any judge may not apply a law because he or she considers it unconstitutional. In such a case, the dissatisfied party can appeal and then file an extraordinary appeal to the Federal Court. Scholars from other countries must be careful not to make a statement based solely on the law in force in Brazil, as it may not be applied by the courts. It often takes years for the case to be heard by the Supreme Court, which creates legal uncertainty for society and uncertainty for the foreign researcher.

More precisely, in Brazil, any judge can and must disapply a law if he or she finds it unconstitutional. But when it does, the process may come before the STF, which will have the final say on the constitutionality of the rule. The trial often does not reach the STF, as a result of the application of a filter: in such cases, the examination of the constitutionality of the law may diverge among the various appellate courts in the country, and so it remains forever.

1.5. Judicial review

Another Brazilian characteristic is the magistrate's wide scope for interference in public administration acts and policies. Until the 1980s, the judiciary did not intervene in the criteria of appropriateness and discretion of the administrative act; and it also intervened very little in the control of legality, leaving the administrator himself to interpret the law in his own way. Until then, the judiciary dealt with obvious and dubious abuses and illegalities. Not surprisingly, this tradition coincided with a politics centralized in the Executive Power through the use of force (dictatorships), as we have already mentioned. With the current Federal Constitution (1988), Brazil has a new direction and the axis of power, which at first seemed destined for the parliament, has definitively shifted to the judiciary.

1.6 Interim protection

The exposition on the particularities of the Brazilian legal system cannot end without alerting the reader to the very widespread application of provisional protection.

The provisional judicial decision issued at the beginning of the trial has ceased to be an exception and has become a norm in Brazilian civil procedural law. The new Code of Civil Procedure (2015), before dealing with the common procedure, provides for interim protection in two modes: emergency and evidentiary.

Emergency protection can be of a precautionary nature or simply an anticipation of final protection, without demonstrating the minimum of *periculum in mora*. Both can be requested: (i) in advance (ie before the main trial begins), (ii) when the main application is filed, or (iii) during the course of the trial. The protection becomes permanent if no appeal is filed against such a decision.

Also in the mode of provisional protection, the Brazilian Code of Civil Procedure provides for evidentiary protection, which may be granted regardless of a showing of danger of harm or risk to the useful outcome of the trial: (i) when characterized by abuse of the right of defense or manifestly dilatory purpose, or (ii) when the facts are supported only by documents.

The topic of interim protection in all its forms is extremely relevant to the study of public civil action, as the effectiveness of interim protection in Brazil in public civil action is equivalent to a nuclear bomb. For example, there have been several unprecedented judicial decisions in Brazil to determine trade closures at the time of the COVID-19 pandemic, when the governor of a federated state either refused to issue a trade closure order or understood that technical conditions already existed for normal resumption of business. Another common example is the immediate withdrawal from circulation of advertising deemed misleading by the court, for violation of consumers' right to honest and clear information.

1.7. Public prosecutor: separate and independent career

The careers of magistrates and prosecutors have always been and are completely separate in Brazil. But only after the 1988 Constitution did they become equivalent in terms of rights, duties and remuneration. Only judges are called magistrates in Brazil, and it is incorrect to use this adjective to refer to members of the public prosecutor's office. The two (completely separate) careers enjoy complete autonomy, both vis-à-vis the government and vis-à-vis their own leadership.

Article 127 of the Federal Constitution establishes the prosecutor's office with the clear function of defending four fundamental values: the legal system, the democratic regime, social interests, and unavailable individual interests. One can clearly see the breadth of the prosecutor's action, with wide margins of interference in the social, economic and political life of the country.

This information needs to be supplemented, to say that the Brazilian Public Prosecutor, as in other countries, intervenes in various types of civil proceedings, in addition to having the legitimacy to bring direct actions of unconstitutionality (in the centralized control system) and for many other functions, all contained in the Federal Constitution.

2. *Brazil's public civil action law*

2.1. *Defense of diffuse interests: history*

Brazil's public civil action law is pioneering; it came into force almost four decades ago, on 24 July 1985 (Law 7.347). It is inspired by British and American experiences, but especially by Italian doctrine.⁶

Brazilian doctrine and law have observed these phenomena well and have created mechanisms for the defense of all kinds of nonindividual rights, not limited to consumer defense. The defense of diffuse rights is the center of Brazilian law and experience.

Since 1970 there has been talk in Italy of the need to establish legal instruments for the defense of diffuse interests. There has been no exclusive emphasis on consumer rights (homogeneous individual rights). At the 1974 Pavia conference of Italian proceduralists, Andrea Proto Pisani emphasized the need that the expression *collective rights* should go far beyond the hypotheses of necessary *lis pendens* and expressed his concern for the protection of the new rights provided by the Republican Constitution.⁷

⁶ The conferences in Pavia in 1974 ('Actions for the Protection of Collective Interests') and Salerno in 1975 ('The Legal Protection of Diffuse Interests, with Special Emphasis on Environmental and Consumer Protection') were widely disseminated in Brazil, particularly by Professor José Carlos Barbosa Moreira (see José Carlos Barbosa Moreira, 'A ação popular do direito brasileiro como instrumento de tutela jurisdiccional dos chamados "interesses difusos"' (1982) 28(7) *Revista de Processo* 7).

⁷ 'It is opportune to be very clear about the function performed by judicial protection in the so-called typical hypotheses of super-individual interests in order to avoid as of now deluding oneself that through recourse to the judge *alone* the need for the protection of multiple interests which, although provided for by the constitution, and although they have the formal characteristics indicated before, have so far remained completely unimplemented, or implemented in a way that is not at all fulfilling'. Andrea Proto Pisani, 'Appunti preliminari per uno studio sulla tutela giurisdizionale degli interessi collettivi (o più esattamente: superindividuali) innanzi al giudice civile ordinario' in Ennio Amodio and others (eds), *Le azioni a tutela di interesse collettivi. Atti del Convegno di studio Pavia, 11-12*

Also at this event, Mauro Cappelletti was very precise in defining diffuse rights and giving a rich exemplification of them.⁸

The great legal breakthrough in favor of diffuse rights occurred in the United States of America in the 1960s, when the first public law litigation, as defined by Abram Chayes, emerged and became universal.⁹ Before that, however, as we know, England had already experienced a system of actions of this nature.¹⁰

What emerges from historical research is that the issues discussed in pioneering collective claims always aimed to protect widespread rights, such as repairing levees for the benefit of the entire community (England, 13th century). The United States is familiar with the group's demands to fight segregation in schools, to respect the rights of prisoners, to fight insurance fraud and unfair competition, to demand adequate housing policy, to defend the rights of women, blacks and other social minorities.

These pioneering trials always dealt with diffuse rights and had as one of their main features the *erga omnes* effects of judicial decisions.

2.2. Diffuse rights: concepts

Diffuse rights are those whose holders are all or a large part of humanity. They go beyond individuality and often beyond a specific collectivity and national boundaries. They are, in essence, non-individual rights, natural rights expressed or not in a legislative diploma. Its recognition is recent, being the result of the maturation of post-industrial society, democracy and the exaltation of the democratic rule of law (although there are historical records of a few much earlier episodes). They are universal, natural, and independent of law. To merit these adjectives, such rights must be of a very high dimension, deeply rooted in human nature and dignity. Human dignity means, above

giugno 1974 (Cedam 1976).

⁸ 'Interests typical of this new world, such as those to health and the natural environment, have a "diffuse", "collective" character since they do not belong to individuals as such but to the collectivity'. Mauro Cappelletti, 'Appunti sulla tutela giurisdizionale di interessi collettivi o diffusi' in Amodio (n 7).

⁹ Abram Chayes, 'The Role of the Judge in Public Law Litigation' (1976) 89 Harv L Rev 1281.

¹⁰ Among others, we highlight the following Brazilian authors, who present an excellent summary of the history of collective action: Márcio Flávio Mafra Leal, *Ações coletivas: história, teoria e prática* (Sergio Antonio Fabris 1998) 139 ff; Aluisio Gonçalves de Castro Mendes, *Ações coletivas no direito comparado e nacional* (Revista dos Tribunais 2002) 41 ff.

all, equality. The main widespread right is respect for human dignity, which is respect for human equality.

From a historical perspective, diffuse rights were recognized after individual and social rights, whose achievements came from the Renaissance and the English, French, and North American revolutions, among other major sociopolitical movements from the 16th century onward.

The positivization of widespread rights is predominant in the constitutions born with the reconstruction of Europe after the end of World War II and the fall of dictatorships. In the United States, the 1960s and 1970s are known for the civil rights movements, which resulted in important Supreme Court decisions. In Brazil, this consolidation occurred only when the last military dictatorship ended (1964-1985). Not coincidentally, in 1985, the Public Civil Action Law came into effect, but the pinnacle of the positivization of diffuse interests came with the advent of the 1988 Federal Constitution. We talk about the dignity of the human person, the right to nature, social rights, political rights etc.

In conclusion, diffuse rights are those that affect society at large, without the need to individually or collectively name the holder. Of course, people may have the same rights on an individual basis, but often the individual search proves fragile and/or fruitless, clashing with the preconceptions of traditional procedural law. Certainly much more effective is the collective and communal defense of diffuse rights.

As can be seen, after two decades of the 21st century, it is no longer so difficult to define diffuse rights and the task of identifying and grouping them all is not so difficult, although no list is conclusive. There was a time, however, when the concept of diffuse interest was said to be an utterly mysterious character.¹¹

To say that diffuse rights are transindividual is a pleonasm, as the terms diffuse and transindividual are used, in this case, in the same sense. The rights with which we are concerned are called diffuse because they are transindividual, although we prefer to say that they are non-individual rights. They are rights of all, although in specific cases they may apply only to a group of people or persons of a certain nature or who share

¹¹ Massimo Villone, 'La collocazione istituzionale dell'interesse diffuso' in Antonio Gambaro (ed), *La tutela degli interessi diffusi nel diritto comparato* (Giuffrè 1976) 73.

the same lack or need. Since they are rights of a few, of many or of all, they cease to be individual rights and become non-individual rights, that is, diffuse, provided, of course, that the holders cannot be identified. These rights are called in many ways, all similar and with the same purpose.

This feature is extremely important for procedural law, since one of the main rules of the traditional process is that only the holder of the right has standing. Since it is everyone's right, this rule is not broken, as most doctrine says, but some aspects of traditional standing need to be revised.

Brazilian law treats the terms diffuse and trans-individual as synonymous, defining diffuse rights as 'indivisible in nature, owned by indeterminate persons and bound by factual circumstances'.¹² The factual circumstances binding the holders of the diffuse right are those that cause harm to the diffuse rights listed above, such as the rights inherent in the dignity of the human person, the right to nature, social rights, etc. Any injury to one of these rights is in itself a factual circumstance that generates collective standing to sue.

Virtually all Brazilian authors, to define diffuse rights, repeat the definition that focuses their explanations on the pleonasm of transindividuality.¹³ Our position, however, follows the teachings of Mauro Cappelletti, who wrote a few decades ago:

Our time, as we have already seen, brings overbearingly into the picture new 'diffuse' interests, new rights and duties that, without being public in the traditional sense of the term, are nonetheless collective: no one is 'entitled' to them, at the very moment that all members of a given group, class or category are entitled to them.¹⁴

¹² Consumer Protection Code, Law 8.078 of 11 September 1990, Article 81, single paragraph, Chapter I: 'Diffuse interests or rights, so understood, for the purposes of this code, to be trans-individual, indivisible in nature, owned by indeterminate persons and connected by factual circumstances'.

¹³ See Hugo Nigro Mazzilli, *A defesa dos interesses difusos em juízo: meio ambiente, consumidor e outros interesses difusos e coletivos* (11th edn, Revista dos Tribunais 1999) 40; Luiz Manoel Gomes Junior, *Curso de direito processual civil coletivo* (2nd edn, SRS 2008) 9; Antônio Carlos Malheiros, TJSP, Ag Inst 259.609-5/2, 21 May 2002; Ricardo de Barros Leonel, *Manual do processo coletivo* (Revista dos Tribunais 2002) 99; Pedro da Silva Dinamarco, *Ação civil pública* (Saraiva 2001) 52; José Marcelo Menezes Vigliar, *Tutela jurisdicional coletiva* (Atlas 1999) 69-71; Rodolfo de Camargo Mancuso, *Interesses difusos: conceito e legitimação para agir* (4th edn, Revista dos Tribunais 1997) 124-5; Fredie Didier Junior and Hermes Zaneti Junior, *Curso de direito processual civil*, vol 4 (8th edn, JusPodivm 2013) 78.

¹⁴ Mauro Cappelletti. 'Tutela dos interesses difusos' (1985) 33 AJURIS – Revista dos juizes do Rio Grande do Sul 169.

2.3. Third generation fundamental rights

Some say that diffuse rights are third-generation rights, with reference to history and the individualist tradition. I think this is an innocuous discussion in this third decade of the third millennium, but it is always good to remember history; and it is very interesting to approach the topic from the perspective of the generations of rights. However, if diffuse rights are part of the third generation, as has been said for over fifty years, today we are talking about generations of diffuse rights.

José Carlos Barbosa Moreira addressed the issue, in 1982, from the perspective of procedural schemes. The first would be the traditional individual scheme, the second would be the extraordinary legitimacy scheme, which has, for example, the situation of the shareholder, who can claim (in his own name) compensation for damages caused by the directors of the company and, if successful, the amount of the condemnation will be paid to the company and not to the (formal) plaintiff of the claim. The third scheme is that of diffuse rights, ‘common to a group of persons, but not necessarily resting on a basic relationship, a well-defined legal bond uniting them’.¹⁵

From the perspective of substantive law, we point out some prominent Brazilian professors who recognize the gradual emergence of new rights. For Inocêncio Mártires Coelho, rights ‘left a fundamental core originating in individual rights, to continue with endless generations of human rights’.¹⁶ Paulo Bonavides supports authors who follow the motto of the French Revolution ‘liberty, equality and fraternity’ to define the three generations of rights.¹⁷ Celso Lafer even thinks of fourth-generation rights.¹⁸

In Italy, Norberto Bobbio expressed himself with great propriety:

Alongside the social rights, which used to be called second-generation rights, so-called third-generation rights have emerged today, which are admittedly still an excessively heterogeneous and vague category that makes it difficult to understand what they are

¹⁵ Moreira (n 6).

¹⁶ Inocêncio Martires Coelho, ‘Direitos individuais e coletivos na Constituição de 1988’ (1992) 45 Arquivos do Ministério da Justiça 187.

¹⁷ Paulo Bonavides, *Curso de direito constitucional* (4th edn, Malheiros 1993) 480.

¹⁸ Celso Lafer, *A reconstrução dos direitos humanos: um diálogo com o pensamento de Hannah Arendt* (Companhia das Letras 1988) 132.

actually about. The most important of these is the one claimed by environmental movements: the right to live in an unpolluted environment.¹⁹

2.4 Legislative recognition of diffuse rights

When we examine the origins of the judicial defense of diffuse rights, we see that in *common law* countries legislative recognition of diffuse interests is limited, so much so that when there are written texts these are vague and imprecise, which requires jurisprudence to give it a precise definition through discussion of its contents. As a result of these discussions, written rules have become necessary.

However, in civil law countries, written legislation must be studied, especially constitutions, since in them Justice must objectively follow the order coming from parliament. Cappelletti stated in 1985, ‘What is protected in this new type of civil procedure is the diffuse interest, as substantive law has turned it into law’.²⁰

We can say, without a shadow of a doubt, that Brazil has played and still plays a leading role in the defense of rights widespread among *civil law* countries. This is because as early as 1934 the Federal Constitution provided for the possibility for a citizen to seek to meddle in acts of the Public Administration that he or she deemed detrimental to the rights of society as a whole. Thus Popular Action was born.

2.5. Diffuse rights in the Italian Constitution

The Italian Constitution guarantees, among others, the rights of childhood and youth, the right to motherhood and the right to the recognition of paternity (Articles 30-31), the right to health and freedom of care (Article 32), the right to freedom of artistic creation and education (Article 33), the right to universal inclusive education (Article 34), the right to work and adequate training (Article 35), the right to fair remuneration and decent working conditions (Article 36), the right to gender equality in relation to work, with special attention to women (Article 37), the right to social assistance (Article 38), the right to trade union organization and strike action (Articles 39 and 40), the duty of social utility of economic initiative (Article 41), the social

¹⁹ Norberto Bobbio, *A era dos direitos* (Campus 1992) 6.

²⁰ Cappelletti, ‘Tutela dos interesses difusos’ (n 14).

function of property (Article 42), and the possibility of expropriation, subject to compensation, for reasons of general interest (Article 42).

2.6. Diffuse rights in the Brazilian Constitution

Brazil's 1988 Constitution, the result of the country's redemocratization, is very generous in granting individual, social and widespread rights. Article 5, with its seventy-eight provisions, deals with individual rights and guarantees, based on the principle of equality. Articles 6 through 8 deal with workers' rights. Article 14 deals with political rights. Articles 170 et seq deal with economic activity, establishing important diffuse rights, including those preventing the abuse of economic power. Articles 182 and 183 deal with urban policy, an important field of diffuse rights. Articles 184 to 191 deal with agrarian policy. Article 192 deals with the financial system, stating that it aims to promote the balanced development of the country and serve the interests of the community. Articles 194 et seq deal with social security. Articles 196 et seq deal with the right to health, in all its forms. Articles 203 and 204 deal with social assistance. Articles 205 et seq deal with education, culture and sports. Article 225 deals with the environment, regulating very important diffuse rights. Articles 226 et seq deal with the family, the child, the adolescent, the young, and the elderly, while Articles 231 and 232 deal with indigenous peoples.

2.7. Collective rights as subspecies of diffuse rights: definition in Brazilian law

We have seen that diffuse rights are those that are essentially nonindividual, which the doctrine has decided to call supraindividual, superindividual, interindividual, transindividual or metaindividual, among other adjectives. We prefer to call them simply *non-individual*. Diffuse rights are not individual rights, they are everyone's rights; they have no borders, they even go beyond national barriers. Moreover, the recent history of collective rights advocacy is specifically about the advocacy of diffuse rights.

In Brazilian law, the expression 'collective rights' has two meanings: *lato sensu* and *stricto sensu*. In the broad sense, collective rights are *all* rights that can be asserted

through public civil action.²¹ *Stricto sensu*, collective rights are those defined by Brazilian law as those trans-individual rights of an indivisible nature held by a group, category or class of persons linked to each other or to the other party by a basic legal relationship.

It is important to repeat that both (diffuse and collective) are diffuse rights, not individual and indivisible. There is only one right, they are not individual rights of many people, as opposed to homogeneous individual rights.

2.8. Homogeneous individual rights

The definition of homogeneous individual rights is very simple, as they are simply individual rights, nothing more. They are the same rights that Justice has always dealt with in all parts of the world. ‘The qualification of homogeneous does not change nor can it distort this nature’.²² This adjective is used only to give an idea of some similarity between the individual rights of a number of people.

For our study, what matters, instead, is the collective treatment that legislation and jurisprudence give to homogeneous individual rights, forsaking the traditional interest/legitimacy relationship to allow a person to claim individual rights that are not materially his or her own, but belong to an indefinite number of individuals. For Ricardo de Barros Leonel: ‘The collective procedural treatment reserved for these interests derives from the convenience of applying collective protection techniques to them. Its implementation configures a legislative policy option’.²³ For this author, homogeneous individual rights are characterized by the fact that ‘their holders are determined or determinable; being essentially individual, the protected object is divisible; and they derive from a common fact, individually causing harm to all concerned’.

José Marcelo Menezes Vigliar teaches that: ‘Homogeneous individual rights are divisible, divisible, susceptible of being assigned to each of the interested parties,

²¹ For this reason, many books and articles published in Brazil talk about class actions, collective jurisdiction, collective process, etc.

²² Teori Albino Zavascki, *Processo coletivo: tutela de direitos coletivos e tutela coletiva de direitos* (3rd edn, Revista dos Tribunais 2008) 39.

²³ de Barros Leonel (n 13) 108.

in the proportion that pertains to each of them, but which, having a common origin, are treated collectively'.²⁴

2.9. Heterogeneous legal situations

We take up here the expression of Teori Albino Zavascki, to mention that there are many factual situations that demonstrate the possibility of rights of various kinds, in which diffuse rights, collective rights, homogeneous individual rights and traditional individual rights coexist.

A real case can be used as an example. In 1967 Kathrine Switzer decided to participate in the Boston Marathon in the United States, a traditional competition whose first edition was held in 1897, a year after the first Olympic Games. For 70 consecutive years, participation was forbidden to women. Kathrine registered using only her last name and the initial of her first name, as well as wearing closed clothing as the cold weather hit the city. No one noticed that there was a woman running. At one point the truck from the test directorate passed by, with many reporters and photographers. When the director of the competition, Jock Semple, noticed that there was an 'intruding' woman in the race, he got out of the car and tried to take her by force, failing only because she was supported by her boyfriend and her coach.

In this concrete case, we can see the possibility of claiming the widespread right to gender equality, especially in sports, the collective right of women in relation to sports, the individual homogeneous rights for the defense of the individual right of each woman who wanted to participate in the Boston Marathon, avoiding the filing of many individual claims. In addition to collective actions, there remains the right of each woman to individually postulate her rights.

²⁴ José Marcelo Menezes Vigliar, *Ação civil pública* (4th edn, Atlas 1999) 54.

3. The protection of diffuse, collective and individual homogeneous rights

3.1. A political solution

The traditional conception of conflict of interest should be recalled at this point. One would expect individuals, companies, and governments to act in a way that respects and provides for the fulfillment of all diffuse rights (or interests). Since this is not done to an adequate extent, one looks for ways to enforce these rights, as with individual rights. It can no longer be assumed that clauses providing for diffuse rights are not clothed in coercibility or are merely constitutional abstractions with no real value.

In the absence of spontaneous adherence on the part of individuals and businesses, it would be reasonable to expect governments to act to administratively enforce diffuse rights, acting through policy and state organs. However, governments are often silent and, worse, governments themselves often act directly or indirectly to infringe on some diffuse right. An example of this happens when an environmental law is passed, which facilitates the destruction of the environment or creates obstacles to effective control.

Then, the judicial route appears, which was silent for many years but has been active in recent decades to provide or attempt to provide for the correction of destructive pathways.

We observe that although there is a lot of talk about class actions for the defense of consumers and their homogeneous individual rights, history teaches us that the origin of collective legitimacy (England and the United States of America) is related to diffuse (or collective) rights and not to homogeneous individual rights. This fact has been recognized by Italian doctrine since the 1970s (in the Pavia and Salerno conferences).

Today, however, the defense of these three rights is provided for in many countries, with increasing enforcement. Many, but not all. However, this should not be limited to the study and protection of homogeneous individual rights.

As we noted above, when it comes to diffuse, collective and individual homogeneous rights, it is certain that public administration (*government*) comes into play, since the purpose of all public administrations is to provide for the realization of everyone's (diffuse) rights. After all, virtually all diffuse rights must be the subject of appropriate public policies, and such policies are (or should be) carried out or

coordinated by the public administration, not the Judiciary. The latter, at most, should exercise a clearly integrative activity. Recourse to the Judiciary should be *the* last resort.

The realization that the realization of widespread rights is the primary responsibility of public administration (government) is the main foundation of this work. This is because the ‘judicialization’ of public policies has spread in various parts of the world as if it were a panacea, losing awareness of the supplementary role of the courts. As we will see later, the tools for judicialization are numerous and very effective (especially in Brazil), which sometimes causes irresponsible excitement. Society needs to be well aware of each individual’s role in achieving equality and social peace.

The above statement explains why it is the state, through its executive power, which implements public policies, which encourages, coordinates and controls private activities, but of course all private actors (natural and legal persons), who must direct their conduct to respect and promote widespread rights. The role of government, however, is central and preponderant.

Of course, these statements are adaptable depending on the political system adopted in each of the states, which may assume greater or lesser interference in the private economy, but it is always good to remember that the importance of diffuse rights has been recognized even in countries famous for liberalism and capitalism, and that the history of their control and promotion took its first steps precisely through the imposition of equality through the courts.

Therefore, before talking about the interference of the judiciary in public policy and the implementation of widespread rights, we must include the study of so-called regulatory agencies.

3.2. The subsidiarity of the judiciary.

In 1982, the aforementioned Brazilian professor José Carlos Moreira warned us:

The classical structure of civil procedure, as it exists in most legal systems today, corresponds to a model designed and implemented to respond fundamentally to situations of conflict between individual interests.

To provide an adequate solution to the spread of rights, the weapons of the legal arsenal inherited from other times often seem ineffective. Indispensable is the work of adaptation, which adapts the tools forged in the old molds to current reality; or rather, in extreme cases, an effort of creative imagination, which invents new techniques for

the effective protection of interests whose dimensions fall outside the well-defined framework of interindividual relations.²⁵

Mauro Capelletti and Bryant Garth stated in their famous research *Access to Justice*:

Undoubtedly, a real “revolution” is developing within the process. The traditional conception of civil procedure left no room for the protection of diffuse rights. The process was seen as a matter between two parties, aimed at resolving a dispute between the same parties over their individual interests. Rights belonging to a group, the general public or a segment of the public did not fit well into this scheme.

Over the 40 years since those words were spoken, Brazil and many other countries have amended their legislation to fill this gap in procedural law.

The objective of this study is to reflect on the reasons for the interference of the judiciary in a matter that is, in principle, the main domain of the executive, either directly or through its independent regulatory agencies. We have already stated that the role of the judiciary is complementary (*ultima ratio*), but what is still observed in many countries, especially in Brazil, is the widening of the interference of the judiciary with respect to the public administration.

Added to this factor is the equal growth of the Public Prosecutor’s Office. On the one hand, the Brazilian innovation of constitutionally assigning to the Public Prosecutor’s Office very broad tasks in the defense of fundamental values, such as the legal system, the democratic regime, social interests, and unavailable interests, is extremely important. But on the other hand, we must remember that the path taken by the Prosecutor’s Office, which led to its enlargement, is a subject that deserves in-depth study, both by jurists and scholars in the social and political sciences.²⁶

Maturity and reflection are the key words, in the hope that, with this approach, a compromise solution can be sought, which may have already arrived.

²⁵ Moreira (n 6) 7.

²⁶ This analysis, however, would be entirely extemporaneous in the current political moment in Brazil, where Parliament has become very strong in defending the self-interests of its members. Any discussion could lead to retrogression, which would be much worse.

4. *The Brazilian system of collective actions*

4.1. *The laws*

We will now analyze the main Brazilian laws dealing with diffuse, collective and individual homogeneous rights, that is, the Brazilian system of collective processes. After all, it was the Brazilian legislature that played a leading role, in a much deeper and richer way than in other civil law countries, in the revolution mentioned by Cappelletti and Garth.²⁷

There are many laws dealing with public civil action in Brazil, three of which are the most important, as they are pioneers and form the basis of the system: LAP - Popular Action Law (Law No. 4717, of June 29, 1965); LACP - Public Civil Action Law (Law No. 7,347, of July 24, 1985); and CDC - Consumer Protection Code (Law No. 8078, of September 11, 1990). Although they appear to be specific laws, particularly the Consumer Protection Code, the three laws mentioned form a single system and all their provisions apply to any class action in Brazil. These three laws are sufficient to support Brazil's collective action system, as they regulate its main institutions, but several other laws have been enacted, each dealing with specific diffuse rights. However, the other laws do not create new proceedings or even modify the rules provided in the three basic laws.²⁸

The LAP and LACP also refer to the Code of Civil Procedure. Although the reference is to the old Code of 1973, which had not even undergone major changes at

²⁷ Zavascki (n 22) 26.

²⁸ Additional laws in specific subjects include: Law on Urban Land Allotment (Law No. 6,766, of Dec. 19, 1979); Law to Support Persons with Disabilities (Law No. 7,853, of Oct. 24, 1989); Law for the Protection of Investors in the Securities Market (Law No. 7913, of Dec. 7, 1989); Statute for Children and Adolescents (Law No. 8069, of July 13, 1990); Administrative Misconduct Law (Law No. 8.429, of June 2, 1992); Law on the Protection of Urban Order (Law No. 10,257, of July 10, 2001); Law on the Protection of Fans (Law No. 10,671, of May 15, 2003); Statute for the Elderly (Law No. 10,741, of October 1, 2003); Law on Genetically Modified Organisms (Law No. 11,105, of March 24, 2005); Law for the Defense of Economic Order and Free Competition (Law No. 12,529, of November 30, 2011). As part of this system, we also have the two laws that structure and regulate the Brazilian Public Prosecutor's Office. The first deals specifically with the Public Prosecutor's Office of the Union and the second has general rules regarding the Public Prosecutor's Office of each state of the federation: Law on the Organization, Attributions and Statutes of the Public Prosecutor's Office of the Union (Law No. 75, May 20, 1993); National Organic Law of the Public Prosecutors of the Federated States (Law No. 8625, February 12, 1993).

the time, it is certain to Brazilian doctrine and jurisprudence that the LACP and CDC now refer to the new Code of Civil Procedure, of 2015, with all the procedural techniques created thereafter to give effect to court orders.

Therefore, to understand the Brazilian class action system, it is essential to know the LAP, LACP, CDC, CPC, and all laws of procedural law, which are mutually applicable.

4.2. The scope of application

As we mentioned above, Brazilian public civil action is the procedural tool for the defense of diffuse, collective and individual homogeneous rights. From the beginning, Article One of the Public Civil Action Law had defined as its scope the liability for moral and material damage caused to the environment, the consumer, and to goods and rights of artistic, aesthetic, historical, tourist, and landscape value. However, five years later, the law was amended to include a provision that clarified that public civil action is an instrument that can be used to defend any diffuse, collective and individual homogeneous right.

The first concern of the law, as can be seen, is the protection of the environment and the consumer, followed by property and rights of artistic, aesthetic, historical, tourist, and scenic value. A later law added the defense of urban order, as a generic value, including those previously defined and any others that may be subject to violation or threat. Economic order, honor and dignity of racial, ethnic and religious groups, and heritage were added. To the end, it remains clarified that the law permits public civil action for the defense of all non-individual rights.

Consumer protection is usually seen as the ultimate example of the defense of homogeneous individual rights, but, of course, the consumer also has diffuse and collective rights. The Brazilian law, however, establishes some exceptions, because it cannot be used in matters of taxes and social security contributions. With these exceptions, the law made it clear that the obligation to pay taxes does not create a consumer relationship between the state and the citizen.

4.3. Legitimation to act

The first to have standing to bring the public civil action in Brazil is the Public Prosecutor. No other country is known where the role of the Public Prosecutor is so broad. Article 5 of the Brazilian Public Civil Action Law defines that, in addition to the Public Prosecutor, the Public Defender and the public administration (the Union, federated states, municipalities, and all decentralized public entities) have standing. Only in the last point of this article are associations mentioned, demonstrating that the system is not based in private, but public legitimacy.

The Public Prosecutor, if not the proponent of the claim, will compulsorily intervene as a third party, and in the event of an unfounded waiver or abandonment of the action by a legitimate association, the Public Prosecutor will assume active title, unless the same is assumed by another legitimate party.

The publicist character of Brazilian legislation is very evident in that it defines the Public Prosecutor as the major player in the system, the main legitimized person. The law is addressed to the Public Prosecutor. Since 1985, the Brazilian Public Prosecutor has ceased to be a body active only in the criminal sphere, to be active in the civil sphere as well. This prominence has been confirmed by the 1988 Federal Democratic Constitution, which provides in Article 127 that it is the duty of the Public Prosecutor to defend four essential values: the legal system, the democratic regime, social interests, and individual interests that are unavailable. The same Constitution stipulates that the Public Prosecutor has the essential function, among other things, of promoting public civil investigation, having the power to issue notifications, request information and documents, and investigative acts.

Other public entities may bring public civil actions, including the Public Defender, the Union, federated states, municipalities, autarchies, and public corporations. The Public Defender is a public body provided for in the Brazilian Constitution, composed of public employees hired through public competition, and is considered a permanent institution, essential to the jurisdictional function of the state, incumbent upon it, as an expression and instrument of the democratic regime. Among its main objectives are legal guidance, the promotion of human rights and the defense, at all levels, that is, both judicial and extrajudicial, of individual and collective rights, integrally and free of charge to those in need. Art. 5, LXXIV of the Brazilian

Constitution enshrines full and free legal aid as one of the fundamental rights for those who demonstrate insufficient resources.

The law allows for *lis pendens* between legitimated parties. The Public Prosecutor will participate in all cases that are not brought by it, acting, then, as an intervener and will assume standing if the association that brought the case withdraws the case or abandons it without giving valid reasons.

4.4. Legitimation of associations

Also eligible for public civil action is an association that has been established for at least one year in the terms of civil law and that includes, among its institutional purposes, the protection of the widespread, collective or individual homogeneous right that is the subject of the action. The pre-establishment requirement may be waived by the court when there is a clear social interest evidenced by the size or characteristic of the harm, or the relevance of the legal asset to be protected. Importantly, the law does not require the authorization of the members' meeting, a decision of its board being sufficient. Associations are registered only before a notary public, without any control of the public administration.

4.5. The public civil inquiry and its filing

One of the defining elements of Brazilian public civil action and the prominence of the Public Prosecutor is the public civil investigation, which functions in similar terms to the already familiar and traditional criminal investigation. In Brazil, criminal investigation is an almost exclusive attribution of the civil police, but public civil investigation is the primary attribution of the Public Prosecutor.

The law gives the Public Prosecutor the main role in the whole scenario of public civil action, but the exclusive role of investigating the facts he or she learns about. We have already seen that other public entities (as well as associations) can bring the public civil action, but only the Public Prosecutor can initiate the public civil investigation. The other legitimates, of course, will do something similar to this investigation, as they will need to know more about the facts and gather enough evidence to bring the action, but they do not have the power given by the constitution and the law to the prosecutor. Nor is it possible to give the name of public civil investigation to acts aimed at acquiring

elements and evidence that already exist. This, the investigation, is the exclusive responsibility of the prosecutor.

4.6. Popular initiative, judges' duty and request for information

The Law on Public Civil Action provides the possibility for anyone to provoke the public prosecutor's initiative by providing him or her with information on the facts constituting the subject of the civil action and indicating the elements of conviction. This, which is merely an option that the private party may or may not exercise, while it is an obligation for the public employee. The latter, as related to his position or function, is obliged to take such an initiative, and criminal legislation deals with sanctioning its omission.

The law contains a specific provision for judges; it stipulates that in every judicial proceeding, if the judge has knowledge of facts that may give rise to public civil action, he or she must send a copy of part or all of that process to the prosecutor. As we have already mentioned, the prosecutor is the primary author of public civil action, and his constitutional mission is to defend, among other values, social and individual rights that are inalienable.

4.7. Self-complaint before or during trial

Self-composition can lead to three different outcomes: the plaintiff can waive the right on which the claim is based; the defendant can acknowledge the merits of the claim; or, as is more common, both enter into a settlement, that is, a contract in which the parties make mutual concessions. Brazil's Public Civil Action Law allows legitimate public entities to 'assume' from the parties concerned a 'commitment to adapt their conduct to the requirements of the law', showing, on first reading, that the law allows only the recognition of the merits of the claim. However, it is observed, not only in Brazil but also in other countries, that the legislature is not always careful with words, especially in matters of self-composition. For this reason, since the advent of the Brazilian Public Civil Action Law, doctrine and jurisprudence have presented a more elastic interpretation, allowing a certain discretion on the part of the legitimized public entities, to accept that the adjustment of behavior takes place in flexible terms, to facilitate and encourage its spontaneous adherence. In the end, practice has shown that when it comes

to diffuse rights, demanding too much can be utopian. It is usual for the public body to agree to some adjustment of conduct from what was initially claimed. More common, however, is to agree on the form and time in which obligations will be fulfilled.

4.8. Jurisdiction

The law stipulates that public civil actions shall be brought in the court of the place of injury, and adds that the filing of the claim excludes the court's jurisdiction over all subsequently brought actions having the same subject matter.

The problem is not as simple as it seems. We must remember that in Brazil there is a Federal Justice, one justice in each federated state and one in the Federal District (Brasília, the country's capital). This implies the need for an initial analysis with the objective of knowing whether these are federal matters. The Federal Constitution establishes that Federal Justice has jurisdiction over 'cases in which the Union, autarchic entity or federal public corporation is interested as author, defendant or assistant'. Since it is not in the interest of the Union, the justice of the federal state will have jurisdiction.

4.9. Precautionary Measures

Brazil's Public Civil Action Law was passed and came into effect on July 24, 1985, four months after the end of the military regime, when a constitution imposed by that regime was still in effect. As we mentioned at the beginning of this paper, Brazil drew inspiration from the Italian doctrine of the 1970s to create a law that would give concrete possibilities for the judicial protection of widespread individual homogeneous rights. It was not difficult for Brazilian professors to influence the National Congress to debate and approve the Public Civil Action Law partly because the last military government had initiated dialogue with civil society and promoted important acts of redemocratization. At this particular stage in history, the Public Civil Action Law emerged as a result of the political and civil rights movement in Brazil. This explains the fact that the law was passed in the first months of redemocratization.

At present, of course, we have to interpret the Public Civil Action Law in conjunction with the advances in Brazilian civil procedural law that have occurred as a result of reforms to the old code and, of course, the 2015 CPC. Collective judicial protection cannot find limits, and all the revolutionary innovations in Brazilian civil

procedure apply to previously enacted special laws, including the Public Civil Action Law of 1985, the Consumer Defense Code of 1990, and the much older Popular Action Law of 1965.

For this reason, it is not enough for a foreign jurist to know only the Public Civil Action Act. To understand its scope, he or she must know as thoroughly as possible the entire Brazilian civil procedural system, today with its main lines centralized in the 2015 Code of Civil Procedure.

Brazilian civil procedure, individual and collective, is based on effectiveness, extending this concept to the prevalence of preventive protection over compensation. The law cannot wait for harm to occur in order to act later. Where possible, the law must prevent harm from occurring by enforcing justice in a timely, effective, and comprehensive manner. Prominent Brazilian jurists tell us that ‘the rights protected by the Public Civil Action Law do not fit within the logic of classic civil proceedings’.²⁹ In particular, Art. 139, IV, of the new Brazilian Civil Trial Code must be taken into account: ‘The judge shall direct the trial in accordance with the provisions of this Code, having the task of determining all the coercive or subrogatory inductive measures necessary to ensure the enforcement of a judicial measure’.

Thus, at present, in any individual or collective process in Brazil, the enforcement of obligations of any kind may be subject to such measures, even if the person concerned does not expressly request them, since the public right of effectiveness of judicial protection prevails. Consequently, the provisions of Articles 3 and 11 of the Public Civil Action Law have been substantially expanded to allow for any kind of judicial protection and any measures that may be necessary to comply with court decisions, particularly injunctions.

The Public Civil Action Law creates the possibility of interlocutory relief, however, it does so with the old system in mind, which required an autonomous interlocutory process based on the classical civil trial system. However, in 1995, the Brazilian Civil Trial Code was amended to create a new system of unitary process, in which the plaintiff can apply from the beginning, even *inaudita altera parte*, for a provisional measure of anticipatory protection. Thus, either a typical interim measure

²⁹ Egon Bockmann Moreira and others, *Comentários a Lei de ação civil pública* (2nd edn, Revista dos Tribunais 2019).

of protection or a simple anticipatory one can be determined by the court before or immediately after the defendant's first defense. In Brazil, it has become normal to request and grant provisional guardianship. Although it is called provisional guardianship, in some cases it can be stabilized.

4.10. Defense Fund for Diffuse Rights

The Law on Public Civil Action stipulates that money from convictions for damages caused will flow into a fund, which will be managed by a special council. The law refers only to convictions for damages to diffuse rights and those known as *fund recovery*, i.e., when, in the case of individual homogenous rights, those affected do not seek individual enforcement of the judgment.

4.11. Costs, Fees and Civil Liability

An important point in Brazil's class trial system is that it stipulates that there will be no advance fees and that the plaintiff association will not pay such fees or even attorneys' fees of the winning party in the event that its claim is denied. However, costs and fees will be paid when the losing association's conduct was marked by bad faith.

In cases of bad faith litigation brought by an association, its directors will also be ordered to pay ten times the court costs.

4.12. Res judicata erga omnes secundum eventum litis

The judgment in the Brazilian public civil action produces the effects of *res judicata erga omnes secundum eventum litis*.

If the claim is granted, the judgment applies to all. In public civil action to defend individual homogenous rights, moreover, the Brazilian system adopts the system known as *opt out*. Thus, the judgment applies to everyone except those who have decided to act individually.

Up to this point, it can be said that the Brazilian collective trial system provides for the delivery of a judgment *erga omnes*. However, a new public civil action can be brought when the first one has been declared inadmissible for lack of evidence. This provision should be interpreted as broadly as possible. The new evidence may be evidence previously unknown, evidence already known but not presented, and even

evidence already presented but whose production in court has not been admitted. Of course, these hypotheses must be stated and amply justified in the original application for the new claim to be accepted. The authority of *res judicata*, then, operates only when the claim is well-founded and when it is unfounded for any other reason, unless the reason is the absence of suitable evidence to support the original judgment. In these terms, it is argued that the Brazilian system is that of the *erga omnes secundum eventum litis* judgment.³⁰

4.13. Action for the Defense of Homogeneous Individual Rights

Brazilian law also deals with the specific system dedicated to the defense of homogeneous individual rights. The essence of the defense of homogeneous individual rights is very simple: 1. a single (collective) claim to define the existence of the harmful fact and to identify the person responsible; 2. once liability is established, individual liquidation and enforcement will be carried out, in order to identify each victim and the amount of damage specifically caused to each of them; 3. legitimacy for enforcement may belong to each victim or to the collective legitimates. After the lapse of one year without qualification of the interested parties in numbers consistent with the severity of the damage, one of the collective legitimates must initiate the liquidation and enforcement of the compensation due, similar (though not equal) to the *fuid recovery* in the North American system.

4.14. The Brazilian Public Prosecutor as Agent for Public Civil Actions

The Brazilian prosecutor's office is organized in the same way as the judiciary: there is a federal union prosecutor and one in each of the federated states. They are organized by Laws May 20, 1993, No. 75 and February 12, 1993, No. 8625, respectively.

³⁰ The law defines this system as follows: In the class actions referred to in this Code, the judgment will be judged: I - *erga omnes*, unless the claim is dismissed for insufficiency of evidence, in which case any legitimated party may bring another action, with identical grounds, using new evidence, in the hypothesis provided for in point I of the sole paragraph of Art. 81; II - *ultra parte*, but limited to the group, category or class, unless it is dismissed for insufficiency of evidence, pursuant to the preceding point, this being the hypothesis provided for in Item II of the sole paragraph of Article 81; III - *erga omnes*, only if the claim is granted, for the benefit of all victims and their successors, in the hypothesis provided for in Item III of the sole paragraph of Article 81.

We have already seen that the prosecutor is the main actor in public civil action in Brazil and that his action is also directed against public entities and public agents. This occurs when a public agent fails to fulfill its duty to act for the promotion of diffuse, collective and individual homogeneous rights or is silent in supervision. For this reason, unlike in other countries, the Brazilian prosecutor is not only the holder of criminal actions but, to a large extent, also of public civil actions. Moreover, as we have already seen, there is a middle ground, which is the control of administrative propriety, as a result of a specific law. The Public Prosecutor's Office, then, in addition to routinely bringing public civil actions, also brings actions for administrative impropriety, seeking a new type of sanction, ranging from compensation for damages to fines, from removal from office to a ban on holding public office and contracting with the state. It is not possible to study public civil action in Brazil without studying in depth the functioning and structure of the Office of the Public Prosecutor.

Brazilian prosecutors are autonomous and their careers are totally separate from those of judges. In Brazil, the words judiciary and magistrate refer exclusively to judges. This has always been the case, but since the 1988 Constitution, members of the Brazilian Public Prosecutor's Office have the same guarantees, salaries, prohibitions and duties as judges.

Since the Constitution, the prosecutor has gained full autonomy in two senses. The first in its relationship with the three traditional powers. The prosecutor is not part of the executive power, nor of the legislature, nor of the judiciary. The second meaning refers to the fact that each prosecutor has his or her attribution defined in advance by rules of law and does not obey orders or directives from the head of the institution or any other public body.

Because Brazil is a federation, there is the Federal Prosecutor's Office and the States Prosecutor's Office. In addition to these, there is the Federal District Prosecutor's Office, which is Brasilia, the federal capital. There are also two specialized prosecutors: the Public Prosecutor's Office, which acts before the Labor Court; and the Military Prosecutor's Office, which acts before the Federal Military Court.

The Federal Prosecutor's Office is headed by the Attorney General of the Republic. Its members are called public prosecutors. In states and the Federal District, prosecutors are headed by the Attorney General for Justice. Its members are designated

as prosecutors and public prosecutors.

In the face of this multiplicity of terminology, it is better to treat everyone as a member of the Public Prosecutor's Office or simply talk about the Public Prosecutor's Office.

According to the Federal Constitution:

Admission to the career of the Public Ministry shall be by means of an open competition of tests and titles, ensuring the participation of the Brazilian Bar Association in its implementation, requiring from the law graduate, at least three years of legal activity and observing, in applications, the order of ranking.

There is no link between the career of the prosecutor and that of the magistrates. The Prosecutor General of the Republic shall be freely chosen by the President of the Republic from among the members of the Union Prosecutor's Office, subject to the approval of the Federal Senate, for a term of two years, with the possibility of reappointment and reapproval by the Federal Senate.

The Attorney General for Justice of each federated state shall be chosen by the Governor of the state from the members of the career comprising a triple list prepared by all members of the prosecutor's office of the respective state.

Once assigned to a particular office, the prosecutor member becomes immovable, unless he or she requests it. These and other guarantees allow for the total independence of each prosecutor, according to the so-called principle of the natural prosecutor. For each unlawful act there is a previously appointed prosecutor, who will act according to legal and constitutional norms, with complete freedom.

On the other hand, each individual prosecutor (federal and state) has a Board of Governors and an internal supervisory body, with powers to punish the prosecutor in cases of noncompliance with his duties, but never to interfere in his work. The only exception is when the prosecutor member decides to close an investigation due to insufficient evidence, in which case he must submit the filing to the higher body for approval. The latter, if it does not agree, will appoint another member instead of the prosecutor to pursue the case.

At the national level and especially of the High Councils of the various prosecutors' offices (federal and state) there is the CNMP - National Council of the

Prosecution, consisting mainly of members of these various prosecutors' offices, but also composed of lawyers and members chosen by Parliament. The National Council has the power to review the disciplinary acts of the councils of each prosecutor's office, to revoke cases, and to control the administrative and financial activities of the various bodies.

In Brazil, the Public Prosecutor's Office annually submits its budget proposal to the National Congress and itself uses the resources, takes care of property administration and support services, as well as pays each of its members, always following what is approved by parliament. There is no interference by the Executive Power, not even the Minister of Justice.

As in other countries, the Brazilian Public Prosecutor acts as a party in criminal proceedings and as an intervener in civil proceedings. What is new in Brazil, however, is the enormous opportunity for the Public Prosecutor's Office to act as a civil party in civil proceedings, especially in public civil actions.