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REFLECTIONS ON COLLECTIVE PROCEDURE IN BRAZIL AND PORTUGAL

CONSIDERAÇÕES SOBRE A TUTELA DO PROCESSO COLETIVO NO BRASIL E EM PORTUGAL

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RESUMO

O presente artigo científico apresenta algumas considerações sobre o processo coletivo no Brasil e em Portugal, destacando as suas semelhanças para, posteriormente, apresentar os pontos de distinção mais evidenciados da matéria. Nesse contexto, a investigação propõe esclarecer se ocorre influência do sistema brasileiro sobre o português, se é possível falar em microssistema jurídico nos dois países para a tutela do direito coletivo e a diferença de regramento nos dois sistemas. Objetiva analisar a legislação do Brasil e de Portugal aplicável ao direito coletivo e destacar a semelhança existente nos dois ordenamentos jurídicos, notadamente em virtude da existência de leis especiais estabelecendo as regras

gerais do proces- so coletivo e da classificação dos interesses tutelados pelo processo coletivo, bem como os aspectos que os diferenciam. Utilizando o método dedutivo, é possível compreender como ocorre a tutela do direito coletivo no Brasil e em Portugal e a diferença existente nos dois países.

Palavras-Chave: Tutela. Processo. Coletivo. Brasil. Portugal.

ABSTRACT

This scientific paper presents some reflections on the collective procedure in Brazil and Portugal, giving emphasis to the similarities and later presenting the most outstanding points of distinction. Given this context, the study seeks to clarify whether there is an influence of the Brazilian system over the Portuguese one, whether it is possible to identify a legal micro-system in both countries for protection of collective rights, and the regulatory difference in both systems. It analyzes the relevant Brazilian and Portuguese legislation on collective rights, and highlights similarities between both legal systems. An important emphasis is given to the existence of special laws establishing the general rules of the collective procedure and the classification of interests protected by collective cases, and also the aspects to differentiate them. Through the deductive method, it is possible to understand how the protection of collective rights in Brazil and in Portugal occurs, and the differences between the two countries.

KEYWORDS: Lawsuit. Collective. Procedure. Brazil. Portugal.

1 INTRODUCTION

The emergence of the collective procedural law, along with the doctrinal controversy about it, dates back to two main sources: the first, found in Roman Law, refers to the popular action in defense of the rei sacrae and rei publicae, according to which the citizen was assigned the power to act in defense of the public thing (DIDIER JÚNIOR; ZANETI JÚNIOR, 2013, p. 25); the second refers to the English representatives actions of the twelfth century, with historical reports indicating that the mark of the emergence of collective actions is the year 1199 making reference to the case of parishpriest Martin (TORRES, 2010, p. 38). It concerns the action filed by the parish priest Martin, from Barkway, before the Ecclesiastical Court of Canterbury, concerning the right to certain offerings and daily services, against the parishioners of Nuthamstead, a village in

Hertfordshire, thus considered as a group, calling, however, to court only some people to, apparently, ponder for all (HIGA, 2011, p. 195).

Anyway, the doctrine indicates that the development of collective actions occurred from the American class actions, introduced in 1842, with the edition of the Equity Rule 48, which relied on the studies developed by Joseph Story, started in 1820 (MENDES, 2008, p. 232). In 1912, Rule 48 was replaced by Rule 38, criticized because of the gaps then existing; only in 1938, with the publication of Rule 23, that the collective actions effectively began to gain the contours closest to what is known today, even so, it was not free from criticism, especially in view of its confusing, complex and abstract wording, a circumstance that drove the movement for reforms that occurred in 1966 and subsequently in 1995, 2003 and 2005 (TORRES, 2010, p. 40).

In Brazil, at the constitutional level, the Constitutional of 1934, provided in its article 113 the possibility of filing a popular action for the declaration of nullity or annulment of harmful acts to the patrimony of the Union, the Sttes and Municipalities, instrument not contemplated by the Charter of 1937, but reintroduced in the Constitution of 1946, from when it became part of the other charters in Brazil until today (TORRES, 2010, p. 42). However, there are some earlier rules that already indicated the Brazilian legislature's concern with the issue of collective representation, such as Decree number 979 of 1931[1] and Decree number 19,770 of 1931[2]. The issue of collective procedural law, however, began in Brazil with the publication of Law number 1154 of 1950, which established the possibility for class associations, founded under the Civil Code, to collectively or individually represent their members before administrative authorities and the ordinary courts.

In Portugal, it is usually said that the popular action was directly derived from the Roman actio popularis, supplementary popular action (MARTINS, 2008), but the first manifestations on the protection of the collective process are found in article 124 of the Constitution of 1826, which established the possibility of Judges and judicial officers being respondent for bribery, cheating, embezzlement and concussion in a popular action that could be filed by the complainant himself or by any of the people. According to Sousa (2003), in administrative law there was a distinction between a supplementary or

[1] Essa norma teve por escopo facultar aos profissionais da agricultura e das indústrias rurais a organização de sindicatos para a defesa de seus interesses.

[2] Regulava a sindicalização das classes patronais e operárias, instituindo a estrutura sindical oficial.

substitutive popular action, which was designed to defend the Administration's assets or rights that were injured or threatened by third parties, when the Administrationhad failed to act (art. 369º CA/1878 and art. 369º CA/1940), and a corrective popular action, which permitted the impugnation of acts of the Public Administration and, therefore filed against it (art. 29º CA/1842 and arts. 97º to 99º CPTA).

2 THE NOTION OF DIFFUSE, COLLECTIVE AND INDIVIDUAL HOMOGENEOUS INTERESTS OR RIGHTS

Nowadays, it is undeniable that a single harmful conduct can affect a large number of people, which is why we speak increasingly of mass litigation or supra-individual litigation (SOUSA, 2003, p. 9). This phenomenon finds an explanation in the history of humanity itself, notably due to the world population growth and the consequent increase of conflicts among human beings, but it develops from the transformation of society from individualistic to mass society (GRINOVER, 1990, p. 49-50).

In this context, legal systems must be sensitive to this increase in supra-individual litigation, so that they can find solutions that allow effective access to justice for all people affected, that is, it is necessary to find appropriate forms of collective protection for supra-individual interests.

In achieving this goal, despite the various problems that are not always easy to solve, the first question that arises is precisely the delimitation of supra-individual interests or rights.

From the outset, it must be emphasized that the distinction between rights and interests has no practical value in the Brazilian legal system, which adopts the single system of jurisdiction with the solution of all controversies exclusively through the actions of the Judiciary (ALVIM, 1994, p. 273), unlike the Portuguese experience whose legislator was influenced by this difference that is important in countries that adopt administrative litigation (GRINOVER, 1996).

The etymological origin of the term interest comes from the Latin word interest, which means "to be among", from which results the idea of connection, that is, that the interest is the element that connects the subject with the good (SILVA, 2003, p. 22). Thus, interest is seen under two distinct aspects: 1) from an objectivist perspective, interest represents the virtuality that certain goods possess to satisfy certain needs; 2) from a subjectivist perspective, it expresses a

relation of aptitude that is established between the needy subject and certain realities that are apt for his satisfaction (SILVA, 2003, p. 25).

In summary, according to the lesson of Sousa (20030), the interest establishes the relationship between a need of a subject and an asset that can meet it, that is, for every interest there is one or several holders that can satisfy certain needs from its appropriation.

The interests can be classified as individual or collective depending on the divisibility or indivisibility of the good suitable for their satisfaction, and the latter can be divided into diffuse or collective in the strict sense (MAZZEI, 2006).

According to Mancuso (2004), the individual interest is the one whose fruition is restricted to its addressee, that is, only a certain individual benefits if the interest is well exercised, which indicates that the qualification for its exercise is attributed to its holder.

Regarding collective interests, the doctrine points out three meanings for this term: 1st) personal interest of the group; 2nd) collective interest as a "sum" of individual interests; 3rd) collective interest as a "synthesis" of individual interests (MANCUSO, 2004, p. 52-57).

The personal interest of the group is more restrictive and corresponds to the interest of the legal entity itself, i.e., it is an interest that predominantly concerns the legal entity. As such, it is not a collective interest per se, because it is primarily directed at the legal entity as an entity, which is why it could be called a "social interest".

The collective interest as a “sum” of individual interests is collective in form, since it qualifies as a mere juxtaposition of individual interests, exercised collectively, for which reason one cannot speak of a true collective interest. The collective interest as a “synthesis” of individual interests qualifies as collective interest properly speaking, since, despite originating from individual interests, it represents a synthesis, creating a new reality.

Collective interests are usually referred to by authors as metaindividuals, transindividuals or supraindividuals and can assume one of three categories: homogeneous individual interests, collective interests or diffuse interests (SILVA, 2003, p. 48).

As for diffuse interests, these are interests that belong simultaneously to each and every member of a acommunity, which is why they are considered diffuse property (SOUSA, 1995). According to Silva (2003), the primary characteristic of

these interests is the fluidity of their ownership which, as a result, implies a protection promoted independently of it.

Similarly to the diffuse interest, the collective interest is also titled by a plurality of subjects, but unlike the diffuse interest there is a concrete entity and provided with organization as a reference center of the holders of the interest, reason why it is possible to determine the subjects holders of the interest (SILVA, 2003, p. 57). Punzi (2002) asserts that in the collective interest, organized groups are always protected, for whom the legislator usually holds importance, such as, for example, an association, a union, a party or a professional association.

However, there is a category of interests that deserves to be highlighted, called homogeneous individual interests, which are true individual rights with a natural collective dimension due to their homogeneity. It means that these interests, despite maintaining their individual character, refer with homogeneity of content to a wider or wider universe of subjects, that is, the goods suitable for the satisfaction of the interest are divisible, identical among the components of the group (SILVA, 2003, p. 69-70).

In Brazil, the formula employed by the legislator was the inclusion of the distinction of interests (or rights) that may be protected by the collective lawsuit in Law No. 8.078, of 1990 – the Consumer Defense Code –, in the following terms: a) diffuse interests, indivisible as to subject matter, with holders that are indeterminate and indeterminable (art. 81, sole paragraph, I[3]); b) collective interests, also indivisible as to subject matter, held by a group, category or class of people, linked among themselves or with the opposing party by a basic legal relationship (art. 81, sole paragraph, II[4]); c) homogeneous individual interests, understood as those of common origin, that is, divisible rights, with determinate holders, but that may be brought before the courts collectively (section 81, sole paragraph, III[5])[6].

According to Sousa (2003), the Portuguese legislator did not employ this strategy to define supra-individual interests; however, he was inspired by

[3] Os interesses ou direitos difusos são os transindividuais, de natureza indivisível, de que sejam titulares pessoas indeterminadas e ligadas por circunstâncias de fato;

[4] Os interesses ou direitos coletivos referem-se aos transindividuais, de natureza indivisível de que seja titular grupo, categoria ou classe de pessoas ligadas entre si ou com a parte contrária por uma relação jurídica base;

[5] Os interesses ou direitos individuais homogêneos são os decorrentes de origem comum;

[6] De acordo com o art. 21 da LACP, aplicam-se à defesa dos direitos e interesses difusos, co- letivos e individuais, no que for cabível, os dispositivos do Título III da lei que instituiu o Código de Defesa do Consumidor.

Brazilian law to distinguish the three classes of interests, present, for example, in articles 3, paragraph "f", 13, paragraph "c", and 20 of the LDC.

In summary, diffuse interests have been conceptually separated from other collective interests due to the inexistence of a legal bond that links their holders; rather, they rest on factual data, generally generic and contingent, accidental and changeable, whereas we speak of collective interests when they are common to categories of people, united by a basic relationship, establishing a legal link that allows the identification of the group's components.

However, in both cases these are transindividual rights (metaindividual, supra-individual, belonging to a collectivity) and indivisible (they can only be considered as a whole).

Individual homogeneous rights, in turn, represent interests with a natural collective dimension dua to their homogeneity, resulting from the massification or standardization of legal relations and the resulting injuries.

3 SUMMARY OF THE COLLECTIVE SUIT IN BRAZIL AND IN PORTUGAL: AN ANALYSIS OF THE MAIN SIMILARITIES AND DIFFERENCES

The first characteristic common to both legal systems is the tripartite nature of the interests protected by the collective lawsuit into diffuse interests, collective interests and homogeneous individual interests, which are expressly defined in Brazil in the Consumer Protection Code and mentioned in Portugal in the LDC, as mentioned above.

In this sense, the absense of an express definition of the interests protected by the Portuguese rules, however, is not enough to conclude that this criterion described in the Consumer Protection Code does not exist in the Lusitanian legal system, especially when the influence that the Brazilian legislation exerted on the Portuguese legislation is well known.

Another point of convergence is the inexistence of specific procedural rules regarding the distribution of the burden of proof in cllective lawsuits, which implies the need for assistance in the codes of civil procedure of these two countries, under the terms of art. 19 of LACP[7] and art. 12, 2, of Law no. 83, of 1995[8], as well as the systematic and teological interpretation of the two legal systems.

[8] Art. 12º, 2: A acção popular civil pode revestir qualquer das formas previstas no Código de Processo Civil.

However, both in Brazil and in Portugal, the judge is endowed with broad powers regarding the collection of evidence in collective proceedings.

Article 130 of the Code of Civil Procedure (CPC), of 1973, already expressly established the possibility of the judge, ex officio or at the request of the party, finishing the necessary evidence for the instruction of the process, rejecting useless or merely delaying measures, a rule reproduced in Article 370 of the Code of Civil Procedure, of 2015.

In Portugal, article 17 of Law no. 83 of 1995 gave the judge his own initiative in matters of gathering evidence, without being bound by the initiative of the parties. in matters of gathering evidence, without binding the initiative of the parties. Furthermore, art. 83 of the Consumer Defense Code (CDC[9]), similarly to art. 12, 2, of Law nº 83, of 1995, established the possibility of filing cognitive, executive or precautionary actions for collective protection. However, what can be observed in these countries is the tendency to file cognitive actions to settle the legal relationship of substantive law to, subsequently, enable an eventual executive action.

In Brazil and Portugal, the legitimacy[10] to file a public civil action and a popular action, respectively, is concurrent and autonomous, that is, the legitimacy of one person does not exclude that of the other. This means that in Brazil, as in Portugal, the criterion of adequate representation, present in the

[9] Art. 83. Para a defesa dos direitos e interesses protegidos por este código são admissíveis todas as espécies de ações capazes de propiciar sua adequada e efetiva tutela.

[10] No Brasil, a LACP estabeleceu a legitimidade nos seguintes termos: Art. 5o Têm legitimida- de para propor a ação principal e a ação cautelar: (Redação dada pela Lei nº 11.448, de 2007). I - o Ministério Público; (Redação dada pela Lei nº 11.448, de 2007). II - a Defensoria Pública; (Redação dada pela Lei nº 11.448, de 2007). III - a União, os Estados, o Distrito Federal e os Municípios; (Incluído pela Lei nº 11.448, de 2007). IV - a autarquia, empresa pública, fundação ou sociedade de economia mista; (Incluído pela Lei nº 11.448, de 2007). V - a associação que, concomitantemente: (Incluído pela Lei nº 11.448, de 2007). a) esteja constituída há pelo me- nos 1 (um) ano nos termos da lei civil; (Incluído pela Lei nº 11.448, de 2007). b) inclua, entre suas finalidades institucionais, a proteção ao patrimônio público e social, ao meio ambiente, ao consumidor, à ordem econômica, à livre concorrência, aos direitos de grupos raciais, étnicos ou religiosos ou ao patrimônio artístico, estético, histórico, turístico e paisagístico. Entretanto, previu expressamente nesse mesmo artigo: § 3º Em caso de desistência infundada ou abandono da ação por associação legitimada, o Ministério Público ou outro legitimado assumirá a titulari- dade ativa. (Redação dada pela Lei nº 8.078, de 1990). Em Portugal, a Lei nº 83/95 estipulou a seguinte legitimidade em seu art. 2º: 1 - São titulares do direito procedimental de participação popular e do direito de acção popular quaisquer cidadãos no gozo dos seus direitos civis e políticos e as associações e fundações defensoras dos interesses previstos no artigo anterior, independentemente de terem ou não interesse directo na demanda. 2 - São igualmente titulares dos direitos referidos no número anterior as autarquias locais em relação aos interesses de que sejam titulares residentes na área da respectiva circunscrição. Essa lei previu no art. 16º: 1 - No âmbito de ações populares, o Ministério Público é titular da legitimidade ativa e dos poderes de representação e de intervenção processual que lhe são conferidos por lei, podendo substituir-se ao autor em caso de desistência da lide, bem como de transação ou de comportamentos lesivos dos interesses em causa.

North American class actions, was not adopted. This criterion consists in the possibility of the judge verifying, case by case, in view of the circumstances, the seriousness and credibility of the representation in order to accept, or not, the legitimacy (GRINOVER, 1996).

Another aspect that should also be highlighted is the role of the Public Prosecutor's Office as a law enforcer when it has not filed a lawsuit, either in a Portuguese popular action[11] or in a Brazilian public civil action[12]. In both cases it is possible that the Public Prosecution Service assumes the active legitimacy of the action, in Portugal, in cases of withdrawal of the suit, as well as in cases of transaction or behavior of the popular plaintiff that may be harmful to the public interest[13], and in Brazil in cases of unfounded withdrawal or abandonment of the action by a legitimate association[14].

Furthermore, as far as res judicata is concerned, both in Brazil and in Portugal the res judicata regime has been established as a general rule for cases that have been granted or dismissed, in the latter case, except when it occurs due to insufficient evidence[15].

As far as the differences are concerned, one can immediately notice the existence in Portugal of a single procedural instrument par excellence - the popular action - for the defense of interests connected to the public patrimony, including the cultural patrimony, and other community assets.

Differently, according to Grinover (1996), in Brazil there are two procedural routes that can be used for this purpose: 1) popular action, regulated by Law No. 4.717, 1965, to defend public property in the broad sense and administrative morality; 2) public civil action, provided for in Law No. 7.347, 1985, to defend any diffuse, collective or individual homogeneous interest or right.

Therefore, Mazzei (2006) points to the existence of the principle of non-exhaustiveness or of the maximum amplitude of collective judicial protection, described in art. 83 of the Consumer Defense Code, according to which there is a series of instruments aimed at the protection of the collective process, among which we can still mention the collective writ of mandamus (art. 5, LXXIII, of the 1988 Federal Constitution).

[11] Art. 16º, 1, da Lei nº 83/95.
[12] Art. 5º, §1º, da LACP.
[13] Art. 16º, 1, da Lei nº 83/95.
[14] Art. 5º, §3º, da LACP.
[15] Art. 19º, 1, da Lei º 83/95 e art. 103, incisos I e II, do CDC.

The regime of legitimacy configures another difference: while in Portugal the legislation admitted the filing of popular action by any citizen[16], in the enjoyment of civil and political rights, in Brazil there is no such possibility of filing a public civil action whose legitimacy, according to LACP, is restricted and does not include the citizen[17].

It implies recognizing in Brazil a more restricted popular participation in relation to Portuguese law, notably when the defense of the consumer, of the environment and of other diffuse and collective interests is under the legitimacy of public entities and legally constituted associations.

A further point of distance is found in the regulation of civil liability.

On one hand, the Portuguese legislator, when establishing subjective civil liability, provided for the duty to idemnify the injured party for damages caused (art. 22, 1, of Law number 83, of 1995); limited itself to providing for indemnification, fixed globally, for the violation of interests of holders that are not individually identified (art. 22°, 2); and tried to assure to the holders of identified interests the right to idemnification under the general terms of civil liability (art., 22°, 3).

On the other hand, the Brazilian legislator chose to adopt an exhaustive discipline of the matter, even with the LACP'S provision for the judge to destine the compensation in cases of damage caused to an indivisible good (diffuse and collective), such as the environment, to a specific Fund[18], which does not occur with the Portuguese magistrate.

In the case of homogeneous individual interests, the discipline is found in arts. 95 to 100 of the Consumer Defense Code, which, in summary, foresees the formulation of a generic petition, without indicating the victims and their successors; the rendering of an illiquid condemnatory sentence in case the

[16] Art. 2º da Lei nº 83/95.

[17] Art. 5o. Têm legitimidade para propor a ação principal e a ação cautelar: (Redação dada pela Lei nº 11.448, de 2007). I - o Ministério Público; (Redação dada pela Lei nº 11.448, de 2007). II - a Defensoria Pública; (Redação dada pela Lei nº 11.448, de 2007). III - a União, os Estados, o Distrito Federal e os Municípios; (Incluído pela Lei nº 11.448, de 2007). IV - a autar- quia, empresa pública, fundação ou sociedade de economia mista; (Incluído pela Lei nº 11.448, de 2007). V - a associação que, concomitantemente: (Incluído pela Lei nº 11.448, de 2007). a) esteja constituída há pelo menos 1 (um) ano nos termos da lei civil; (Incluído pela Lei nº 11.448, de 2007). b) inclua, entre suas finalidades institucionais, a proteção ao patrimônio público e social, ao meio ambiente, ao consumidor, à ordem econômica, à livre concorrência, aos direitos de grupos raciais, étnicos ou religiosos ou ao patrimônio artístico, estético, histórico, turístico e paisagístico.

[18] Art. 13. Havendo condenação em dinheiro, a indenização pelo dano causado reverterá a um fundo gerido por um Conselho Federal ou por Conselhos Estaduais, de que participarão necessariamente o Ministério Público e os representantes da comunidade, sendo seus recursos destinados à reconstituição dos bens lesados.

petition is granted; the personal liquidation of the enforcement order by the victims and their successors, by means of habilitation, through which they must prove the causal connection with the general damage and their personal losses, which must be quantified; and the individual execution of the calculated installments; the destination of the compensation to the above mentioned Fund in case there is no habilitation of interested parties in a number compatible with the seriousness of the damage.

Regarding res judicata, it can also be noticed that Portuguese law established its indifference to the hypotheses of the exercise of the right of self-exclusion, whether the claim is founded or unfounded[19] which does not exist in the Brazilian law. However, the Portuguese legislator, unlike the Brazilian legislator, expressly adopted the opt out and opt in criteria, provided in rule 23, c2 and c3 of the Federal Rules of 1966, which implies the possibility of opting out of the res judicata, and third parties that have been notified of the claim and have not made the request for exclusion[20] or have not manifested after becoming aware of the action[21], with the proviso that they still have the right to refuse representation until the end of the evidentiary phase[22].

In Brazil, differently, the erga omnes efficacy of the judgment, favorable or unfavorable, was only adopted in the case of indivisible interests (diffuse and collective), except in the case of dismissal for lack of evidence, but in the case of homogeneous individual interests - divisible - the law adopted the scheme of res judicata erga omnes secundum eventum litis, That is, in case the claim is granted, all the components of the group, class or category will benefit and, in case it is dismissed, the res judicata will operate only to prevent new collective claims, ensuring the filing of individual lawsuits by those who have not intervened in the lawsuit as co-plaintiffs[23].

4 THE BRAZILIAN COLLECTIVE PROCEDURAL MICROSYSTEM

Having established the main distinctive premises and traced the most sensitive points of approximation between the Brazilian and the Portuguese

[19] Art. 19º, 1, da Lei nº 83/95.
[20] Art. 15º da Lei nº 83/95.
[21] Art. 15º, 1, da Lei nº 83/95.
[22] Art. 15º, 4, da Lei nº 83/95.
[23] Art. 103, III e §2º, do CDC.

collective lawsuits, it is necessary to address the most outstanding specific characteristics of the two legal systems.

In this context, given its importance, it is necessary to analyze the so-called micro-collective procedural system in Brazil[24], which does not exist in Portugal, and understanding it implies preliminary knowledge of the development of collective proceedings in the course of the history of Brazilian legislation.

The publication of Law no. 4.717, of 1965 - which regulates popular action - introduced in Brazil specific legal provisions about the process, such as those referring to jurisdiction, passive legitimacy and process.

However, according to Torres (2010), the collective process developed more rigorously after the influence of Vittorio Denti and Mauro Cappelletti in the 1970s, and José Carlos Barbosa Moreira was responsible for inaugurating a new approach to the subject in Brazilian doctrine in the early 1980s.

In 1985, with the enactment of Law No. 7.347, we find the most outstanding piece of legislation on class action suits until then published in the country, which "disciplines the public civil action for liability for damage caused to the environment, the consumer, goods and rights of artistic, aesthetic, historical, touristic and landscape value.

The theme continued its upward climb, which implied the introduction of provisions in the Federal Constitution of 1988, notably: article 5, LXXIII, expanded the object of popular action to include the preservation of administrative morality and protection of the environment[25]; article 5, LXX, introduced the collective security mandate[26]; article 129, III, established the legitimacy of the State Prosecution to file a public civil action for the defense of public and social heritage and of any other diffuse or collective interest[27]; and

[24] Cambi (2006) prefere empregar a expressão subsistema e não microssistema. O autor sus- tenta que o Código de Processo Civil deixou de ser o centro de gravitação do ordenamento processual, ao ponto de regular a tutelar dos direitos individuais e o CDC, a dos interesses transindividuais.

[25] LXXIII - qualquer cidadão é parte legítima para propor ação popular que vise a anular ato lesivo ao patrimônio público ou de entidade de que o Estado participe, à moralidade administra- tiva, ao meio ambiente e ao patrimônio histórico e cultural, ficando o autor, salvo comprovada má-fé, isento de custas judiciais e do ônus da sucumbência;

[26] LXX - o mandado de segurança coletivo pode ser impetrado por: a) partido político com representação no Congresso Nacional; b) organização sindical, entidade de classe ou associação legalmente constituída e em funcionamento há pelo menos um ano, em defesa dos interesses de seus membros ou associados;

[27] Art. 129. São funções institucionais do Ministério Público: III - promover o inquérito civil e a ação civil pública, para a proteção do patrimônio público e social, do meio ambiente e de outros interesses difusos e coletivos;

Art. 129, §1°, foresees the legitimacy of the State Prosecution to file a public civil action for the protection of any collective interest[28].

Since then, some ordinary laws dedicated to the subject have been enacted, such as, for example, Law number 7.853 of 1989 (Law for the Defense of the Interests of Disabled Persons); Law number 8.069 of 1990 (Child and Adolescent Statute); Law number 8.078 of 1990 (Consumer Defense Code); Law number 8.429 of 1992 (Administrative Improbity Law); Law number 8.884 of 1994 (Antitrust Law); and Law number 10.741 of 2003 (Statute of the Elderly).

The existence of a procedural microsystem for collective protection is justified, primarily, by the individualistic character present in the Civil Procedure Code of 1973 - and reproduced in the Civil Procedure Code of 2015 - which implies the lack of specific rules and principles that should guide the dynamics of mass protection.

The foundation of this procedural microsystem, according to Didier Júnior and Zeneti Júnior (2013), is found in the polycentrism of contemporary law itself, since the various centers of power - Constitution, codes, and special laws - harmonize systematically around the Constitution.

In Brazil, the Consumer Protection Code dedicated its Title III to the defense of consumers in court, establishing criteria and filling gaps in Brazilian legislation, such as, for example, the provision of jurisdiction by the domicile of the plaintiff (consumer); the prohibition of the denouncement of the lawsuit; the use of any suitable action for the defense of consumer rights; the specific rules regarding the res juricata the rules of legitimacy; the regulation of the relationship between collective and individual action; the amendment and expansion of collective protection described in LACP. This Title III of the Consumer Protection Code applies to the defense of diffuse, collective and individual rights and interests, whenever applicable, according to the provisions of Article 21 of LACP.

However, the Consumer Protection Code has assumed the role of unifying and harmonizing agent, forming a micro-system, whose main characteristic consists in adapting the current procedural system of the CPC and LACP to ensure the defense of diffuse, collective and individual homogeneous interests.

In this sense, according to the view of Fredie Didier Júnior and Hermes Zaneti Júnior (2013), the main practical consequence of the development of this micro-system of the Brazilian collective process is that the Consumer Protection Code

[28] § 1º A legitimação do Ministério Público para as ações civis previstas neste artigo não impede a de terceiros, nas mesmas hipóteses, segundo o disposto nesta Constituição e na lei.

stands as the Brazilian Collective Process Code, while the Civil Procedure Code of 2015 takes on the role of a mere residual diploma, since its effect on the collective process will always be reduced, with the aim of preventing it from disciplining collective claims with institutes developed for individual proceedings.

It means, then, that the rules provided in the Consumer Defense Code and applicable to the collective lawsuit cannot be limited to those provided in its Title III, especially when there are other rules in this Code that are not found in this title, but are extremely relevant to complete the unification and harmonization of the system, such as Article 6, VIII and Article 51, VI.

Therefore, Mazzei (2006) concludes that the collective micro-system is characterized by the intercommunicative gathering of several diplomas, so that it is composed not only by the CDC and the LACP, but also by all the regulations inherent to collective law, and the Code of Civil Procedure assumes the contours of a mere residual diploma.

Moreover, the jurisprudence in Brazil corroborates this thesis of the existence of a collective procedural microsystem to the extent that the Superior Court of Justice has ruled for the existence of a microsystem for the protection of transindividual and interdisciplinary interests composed of the Law of Administrative Improbity, Law of Public Civil Action, Law of Popular Action, Law of Collective Security Mandate, Consumer Protection Code, Statute of the Child and Adolescent, and the Statute of the Elderly (BRASIL, 2018).

This collective microsystem, however, is not satisfied only by means of the integration of sparse norms, but is also governed by specific principles, whose list is merely exemplary, and there is no unanimity among Brazilian authors, which make its structural constitution possible.

Among these principles, the following may be enumerated: 1°) principle of maximum effectiveness of the collective suit or principle of maximum benefit of the common collective jurisdictional guardianship; 2°) principle of atypicality of the collective suit or principle of non-taxativity of the collective suit; 3°) principle of wide disclosure of the collective demand or principle of adequate information and publicity;

Otherwise, however, the microsystem is not immune to criticism. The attempts to elaborate a Collective Proceedings Code in the Brazilian National Congress[29],

[29] No Brasil foram apresentados quatro projetos de lei para a criação de um Código de Pro- cessos Coletivos, nenhum deles aprovado pelo Poder Legislativo: 1º) Código de Processo Co- letivo Modelo para Países de Direito Escrito (Projeto Antônio Gidi); 2º) Anteprojeto de Código Modelo de Processos Coletivos

together with the insufficiency of the procedural rules related to collective proceedings described in the Consumer Protection Code, indicate that this legislative diploma did not effectively correspond to the wish of the doctrine that intended it to take the place of a true Collective Proceedings Code. It is undeniable that the Consumer Defense Code has its merits as a unifying and harmonizing agent of the current procedural system related to collective lawsuits, but to grant it the status of a Collective Procedure Code seems excessive, even because, according to the authors themselves the Consumer Defense Code has not contemplated all the provisions pertaining to the Brazilian class action suit in such a way that it is indispensable for the attainment of the purpose that attends the class action suit that an attempt be made to integrate, in a positive manner, the various diplomas that refer to class actions (DIDIER JÚNIOR; ZENETI JÚNIOR, 2013).

5 THE COLLECTIVE LAWSUIT IN PORTUGUESE LAW

In Portuguese law, the judicial protection of diffuse interests is provided for in article 52, no. 3, of the Constitution of the Portuguese Republic[30]. From the reading of this provision, some important conclusions can be drawn: 1) the Portuguese legislator chose to make a clear distinction between the protection of individual interests, enshrined in section 20, no. 1 of the Constitution, and the protection of diffuse interests, described in section 52, no. 3; 2) section 52 is located in the chapter on rights, liberties and guarantees of political participation. 52 is highlighted in the chapter on rights, freedoms and guarantees of political participation, so that the right to popular action is an example of participation through justice; 3rd) unlike in Brazil, the Portuguese legislature ensured any citizen the possibility of defending the general interests of the community in court; 4) the Portuguese legislator chose to clearly define the judicial means for the protection of diffuse interests - popular action -; the people legitimated to defend these interests - individuals and associations for

para a Ibero-América; 3º) Anteprojeto do Instituto Brasileiro de Direito Processual; 4º) Anteprojeto de Código Brasileiro de Projetos Coletivos.

[30] É conferido a todos, pessoalmente ou através de associações de defesa dos interesses em causa, o direito de acção popular nos casos e termos previstos na lei, incluindo o direito de requerer para o lesado ou lesados a correspondente indemnização, nomeadamente para:
a) Promover a prevenção, a cessação ou a perseguição judicial das infracções contra a saúde pública, os direitos dos consumidores, a qualidade de vida, a preservação do ambiente e do património cultural; b) Assegurar a defesa dos bens do Estado, das regiões autónomas e das autarquias locais.

the defense of diffuse interests - and, finally, the purpose of jurisdictional protection - preventive or repressive of the offense of diffuse interests (SOUSA, 2005, p. 107). 107).

In addition, the Portuguese ordinary legislation has regulated the right to popular action foreseen in art. 52, no. 3 of the Constitution, mainly through Law no. 83 of 1995, of August 31st, but there are other regulations aimed at protecting diffuse interests, such as Law no. 95 of 1988, of August 17th, which grants women's associations the legitimacy to exercise the right to popular action in defense of women's rights; Law nº 486, 1999, of November 13th, 1999, which establishes a popular action for the protection of collective and individual homogeneous interests of non-institutional investors in securities; Law nº 107, 2001, of September 8th, 2001, which grants the right of popular action to associations for the defense of cultural heritage; Law No. 24 of 1996, which provides for an injunction to defend the interests of consumers, granting active legitimacy to the consumer, consumer associations even if not directly injured, the Public Ministry and the Directorate General of the Consumer when diffuse, collective or individual homogeneous interests are at stake; Decree-Law No. 446 of 1985, October 25th, which regulates an injunction aimed at obtaining an order to abstain from using or recommending null and void clauses (SOUSA, 2005, p. 86-87).

An analysis of Law No. 83 of 1995 shows that, in its 28 articles, the law regulates the right to popular participation in the preparation of plans or the location and execution of public works and investments (Chapter II), the exercise of popular action (Chapter III), and civil and criminal liability (Chapter IV), reserving Chapter I for general provisions and Chapter V for final and transitory provisions.

As for its object, Law nº 83, of 1995, deals with the protection of interests related to public health, the environment, quality of life, protection of the consumption of goods and services, cultural heritage and the public domain (art. 1, 2), from which it can be concluded that it covers diffuse interests strictu sensu, collective interests and homogeneous individual interests, i.e., on one side, it deals with a list of examples, and on the other side, it excludes subjective rights and merely individual interests (SOUSA, 2005, p. 89).

Thus, as stated by Grinover (1996), it is clear that Portuguese legislation chose to establish the popular action as the only procedural instrument for the defense of interests related to the public patrimony in a broad sense, which differs from

Brazilian legislation, in which there are two procedural means suitable for this purpose: 1) constitutional popular action (Law no. 4.717, 1965) and 2) public civil action (Law no. 7.347, 1985).

6 CONCLUSION

Over this study, we have tried to analyze the protection of the collective lawsuit in Brazil and in Portugal, and from all that has been exposed some conclusion can be drawn:

1. Legal systems must be sensitive to the increase in litigation among human beings, especially at the level of supra-individual litigation, and must seek to establish solutions that allow for effective access to justice by enabling the protection of supra-individual interests.

2. The formula used by the Brazilian legislator to differentiate the categories of supra-individual interests is described in article 81, sole paragraph, of the Consumer Defense Code, and served as inspiration for the Portuguese legislator.

3. There is a collective procedural microsystem in Brazil, non-existent in Portugal, which aims at the protection of transindividual and interdisciplinary interests, composed by the Law of Administrative Improbity, the Law of Public Civil Action, the Law of Popular Action, the Law of Collective Injunction, the Consumer Defense Code, the Child and Adolescent Statute, and the Elderly Statute.

4. The collective procedural microsystem emerged in Brazil with the enactment of the Consumer Defense Code, which acted as a unifying and harmonizing agent for collective protection.

5. In Portugal there is an instrument par excellence - popular action, based on article 52, no. 3 of the Constitution and regulated by Law no. 83, of 1995 - for the defence of interests connected to public heritage, including cultural heritage and other community assets, while in Brazil there are two procedural routes that can be used for this purpose: 1) popular action, regulated by Law no. 4. 717 of 1965, to defend the public patrimony in a broad sense and administrative morality; 2nd) public civil action, provided for in Law 7.347 of 1985, to defend any diffuse, collective or individual homogeneous interest or right.

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