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# **THE ROLE OF THE DEPARTMENT OF PUBLIC PROSECUTIONS IN PROTECTING THE ENVIRONMENT UNDER BRAZILIAN LAW: THE CASE OF “FAVELAS” IN THE CITY OF RIO DE JANEIRO**

**Humberto Dalla Bernardina de Pinho\***

## **INTRODUCTION**

The objective of this paper is to analyze the role of the Department of Public Prosecutions of Rio de Janeiro in protecting the environment against the fast and disorganized growth of the “favelas”<sup>1</sup> in the city. A brand new case,<sup>2</sup> still being adjudicated,<sup>3</sup> appears to create a conflict between at least two major principles: the right to a place to live in<sup>4</sup> and the right to a healthy environment.<sup>5</sup> The dilemma created by this case is so intense that, at a certain point,

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\* Public Prosecutor in the State of Rio de Janeiro, Brazil. Doctor in Law and Assistant Professor in Civil Procedure at the Rio de Janeiro State University. This paper is dedicated to Mariana Suzuki Sell, a known defender of the environment, not only in Brazil, but all over the world; and a close friend. She was killed on July 17, 2007, due to Brazilian authorities’ irresponsibility in ensuring the security of passengers of air companies.

1. As far as we are concerned, there is no correspondent in English to the term “favela.” A “favela” is a small community, generally over the hills. Due to the geography of the city of Rio de Janeiro, the hills are everywhere, from the suburbs to downtown, and some of them are just in front of the beaches. It is common to find drug dealers, former convicts, and thieves among its residents. That is why the word has a pejorative meaning and is offensive to the many dwellers that have nothing to do with unlawful activities.

2. T.J.R.J., Pro. No. 2006.001.139217-4. 4th State Public Treasury Bench, Rio de Janeiro State Court (Brazil). For more information, see Tribunal de Justiça do Estado do Rio De Janeiro Homepage, <http://www.tj.rj.gov.br>.

3. Many thanks to Rosani da Cunha Gomes, prosecutor in charge of the process that inspired this piece, for all the information received and mainly for the wonderful job she is doing. I would also like to thank Leila Trierveiler, responsible for the survey used in this article about the historical background of Brazilian environmental law.

4. Another explanation must be given here. As a general rule, only poor people live in the “favelas.” The first “favelas” were created to receive former slaves set free by Princess Isabel in 1888, by a Federal Act known as “Lei Áurea.” Since then, the descendants of the slaves and other less fortunate persons coming from far regions of the country have been concentrating in these areas. This is the origin of the argument based on the right to a place to live.

5. Many “favelas” are getting bigger and bigger. The growth of the “favelas” is getting out of control. They have exceeded their original locations and have invaded the environmental protection areas near them. That is the reason why a conflict between these two principles exists.

it caused a division between the groups of prosecutors involved in the case. In order to promote a broad debate over this question, namely the conflict between the right to live and the right to a healthy environment, we are going to present the general aspects of Brazilian environmental law. Then, we will establish the outlines of the Brazilian civil public action system and, after that, the Public Ministry's legislation. At the end, we shall present an overview of the case and some considerations in order to initiate a discussion about it.

## I. FUNDAMENTALS OF ENVIRONMENTAL LAW IN BRAZIL

### A. Legislative Evolution

Environmental Law is the science that studies environmental problems and their interconnection with humans, pursuing protection of the environment to improve the conditions of life as a whole.<sup>6</sup> In Brazil, Law No. 6,902 was promulgated on April 27, 1981, addressing the setting-up of ecological stations and Environmental Protection Areas (APAs).<sup>7</sup> On August 31, 1981 came Law No. 6,938/81, a historic landmark in the development of environmental

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6. See Adriana Lieders, Note, *A New Chapter in Brazil's Oil Industry: Opening the Market While Protecting the Environment*, 13 GEO. INT'L ENVTL. L. REV. 781, 783 (2001). Ms. Lieders states:

Brazil does not have a long history of protecting the environment. In its first attempt to regulate oil pollution, Brazil adopted Law No. 5.357 in 1967, which established penalties for sea or river vessels and terminals that discharged refuse or oil into Brazilian waters. Only during the 1980s did Brazil begin to make a serious attempt to protect its environment. In 1981, Brazil enacted Law No. 6.938 in an effort to develop its national environmental policy. This law integrates various environmental objectives and economic development policies. Law No. 6.938 stated the objectives and procedures for the development and implementation of a national environmental policy, created the National Environmental Council, and instituted the Federal Technical Register of Environmental Defense Means and Activities. Under 6.938, Brazil made the compatibility of socio-economic development and preservation of environmental quality and ecologic equilibrium one of its main objectives. Other noteworthy objectives are found in Article 4, Section VII, which aims to preserve and restore environmental resources while taking into account rational use and permanent availability; and Article 4, Section III, which seeks to establish environmental quality criteria, standards, and regulations for use and development of environmental resources. In 1988, Brazil wrote a new Constitution, of which a whole chapter was dedicated to the protection of the environment.

*Id.* at 783 (citations omitted).

7. See Lei No. 6.902, de 27 de abril de 1981, D.O.U. de 28.04.1981.

law, which established the basic definitions concerning the environment and its national policy.<sup>8</sup> A protectionist stance was taken, setting responsibilities for whoever directly or indirectly caused environmental degradation, whether a legal entity or natural person, under public or private law. The principle adopted was that of the paying polluter, who must answer, regardless of fault, adopting for this case the theory of strict liability, in which it is engaging in an unreasonably dangerous activity which determines the duty to answer for damage.

Law No. 6,938/81 adopted the following definitions:

I – environment: the set of conditions, laws, influences and interactions of a physical, chemical and biological order, that permits, shelters and governs life in all its forms;

II – degradation of environmental quality: the adverse change of the characteristics of the environment;

III – pollution: the degradation of environmental quality resulting from activities that directly or indirectly harm the health, safety and well-being of the population, create conditions adverse to social and economic activities, affect the biota unfavorably, affect the aesthetic or health conditions of the environment, or release matter or energy in a manner non-compliant with the environmental standards set;

IV – polluter: the natural person or legal entity, under public or private law, directly or indirectly responsible for an activity that causes environmental degradation;

V – environmental resources: the atmosphere, inland waters, both surface and underground, estuaries, territorial sea waters, the soil, subsoil, the elements of the biosphere, fauna and flora.<sup>9</sup>

The aim of the National Environmental Policy is the preservation, improvement, and recovery of environmental quality suited to life,

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8. See Lei No. 6.938, de 31 de agosto de 1981, D.O.U. de 31.08.1981.

9. *Id.*

seeking to ensure in the country conditions for socio-economic development, the interests of national security and protection of the dignity of human life. Its principal instruments of control are stated in Article 9 of the Law.

This law was recognized by the 1988 Federal Constitution, article 225,<sup>10</sup> which sets forth the overall principles in relation to the atmosphere, its third paragraph stating, “conducts and activities harmful to the environment will subject those in breach, whether natural persons or legal entities, to criminal and administrative

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10. *Constituição da República Federativa do Brasil [C.F.] art. 225 (1988)*, stating:  
All are entitled to an ecologically-balanced environment, an asset for the common use of the people, and essential to the healthy quality of life, imposing on the Public Power and society the duty to defend it and preserve it for the present and future generations.
- 1st Paragraph—To ensure the effectiveness of this right, it behooves the Public Power:
- I—to preserve and restore the essential ecological processes and promote the ecological handling of the species and ecosystems;
  - II—to preserve the biodiversity and integrity of the genetic heritage of the Country, and supervise the entities devoted to the research and treatment of genetic material;
  - III—to define, in all the units of the Federation, territorial spaces and their components to be ecologically protected, with alteration and suppression permitted only by law, with any use forbidden that may compromise the integrity of the attributes that justify their protection;
  - IV—to require, as provided by law, before the installation of a work or activity with potential for causing a significant degradation of the atmosphere, a prior study of environmental impact, which will be made public;
  - V—to control the production and sale and the use of techniques, methods and substances that entail risk to life, the quality of life and the environment;
  - VI—to promote environmental education at all levels of teaching, and public awareness for preservation of the environment;
  - VII—to protect the fauna and flora, forbidding, as provided by law, practices that put at risk their ecological function, cause the extinction of species or submit animals to cruelty.
- 2nd Paragraph—Anyone exploiting mineral resources is obliged to recover the environmental degraded, according to a technical solution required by the competent public body, pursuant to the law. Conducts and activities considered administrative penalties, regardless of the obligation to make good the damages caused.
- 4th Paragraph—The Brazilian Amazonian Forest, the Atlantic Woodland, the Serra do Mar mountain range, the Swamplands of Mato Grosso and the Coastal Zone are national heritage, and their use will take place, as laid down in law, within conditions that ensure the preservation of the environment, this also with regard for the use of natural resources.
- 5th Paragraph—Lands retaken or collected by the State, for discriminatory actions, are considered inaccessible; - necessary to protection of the natural ecosystems.
- 6th Paragraph—Plants that operate with a nuclear reactor shall have their location defined in a federal law, without which they may not be installed.

penalties, regardless of the obligation to make good the damage caused.”<sup>11</sup>

On July 24, 1985, Law No. 7,347 was enacted, creating the Public Civil Action, which protected environmental values, requiring a Public Civil Action for those causing damage to the environment, the consumer, or goods and rights of artistic, aesthetic, historical, touristic, or natural worth.<sup>12</sup>

The following year saw the publication of CONAMA (National Council for the Environment) Resolution No. 01/86, which started in Brazil the “Principle of Prior Action” in the environmental area.<sup>13</sup> Since then, every entity undertaking an activity which can potentially have a significant environmental impact has been required to prepare and submit to the environmental body a Prior Study of Environmental Impact, as part of its environmental licensing procedure. This valuable mechanism for environmental protection consists of a study and a report. The more complex and detailed study was denominated “Study of Environmental Impact” (EIA), and the report, summarizing the information from the study in language easier to understand was denominated “Report of Impact on the Environment” (RIMA). In this way the EIA and RIMA became effective and modern tools, in environmental terms.

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11. C.F. art. 225. Regarding Brazil’s Constitution, one commentator notes, that: Brazil’s federal constitution, rewritten in 1988 (“Constitution”), provides the direction for most of the regulations in Brazil’s twenty-seven states. Environmentalists had hoped that the Constitution would mark a great advance for environmental protection in Brazil by making environmental concerns a national priority, at least on paper. The Brazilian Constitution attempts to provide a comprehensive approach to environmental protection. Perhaps most importantly, at least rhetorically, is its guarantee of a healthy and stable environment to all Brazilian citizens. The truth, however, is that the “promise of the amendments” contained in the Constitution has been “illusory.” The Constitution establishes administrative and penal sanctions for those in violation of its environmental “mandate.”

Janelle E. Kellman, *The Brazilian Legal Tradition and Environmental Protection: Friend or Foe*, 25 HASTINGS INT’L & COMP. L. REV. 145, 152 (2002).

12. See Lei No. 7.347, de 24 de julho de 1985, D.O.U. de 25.07.85.

13. See Resolução CONAMA No. 1, de 23 de Janeiro de 1986, available at <http://www.mma.gov.br/port/conama/legiabre.cfm?codlegi=23>; see also PAULO NOGUEIRA-NETO, A PANORAMA OF BRAZILIAN ENVIRONMENTAL LAW, [http://www.bmalaw.com.br/sp/docs/comunicacao/newsletter/ambiental/bma\\_panorama\\_ambiental.pdf](http://www.bmalaw.com.br/sp/docs/comunicacao/newsletter/ambiental/bma_panorama_ambiental.pdf) (last visited June 23, 2008).

One year later, CONAMA Resolution No. 09/87 started up the “Principle of Sharing” in the environmental area, creating a tool known as the “Public Hearing.”<sup>14</sup> Since then, any entity undertaking an activity with potential to cause a significant impact on the environment, and thus obliged to prepare an EIA/RIMA, must hold a Public Hearing, if this is requested by any segment of society.

On February 22 1989, Law No. 7,735 created IBAMA—the Brazilian Institute of the Environment and Renewable Natural Resources, which is currently an autarkic entity under a special regime, with a public-law legal personality, linked to the Ministry of the Environment.<sup>15</sup> IBAMA's purpose is to execute the national environmental policies concerning the preservation, conservation, and sustainable use of the environmental resources. IBAMA also supports the Ministry of the Environment in the performance of complementary actions by the Federal Union, pursuant to the legislation in force and the guidelines from that Ministry.

On the worldwide stage, the UNO Conference on the Environment and Development, held in Rio de Janeiro in June of 1992, or RIO-92 as it became known, formalized concern with environmental problems, strengthening the principles and rules for fighting environmental degradation and preparing Agenda-21, a guiding instrument for sustainable development.<sup>16</sup>

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14. See Resolução CONAMA No. 9, de 3 de dezembro de 1987, available at <http://www.mma.gov.br/port/conama/legiabre.cfm?codlegi=60>.

15. See Lei No. 7.735, de 22 fevereiro de 1989, D.O.U. de 23.02.89.

16. A document from the Ministerio do Meio Ambiente summarizes Agenda-21 by saying: Agenda 21, like other international documents, is important because it is signed by the community of nations. But the true significance, the historical significance of these documents is afforded by the social and political use that society makes of them. The most remarkable example we have, and which shows that we cannot expect immediate results when we speak of Agenda 21, is the Declaration of Human Rights, signed in 1948. It remained in oblivion for several decades, until the seventies, when it became an essential document for the contemporary world. Agenda 21 was a major international negotiating effort to produce a consensus and a program with a certain degree of operability (sic) for mankind for sustainable development. The implementation of sustainable development implies incorporating the concern for sustainability in all levels of policy formulation; establishing the principles to guide this process, from policy macro statements, through macro guidelines and sectoral strategies, to the execution of programs of actions, going through the conception, implementation, monitoring and assessment of government efforts in partnership with organized society, in order to

As pollution may affect more than one country, the environmental issue has taken on a planetary scale. Today, protection of the environment, the need for cooperation among nations and the principle of international cooperation have become universal goals, thus setting one more guiding principle of Environmental Law, established in the 2nd Principle of Agenda 21.<sup>17</sup>

On February 12, 1998 Law No. 9,605 was enacted, addressing the criminal and administrative penalties to be imposed for conducts and activities harmful to the environment. This law broke new ground in applying penalties to both natural persons and also legal entities in the perpetration of crimes against the environment.<sup>18</sup>

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characterize a large structure capable of constant feedback and allowing for an increasingly more qualified (sic) in the formulation of consistent policies.

Ministerio do Meio Ambiente, Brief of the Brazilian Agenda 21, <http://www.mma.gov.br/index.php?ido=conteudo.monta&idEstrutura=18&idConteudo=4957> (last visited June 23, 2008).

17. The Ministerio do Meio Ambiente Brief further states:

In sum, Agenda 21 should express a participatory and strategic planning that establishes the priorities to be defined and executed in a partnership of government and society. Agenda 21, thus, brings to the forefront of the international arena the need for strategic, decentralized and participatory planning. In terms of initiatives the Agenda leaves no doubt, Governments have the prerogative and the responsibility for initiating and facilitating the process of implementation at all levels. In addition to governments, the Agenda seeks to mobilize all segments of society, calling them "relevant actors" and "sustainable development partners." This processual (sic) and gradual conception for validating the concept implies in assuming that the principles and premises that should guide the implementation of Agenda 21 are not an exhaustive list: to turn the Agenda into reality is above all a social process in which actors slowly agree to new consensus and build a feasible Agenda in [the] direction of an expected sustainable future. As a result, all the actors participating in the process should concentrate their efforts on the task of recreating the institutional-political mechanisms necessary for long-term actions, inherent to the concept of sustainable development. The main lesson of the successes and failures of planning experiences has been the understanding that the process is more important than the report-outcome, independent of the technical capacities of those who drafted it. The transforming power of planning depends directly on the involvement of the agents that are significant for a particular issue. In this sense, the Brazilian Agenda 21 aims to assess the vulnerabilities and potentialities of the country, to implement a sustainable development model, determining strategies and lines of action co-operated or shared among the public sector and civil society.

*Id.*

18. See Lei No. 9.605, de 12 de fevereiro de 1998, D.O.U. de 13.02.1998.



### *B. Principles of Brazilian Environmental Law*

Besides the so-called “General Principles of Law,” the following principles also apply specifically to environmental law:

a) Legality—the need for legal support to require someone to do something. Obligatory nature of obedience of the laws.<sup>19</sup> This Principle, according to the Brazilian Legal System, means that the citizen can do anything that is not forbidden by Law. On the other hand, the State and its public institutions can only do what is prescribed by administrative regulations.

b) Supremacy of the public interest—a principle mandating that environmental protection is the right of all persons, while at the same time an obligation for all persons.<sup>20</sup> This demonstrates the public nature of environmental law, which by implication must be in accord with the principle of supremacy of the interests of society, that is to say, of public interest over private interests in the issue of environmental protection.

c) Obligatory nature of environmental protection—a principle stated in article 225, main section, of the Federal Constitution, says that the Public Power and society must ensure the effectiveness of the right to a healthy and balanced environment.<sup>21</sup>

d) Precaution—a principle based on the difficulty and/or impossibility of making good environmental damage. The 1992 Rio Declaration on the Environment and Development (ECO 92), principle 15, states:

In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damages, lack of full scientific certainty shall

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19. See C.F. art. 5, § 2.

20. See C.F. art. 225.

21. *Id.*

not be used as a reason for postponing cost-effective measures to prevent environmental degradation.<sup>22</sup>

e) Obligatory nature of a prior appraisal when undertaking activities potentially harmful to the environment—the obligation to make a prior appraisal of the environmental damages in potentially harmful works is established by Article 225, 1st Paragraph, of the Federal Constitution, which requires the Study of Environmental Impact and its respective report (EIA/RIMA).<sup>23</sup>

f) Publicity—the Studies of Environmental Impact and their respective reports (EIA/RIMA) are public in nature, as they involve elements that make up an asset common to all, namely, a healthy and balanced environment.<sup>24</sup> Therefore, publicity is one of the features of environmental protection.

g) Participation—CONAMA Resolution No. 9, of December 1987, requires holding a Public Hearing during analysis of the RIMA report, thus initiating public participation in the licensing process.<sup>25</sup>

h) Reparability of environmental damage—this principle is expressed in various legal precepts, starting with the Federal Constitution, article 225, paragraph 3, which states that, “[p]rocedures and activities considered as harmful to the environment shall subject the infractors, be they individuals or legal entities, to penal and administrative sanctions, without prejudice to the obligation to repair the damages caused.”<sup>26</sup> Article 4, VII, of Law No. 6,938/81 also imposes on the polluter and predator the obligation to make good and/or indemnify the damages caused.<sup>27</sup>

22. Rio Declaration on Environment and Development, June 14, 1992, U.N. Doc. A/CONF. 151/5, 31 I.L.M. 874 (1992) [hereinafter Rio Declaration], available at [www.unep.org/Documents/Default.asp?DocumentID=78&ArticleID=1163](http://www.unep.org/Documents/Default.asp?DocumentID=78&ArticleID=1163).

23. See C.F. art. 225.

24. See *id.*

25. Resolução CONAMA No. 9, de 3 de dezembro de 1987, available at <http://www.mma.gov.br/port/conama/legiabre.cfm?codlegi=60>.

26. C.F. art. 225, ¶ 3.

27. See Lei No. 6.938, de 02 de setembro de 1981, D.O.U. de 31.08.1981.

i) Polluter-payer—the national authorities must ensure the internalization of environmental costs and the use of economic tools, taking into consideration the criterion that anyone who contaminates must, in principle, shoulder the costs of the contamination, taking into account the public interest without distorting international investment and trade interests.

j) Responsibility—anyone engaging in an environmental crime may have to answer for it, and may suffer administrative, civil and criminal penalties.

k) Environmental education—Article 225, Paragraph 1, of the Federal Constitution, sets forth the “Principle of Environmental Education,” in stating that it behooves the Public Power to promote environmental education at all levels of teaching and public awareness for preservation of the environment.<sup>28</sup> Environmental Education has become one of the guiding principles of environmental law.

l) International cooperation—as pollution may affect more than one country, on top of which environmental protection has already become a planetary issue, the need for cooperation among nations, the “Principle of International Cooperation”, has become a rule to be obeyed, thus setting one more guiding principle of Environmental Law.<sup>29</sup>

### C. *Liability According to the Environmental Legislation*

#### 1. *Criminal Liability*

The paramount objective of Law No. 9,605/98, as mentioned above, is to regulate the criminal liability of the polluter or the degrader of the environment, while not purporting to overrule law No. 6,938/81, which regulates the civil reparations arising from acts harmful to the environment, and which continues to play an extremely important role in environmental legislation, as it asserts

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28. See C.F. art. 225, ¶ 1.

29. See Rio Declaration, *supra* note 23, Principle 12.

liability without guilt—the so-called strict liability and joint liability.<sup>30</sup>

Conducts and activities harmful to the environment are punished with administrative, civil, and criminal penalties, as provided by law.<sup>31</sup> The administrative, civil, and criminal penalties may accumulate, and stand apart from one another.<sup>32</sup>

Without prejudice to the provisions of this law, the agent, regardless of the existence of guilt, is obliged to indemnify or repair the damages he caused to the environment and to third parties affected by his acts.<sup>33</sup>

Article 2 of this law makes it clear that criminal liability will occur according to the degree of guilt of the agent, thus setting aside the idea of strict liability for criminal effects too.<sup>34</sup> This selfsame article includes among those criminally imputable not only the party directly responsible for the damage, but also other agents who, aware of the criminal conduct, refrained from impeding its practice, even though they were in a position to do so. Included among such agents held co-

30. See Lei No. Lei No. 6.938, de 02 de setembro de 1981, D.O.U. de 31.08.1981; Lei No. 9.605, de 12 de fevereiro de 1998, D.O.U. de 13.02.1998. Discussing the issue, one commentator has noted:

Before the adoption of the 1988 Federal Constitution, the Brazilian legislation addressing environmental crimes was contradictory and of little or no practical use. There was criminal liability for pollution of water, as provided for in the 1940 Criminal Code. But for many years, according to the prevailing jurisprudence, in order to characterize a polluting act as a crime, the affected water had to be physically and biologically pure. Air pollution was a misdemeanor addressed by the Criminal Offense Act of 1941, but the enforcement of this provision depended on a previous definition of the acceptable pollution levels, which was never completed. . . . The issue started shifting course with the 1988 Federal Constitution and its comprehensive chapter on environmental protection. Slowly but surely, the country has become aware of the seriousness of its environmental problems, and public opinion, primarily in the larger cities, has been demanding from the authorities more effective actions against polluters. . . . The Environmental Crime Act of 1998 (No. 9.605/98) represented the end of a long proceeding in the National Congress of a bill which characterized actions against fauna and flora as crimes. During the legislative proceeding, new criminal aspects were added to the bill, which resulted in a much more comprehensive text than the original.

Fernando C. Walcacer, *Proceedings of the Third Annual Legal & Policy Issues in the Americas Conference: Environmental Damages and Crimes—Brazil and Environmental Law*, 15 FLA. J. INT'L L. 54, 55 (2002).

31. Lei No. 9.605, de 12 de fevereiro de 1998, D.O.U. de 13.02.1998.

32. *Id.*

33. *Id.*

34. *Id.*

liable by the law are directors, officers, board members, and heads of the technical body, auditors, managers, representatives, or agents of the legal entity which causes environmental damage.<sup>35</sup> In the literal terms of this rule, technical advisors, auditors, and attorneys of the company may have to answer in criminal terms for environmental damages caused with their knowledge, should it be proven that they could have somehow avoided them, but failed to do so.

The law punishes natural persons with loss of liberty (imprisonment or confinement), and also includes penalties restricting rights, expressly stating that these latter replace the former, provided the conditions set forth in its Article 7 are met, namely: (i) the case is one of a felony with a penalty of less than four years, or one of negligence; and (ii) the defendant satisfies the subjective conditions as agent, to convince the judge that a penalty restricting rights will be sufficient to act as reproof of the crime and prevent others from being committed.<sup>36</sup> Penalties restricting rights consist of community service, a temporary loss of rights, the total or partial suspension of activities, a monetary payment, or house arrest. Article 3 asserts the criminal liability of a legal entity, without ruling out possible punishment of the natural persons who may be considered co-agents of the person or entity causing harm to the environment.<sup>37</sup>

Article 4 sets out the concept of disregarding juridical personality.<sup>38</sup> This principle seeks to annul any corporate scheme set up to place formal obstacles in the way of any compensation. The

35. *Id.*

36. Lei No. 9.605, de 12 de fevereiro de 1998, D.O.U. de 13.02.1998.

37. *Id.* Professor Walcacer notes:

Despite these specific exceptions, Law No. 9.605/98 unquestionably represented a remarkable step towards the appropriate management of Brazilian natural resources and pollution control. Specialists point out the criminal responsibility assigned to corporations as the most innovative item in the law. In fact, as of its effective date, corporations may answer for the damages caused, provided that the crime was committed for their benefit, and by determination of their officers. Among the penalties to which companies are now subject, the so called right depriving penalties include fines, the compulsory rendering of community services, and a prohibition on contracting with public agencies.

Walcacer, *supra* note 31, at 55.

38. Lei No. 9.605, de 12 de fevereiro de 1998, D.O.U. de 13.02.1998.

transfer of assets to a legal entity that is obviously not in a position to compensate environmental damages caused by such assets is one of these schemes focused on by the law. The penalties applicable specifically to legal entities,<sup>39</sup> according to article 21, are a fine and penalties restricting rights, which may include: (i) the total or partial suspension of their activities; (ii) temporary shutdown of the premises, work or activity; and (iii) a prohibition on contracting with the Public Power, or obtaining from it subsidies, incentives or donations.<sup>40</sup>

## 2. *Civil Liability*

Liability in the civil sphere reaches the damage committed, as the immediate concern lays in the possibility of reparation. If it is beyond repair, then it will be compensated for by indemnity. The greatest difficulty lays in accounting and quantifying, so as to set the award in relation to the environmental damage committed.

In Brazil until 1981, the environmental legislation, just like all other branches of law, was based on liability based on fault. Fault is a subjective concept, which may take on one of three figures: (i) malpractice—failure to master a technique, or to apply it in the manner best suited; (ii) recklessness—not taking the measures necessary to avoid occurrence of the damage; or (iii) negligence—carelessness or laxity duly characterized.

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39. See Luiz Fernando Henry Sant'anna, *General Overview of Brazilian Environmental Law*, 15 INT'L L. PRACTICUM 22 (2002), stating:

State Law No. 9605/98 introduced an entirely new concept by imposing criminal liability on legal entities. Traditionally, the criminal code imposed criminal responsibility only on individuals. Thus, in the case of crimes committed by a legal entity, criminal liability was imposed on individuals, that is, on the directors and managers (including members of technical and advisory councils) responsible for the act or omission that resulted in the criminal violation. Under the new law, a legal entity will be held liable under administrative, civil and criminal laws whenever such a law is violated as a result of the decision of a legal or contractual representative of the entity or of any of its constituent bodies, made in the interest or for the benefit of the legal entity. (internal quotations and citations omitted).

40. Lei No. 9.605, de 12 de fevereiro de 1998, D.O.U. de 13.02.1998.

Lack of these subjective elements means lack of fault, which is considered as a factor to exclude liability. On the other hand, once fault is proven, there arises the obligation to make good the damage, which encompasses the whole loss sustained, and may be stated as follows: (i) material damages—encompasses direct losses and indirect losses (interruption of profits, that is to say, what one failed to gain); and (ii) damages for pain and suffering. Until the advent of Law No. 6,938/81, this was the general rule for environmental civil liability.

The “theory of assumed risk” is adopted based on the premise that only those with capacity to assume all the risks inherent to the activity may act in a hazardous area. Those who act in a hazardous activity must be directly liable for any damage caused. Strict liability establishes that all those responsible answer for the damage; suffice to prove the causal nexus between the productive activity and the environmental damage. It is strict in the sense of not requiring a subjective element of fault, as granted in article 14, 1st paragraph of Law No. 6,938/81.<sup>41</sup>

Brazil has adopted strict liability for any and all environmental damage caused by industrial activities. It has also adopted the principle of joint liability, whereby not only the direct agent answers for the damage, but likewise the indirect agent, in a clear attempt to avoid reciprocal allegations of exclusion of liability, so common when several companies are linked to one damaging event. Also adopted is the principle of holding the agent liable even in cases of force majeure or acts of God, to the extent that strict liability, as a rule, does not open exceptions for accidents, considering that they are mere risks of the business. Moreover, the party responsible knows the risks of the activity and can undertake increased precautionary measures.<sup>42</sup>

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41. See Lei No. 6.938, de 02 de setembro de 1981, D.O.U. de 31.08.1981.

42. One commentator notes:

Despite numerous environmental laws, Brazil still lacks a comprehensive approach to environmental issues. Governmental agencies are plagued by budgetary constraints and bureaucratic restraints. Not surprisingly, economic development continues to guide planning decisions and influence enforcement of environmental regulations. There are

## II. TRANS-INDIVIDUAL RIGHTS AND THE PUBLIC CIVIL ACTION AS AN INSTRUMENT FOR DEFENSE OF ENVIRONMENTAL RIGHTS

### A. *Trans-Individual Rights*

An environmental right is a trans-individual right, meaning that it does not belong to one sole person, but to a social group. As is widely known in Brazil, article 81, sole paragraph, of the Consumer Defense Code (CDC) sets out the three kinds of trans-individual rights: (i) diffused; (ii) collective; and (iii) individual and homogeneous.<sup>43</sup> However, this lawmaker's option (try to organize the species of trans-individual rights, instead of classifying the appropriate actions) has proven to be deeply mistaken.<sup>44</sup>

Trans-individual rights are not static and do not brook a once-and-for-all classification. They are dynamic rights, insofar as they reflect the intentions of a society undergoing constant change. While it is desirable from the theoretical and methodological standpoint, in practice the classification proposed by the CDC has turned out to be catastrophic. Various problems have arisen based on the difficulty of adapting these hermetic concepts to concrete situations. To cite just one example, we may mention the discussion surrounding the legitimacy of the Department of Public Prosecutions (DPP) involvement in the case of increases to school fees.<sup>45</sup> From filing the

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many reasons why Brazil's environmental program has not been a great success. Brazil is a country with a wide range of problems including social stratification, racial tension, and debt. Yet, with so many environmental laws in place, those problems alone cannot explain why environmental regulations have not succeeded. Keeping in mind the many different interests impacted by environmental regulation in Brazil, it becomes evident that Brazil's legal history and tradition have greatly impacted the enforcement of environmental laws. Judges and lawyers are poorly trained and uninformed about relevant environmental issues. In some respects this ignorance is to be blamed on the Brazilian educational system, i.e. the conservative nature of law school curriculums mandated by the federal government and the lack of training programs in place for both lawyers and judges.

Kellman, *supra* note 11, at 166.

43. Lei No. 8.078, de 11 de setembro de 1990, D.O.U. de 12.09.1990.

44. About the subdivisions of collective rights in Brazil, Professor Oquendo has already shown some preoccupation, stating "Article 81 introduces a complex and abstract taxonomy of group rights." ANGEL R. OQUENDO, *LATIN AMERICAN LAW* 751 (2006).

45. The syllabus of the case states, in part:



suit, five years went by before the Federal Supreme Court ruled, by majority, that the DPP enjoyed legitimacy to this end.

It took five years to attest to the presence of a condition for regular exercise of the right of action. Following this, the case records went back to the “court of first instance,” for it to grant a positive writ, then moved on to the pleading phase, with citation of the defendant. As one sees quite easily, the lapse of such a long time, during which all the parents of children in financial difficulties had to find another solution to pay their children's school fees, meant that when the court finally addressed the issue, those students had already graduated from high school. Back in 1990, the lawmakers worked with indeterminate juridical concepts, with norms left open to interpretation, and in this way gave rise to all this confusion. It does not make much sense to draw upon oneself the responsibility of defining and classifying an institution, and then failing to place a clear, objective delimitation on the responsibility. The problem took on concrete form, to the extent that for a long time the courts displayed great difficulty in handling the new concepts. Moreover, there is still no structure to allow the application of specific rules to the juridical collective.

On this point, it is worth mentioning experiences in the United States. In an attempt to reach a theoretical base for class actions, James W. Moore, one of the drafters of the Federal Rules of Civil Procedure (FRCP), conceived a somewhat confused conceptualization, stated in FRCP Rule 23, making a division of class actions into true, hybrid, and spurious.<sup>46</sup> One gathers from reading through the former Rule 23 that such actions were classified on the basis of the criterion of the nature of the right (“character of the right.”) Thus, a “true class action” would be one addressing common

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Extraordinary Constitutional Appeal. Legitimacy of the Department of Public Prosecutions to bring a Public Civil Action in defense of diffused, collective and homogeneous interests. School fees: pleading capacity of the DPP to discuss the issue in court. . . . Extraordinary appeal heard and upheld to, setting aside the alleged illegitimacy of the DPP, seeking the defense of the interests of the collectivity, have the case records sent to the court of origin, to proceed with judging the action.

S.T.F., Ap. No. 163.231-SP, Relator: Min. Mauricio Corrêa, 26.02.1997.

46. See FED. R. CIV. P. 23.

and internal interests of the members of one selfsame legal entity, such as associations. A "hybrid class action" (made obsolete through the supervening advent of bankruptcy legislation) would materialize the case of bankruptcy creditors' claims. Lastly, "spurious class actions" would be nothing more than invitations to joint parties, to have them join that legal-procedural relationship.

During the twenty-eight years when the classification was in effect (1938-1966), it did not prove possible to implement the system efficiently, and the system has been widely criticized by doctrine and poorly understood in case law. From 1966 onwards, with the reformulation of Rule 23, the former categories were extinguished, and an "opt-out" regime was set up for class (collective) actions (protecting homogeneous individual rights), plus a waiver of notification for class (people's) actions (protecting diffused rights). These changes were followed by the state legislatures, although with a considerable reduction in the requirements for filing in the majority of cases.

Along this line of reasoning, and going back to the Brazilian issue, it might be a good idea for the lawmaker to abandon classification on the material plane (of civil law) and adopt a classification at the procedural level, so as to conceive just two kinds of suits, according to whether or not the right implicated is divisible, and consequently according to the addressee of the sum to be received by way of indemnity (the fund, in the former case, and the injured parties, in the latter).

Notwithstanding the criticisms, we must examine the CDC so as to contemplate the issue just as it is regulated in the Brazilian legal system. Diffused rights or interests are conceptualized in article 81, sole paragraph, sub-item I of the Consumer Defense Code as being "those trans-individual, indivisible by nature, held by indeterminate persons, linked by factual circumstances."<sup>47</sup> On the basis of the legal conceptualization indicated above, we can point out as basic features of such interests the indeterminate nature of the subjects,

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47. Lei No. 8.078, de 11 de setembro de 1990, D.O.U. de 12.09.1990.

indivisibility of the object, intensity of the conflict, and their ephemeral duration.

With regard to the indeterminate nature of the subjects, we have it that diffused interests will concern an indeterminate or hard-to-determine group of subjects. Protection of this kind of right is justified following the rationale that if an individual interest warrants protection under the law, then all the more so does an interest of many, even if its holders cannot be precisely identified. An offense to these rights, thus, will also affect an indeterminate number of people, who may be either a community, an ethnic group, or even a whole country. We therefore have it that diffused interests are sited at the “extreme opposite” of subjective rights, since they have as their keynote the “right to demand,” to be exercised by their holder, against someone else, and involving a certain asset of life.

As to the indivisibility of the object, satisfaction of diffused interests to one individual necessarily implies the satisfaction of others, since the offense will likewise affect the whole collectivity. The indivisible nature of these interests also arises from the fact that it is impossible to state accurately how much of the right belongs to each one of the members of the indeterminate group that holds it.

The third feature of diffused rights is the intense internal conflict, derived basically from the circumstance that all these individual would-be targets lack a defined legal tie, but arise from *de facto* situations, at times merely happenstance. The fourth differentiating characteristic of diffused interests is their transition or mutation through time and space. Given that, quite often they arise from and even vanish due to sudden and unforeseeable situations.

Environmental rights are diffused rights by their very nature. Collective interests or rights in the strict sense are conceptualized by article 81, sole paragraph, sub-item II of the CDC, as “trans-individual, of an indivisible nature, held by a group, category or class of persons linked among one another or with the opposing party by a basic legal relationship.”<sup>48</sup> Thus, collective rights strictly speaking

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48. *Id.*

are those whose subjects are linked among one another or with the opposing party by a basic legal relationship, and not by factual circumstances, as happens in the case of diffused rights. Furthermore, the holders of collective rights strictly speaking are determined, or at least determinable in theory, given the fact that they are part of certain "groups, categories or classes," such as the residents of a building, partners of a company, players in a sports team, members of a professional association, etc.

Lastly, we need to address homogeneous individual rights. The CDC broke new ground when it included in its article 81, sole paragraph, sub-item III, the possibility of collective protection of these rights defined, simplistically, as those possessing a "common origin."<sup>49</sup> This lack of a precise conceptualization led to the mistaken understanding that a homogeneous individual right would be one that could not be fitted into the concepts of diffused and collective rights. As we can see, the homogeneous individual right is a species belonging to the genus of subjective rights. More precisely, it is a complex individual subjective right. It is an individual right, as it concerns the needs and hopes of just one person; at the same time, it is complex, as these needs are the same for a whole group of people, thus giving rise, quite clearly, to the social importance of the issue. Along this line of reasoning, one reaches the conclusion that in a case of homogeneous individual rights there is a collective issue common to all the members of the class, and which prevails over any individual issues.

This is the touchstone—that is to say, the so-called homogeneity arises from this prevailing common issue—which then becomes a social issue, and consequently something inaccessible. A homogeneous right, is, in the last place, a divisible right. In this context, it is worth recalling that the sole paragraph of article 81 of the Consumer Defense Code, in defining diffused and collective rights, makes a point of qualifying them as indivisible.<sup>50</sup> However,

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49. *Id.*

50. *Id.*

this is omitted in sub-item III, which regulates the homogeneous individual right, and the omission generates difficulties in the interpretation of this provision.<sup>51</sup>

According to the methodology of the Consumer Defense Code, the homogeneous individual right is nothing more and nothing less than a right that in theory would be diffused or collective, but at some point became divisible and therefore subordinate to specific rules, mainly with regard for concrete satisfaction for the parties harmed.<sup>52</sup>

51. *Id.*

52. *Id.* Professor Gidi notes:

Examples illustrating the three kinds of group rights that may be adjudicated through class litigation may clarify Brazilian class action law. Since this is an area where civil procedure closely connects with substantive law, some examples may not be encountered in other jurisdictions . . . . The most illuminating examples of diffuse rights are found in the fields of environmental and consumer protection. The right to a safe environment, and to truthfulness in advertising belongs to everyone in the community and, at the same time, belongs to no one in particular. In the case of pollution in a bay, for example, it is apparent that the bay does not belong to anyone in particular; pollution of its waters will damage the community as a whole, and the cleaning of the water will benefit the group as a whole (indivisibility). This right belongs to the community as a whole, not to individual members of the group. It is a transindividual right, not an individual right. Since there is no distinct property right in jeopardy, this conflict cannot be compared with the nineteenth century neighborhood controversies and cannot be solved by the traditional rules of nuisance . . . . A collective right is defined by statute in terms similar to a diffuse right. A collective right is also defined as transindividual and indivisible. However, it differs from a diffuse right in that, instead of the group being constituted of indefinite persons linked only by factual circumstances (living in the same neighborhood, buying the same product, watching the same television program, etc), the members of the group in the case of a collective right are linked to each other, or to the opposing party, by a prior common legal relationship. The pre-existing common legal relationship makes the membership in the class more definite in the case of collective rights than in the case of diffuse rights. For example, when a bank, a credit card company or a school charges excessive or illegal fees to its clients, or a health insurance company refuses to cover treatment for some diseases, they are violating the collective rights of their clients. In those cases, there is a contractual relationship that links all class members (consumers) with the opposing party (corporation). Thus, an injunctive claim against the defendant to cease charging abusive or illegal fees, or to conform its practices to the substantive law, falls in this category. Because each contract is governed by the same provisions (usually an adhesion contract,) and each is subject to the same substantive law, the decision regarding the legality of the defendant's conduct is identical for all members of the group. This is a common question of law that allows a uniform decision that will affect the interests of all class members . . . . Homogeneous individual rights, however, are the very same individual rights that have traditionally been known in the civil law system as "droits subjectifs." The novel concept of homogeneous individual rights only reflects the creation of a new procedural device for the unitary treatment of related individual rights in a single action: a class action for individual damages. . . . The concept of "homogeneous" rights is further illustrated by the aforementioned example of pollution in

### B. *The Public Civil Action*

Only from 1985 onwards did Brazilian law organize systematically the protection of trans-individual rights.<sup>53</sup> The regulation of the public civil action by Law No. 7,347 of July 24, 1985, which contemplated this mode of action for the defense of environmental rights, among other things, opened the way for the appearance of class actions in Brazil.<sup>54</sup> Following this, various laws have been promulgated, each one addressing the protection of a determined legal asset of society.

The 1988 Federal Constitution created provisions for the protection of trans-individual rights by means of the collective writ of mandamus, the class action, and also the public civil action.<sup>55</sup>

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a bay. For example, suppose the inhabitants of the area were injured by the pollution; some people might have developed health problems, others, such as fishermen or landowners, might have suffered property damage. The class claim to render the defendant liable to those individual members of the class fits under the label of homogeneous individual rights. Similarly, individual claims for damages suffered by each client in the example of the health insurance company's illegal refusal to cover treatment also fit in this category.

Antonio Gidi, *Class Actions in Brazil—A Model for Civil Law Countries*, 51 AM. J. COMP. L. 311, 354–58 (2003).

53. See OQUENDO, *supra* note 44, at 712.

In Latin America, Brazil has taken the lead in this direction. Since the 1980s, it has recognized a wide array of collective causes of action. It has thus created a paradigm that has drawn significant attention from other countries in the continent. Many of these nations have already produced statutes or legislative bills on the matter, but none has gone as far as Brazil in terms of the quantity and quality of the options available.

*Id.* (citations omitted).

54. See Lei No. 7.347, de 24 de julho de 1985, D.O.U. de 25.07.85.

55. C.F. tit. II, ch. 1, art. 5. The fifth article of the 1988 Federal Constitution addresses the class action and the collective writ of mandamus:

Art. 5—All are equal before the law, with no distinction of any kind, assuring Brazilians and foreigners resident in the Country of the inviolability of the right to life, liberty, equality, security and property, in the following terms:

....

LXX—the collective writ of mandamus may be applied for by: a) a political party with representation in the National Congress; b) a union organization, professional body or association legally constituted and functioning for over one year, in defense of the interests of its members or associates.

....

LXXIII—any citizen is a legitimate party to file a class action seeking to annul an act harmful to the public estate or that of an entity in which the State holds an interest, to administrative morality, the environment and the historical and cultural heritage, and the

Following chronological order, Law No. 7,853 of October 24, 1989, regulated the public civil action in relation to the collective interests of challenged persons, while Law No. 7,913 of December 7, 1989, created liability for damages to investors on the securities market.<sup>56</sup> The Statute of the Child and Teenager (Law No. 8,069, of July 13, 1990), set up a new area of activity for this procedural tool.<sup>57</sup> Then came the Consumer Defense Code (CDC), which made several changes to the Law of the Public Civil Action, also regulating in Brazilian law the class action, in its articles 91 through 100.<sup>58</sup>

After the CDC, the Law of Administrative Malfeasance was promulgated, seeking to fight illicit acts practiced by public servants in the exercise of their functions, and setting up mechanisms for the repression of these acts and the return to the public coffers of any sums diverted from their original purposes. Next came Law No. 8,884, known as the Anti-trust Law, aimed at fighting infractions against the economic order.<sup>59</sup> October 1, 2003, saw the enactment of the Statute of the Elderly, laying down rules for the protection of persons over age sixty-five, while regulating the use of the public civil action for the defense of their interests.<sup>60</sup> Then, the “Maria da

plaintiff, excepting bad faith, is exempt from legal costs and the costs to be borne by the defeated party.

*Id.*

The public civil lawsuit appears in the chapter that addresses the Department of Public Prosecutions, as being one of its institutional functions:

Art. 127—The Department of Public Prosecutions is a permanent institution, essential to the jurisdictional function of the State, answering for the defense of the legal order, the democratic regime and inaccessible social and individual interests.

....

Art. 129—The following are institutional functions of the Department of Public Prosecutions:

....

III—opening a civil inquiry and filing a public civil action, for protection of the public and social estate, the environment and other diffused and collective interests.

C.F. title IV, ch. 3, art. 129.

56. Lei No. 7.853, de 24 de outubro de 1989, D.O.U. de 25.11.1989; Lei No. 7.913 de 7 de dezembro de 1989, D.O.U. de 8.12.1989.

57. Lei No. 8.069, de 13 de julho de 1990, D.O.U. de 14.07.1990.

58. Lei No. 8.078, de 11 de setembro de 1990, D.O.U. de 12.09.1990.

59. Lei No. 8.429, de 2 de junho de 1992, D.O.U. de 3.06.1992; Lei No. 8.884, de 11 de junho de 1994, D.O.U. de 12.06.1994.

60. Lei No. 10.741, de 3 de outubro de 2003, D.O.U. de 4.10.2003.

Penha" Law was enacted, which seeks to inhibit domestic violence, and which also addressed collective protection, in articles 26, subitem II, and 37.<sup>61</sup> Lastly, Federal Law No. 11,418, of December 19, 2006, in Article 2, conferred new wording on Article 5 of Law No. 7,347/85, denominated the Law of the Public Civil Lawsuit, and registered the Department of Public Defense as among legitimate parties for bringing such suits.<sup>62</sup> In a short synthesis, this is a brief evolution of the Brazilian laws addressing the protection of collective interests.

### C. *Procedural Aspects of Collective Protection*

As we have seen, Law No. 7,347/85, which is the general norm on the topic, states that a public civil action may be used to hold a party liable for material damages, along with pain and suffering, caused to the environment, consumers, goods and rights of artistic, aesthetic, historical, touristic, or natural worth, to any other diffused or collective interest, for infractions against the economic order and people's economy and the urban-planning order.<sup>63</sup> Once filed, the suit follows ordinary procedure according to the Code of Civil Procedure, and the listing of parties with legitimacy to act appears in Article 5 of the Law of the Civil Public Action, and also in Article 82 of the CDC.<sup>64</sup> Those enjoying legitimacy to file a public civil action are the

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61. Lei No. 11.340, de 7 de agosto de 2006, D.O.U. de 8.08.2006.

62. Lei No. 11.418, de 19 de dezembro de 2006, D.O.U. de 20.12.2006; Lei No. 7.347 de 24 de julho de 1985, D.O.U. de 25.07.1985.

63. *See id.*; *see also* OQUENDO, *supra* note 44, at 711, noting:

Consequently, collective suits have historically played a relatively modest role in both Continental Europe and Latin America. However, legal reformists in both regions have recently started calling for change. In particular, they have propounded the broad use of such actions to implement not only civil, political, social and economic liberties, but also third generation rights in areas such as environmental or consumer law. They have mostly proposed developing already existing collective procedures. Nonetheless, they have occasionally supported the adoption of class actions, which are foreign to the civil law tradition.

64. Lei No. 8.078, de 11 de setembro de 1990, D.O.U. de 12.09.1990. *See Sant'anna, supra* note 39, at 27.

In a "public civil action," a court order may be sought requiring a polluter to make a cash payment or requiring the polluter to do something or to refrain from doing something. A public civil action may be commenced by a public prosecutor, the federal government, a



Department of Public Prosecutions, the Federal Union, the States, Federal District and Municipalities, autarkies, state-owned companies, foundations, mixed-capital companies, bodies which, albeit devoid of juridical personality, are part of the direct or indirect public administration (such as “Procon” (consumer defense agencies) and the Municipal Environmental Secretariats), associations constituted more than one year ago (paragraph 4 of Article 5 does allow the judge to overlook this requirement, given the patent social interest of the case), and those which include within the purposes of their by-laws the defense of the asset addressed in the suit to be filed (“thematic relevance”). Lastly, the Public Defense Department also enjoys legitimacy, pursuant to Law No. 11,448/07, as mentioned above.<sup>65</sup>

Even though Brazilian lawmakers did not provide for the legitimacy of an individual to file a class action in the broad sense (except in the case mentioned above, of a people's class action, as an instrument for the defense of a diffused right), an individual is allowed a certain level of participation in the suit, to the extent that Article 94 of the CDC states that, with the opening of the procedural relationship, there must be “publication in the official press, so that interested parties can intervene in the proceeding as joint parties, without prejudice to widespread publicity through the social communication media by the consumer defense agencies.”<sup>66</sup>

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state or municipal government, a public company, a foundation, or an environmental association duly organized and existing for at least one year prior to the action.

If an environmental association commences a civil action and subsequently abandons the case, the public attorney is substituted for the plaintiff.

A plaintiff association will not be liable for any court costs, attorneys' fees (including the fees of experts), or any other expense, except if the association is proved to have litigated in bad faith. If an association brings a public civil action in bad faith, the association and the director responsible will be held jointly liable for payment of an amount equal to ten times the judicial costs and for any losses and damages sustained by the defendant.

65. Lei No. 11.448, de 11 de outubro de 2007, D.O.U. de 12.10.2007.

66. Lei No. 8.078, de 11 de setembro de 1990, D.O.U. de 12.09.1990; *see also* Gidi, *supra* note 52, at 341–42, noting:

Despite these important innovations, Brazilian class action statutes are deficient in several aspects. For example, the ‘notice’ requirement is satisfied merely by a single publication in an official newspaper. This fictitious and perfunctory notice is clearly

Also fitting is a joinder of plaintiffs (Article 5, paragraph 2, of the Law of the Public Civil Lawsuit) and joinder of defendants, in spite of the law's silence on this point, along with the so-called joinder of the Departments of Public Prosecutions (Article 5, paragraph 5), although this latter provision is much criticized, on the understanding that it is unconstitutional, which is not our opinion at all.<sup>67</sup>

Competency for handling the case is regulated in Article 2 of the Law of the Public Civil Action, according to which the courts of the place where the damage takes place are competent.<sup>68</sup> This provision is complemented by Article 93 of the CDC, which addresses the cases of local, regional or national damage, while the sole paragraph of the aforementioned Article 2, introduced by Provisional Measure No. 2,180-35/01, mentioned above, states that filing suit will set jurisdiction of the court for all lawsuits subsequently brought having the same right of action or the same object.<sup>69</sup> Thus, the traditional rule of the Code of Civil Procedure, setting competency in personal lawsuits in the courts of the plaintiff's domicile (art. 94)<sup>70</sup> is broken.

Upon conclusion of the phase of pleading, with the presentation of the defendant's reply, the case then moves on, successively, to preliminary measures, to judgment, and according to the state of the proceeding, a preliminary hearing, if such is the case, fact-finding through proofs, a conciliation hearing, fact-finding and judgment, and lastly to sentencing. This is because the ordinary procedure laid down in the Code of Civil Procedure applies, involving the four traditional phases of pleading, acknowledgement of the formal requirements, fact-finding and decision-making, as well as the phase of executing

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inadequate, particularly because of the low levels of public readership of the official newspaper. Moreover, the statute provides for this notice, inadequate as it is, only in class action for individual damages; in other kinds of class actions, no notice is legally mandated.

67. Lei No. 7.347, de 24 de julho de 1985, D.O.U. 25.07.1985.

68. *Id.*

69. Lei No. 8.078, de 11 de setembro de 1990, D.O.U. de 12.09.1990; Medida Provisoria No. 2.180-35, de 24 de Agosto de 2001.

70. C.P.C. art. 94.

the sentence, inaugurated by Law No. 11,232/05, which replaced the process of autonomous execution in cases of judicial title.<sup>71</sup>

Next, application for a writ is admitted, and this may take the form of injunctive protection or advanced protection, in which the judge, in a provisional decision, accelerates the actual merit of the case and grants a measure which, as a rule, would only be achieved in the sentence. This is an innovation in Brazilian law, originally present in Articles 84 of the CDC and 213 of the Statute of the Child and Teenager, and since 1994, set forth in Articles 273 and 461 of the Code of Civil Procedure.<sup>72</sup> The Public Civil Action may be (and normally is) preceded by a civil inquiry (Articles 8 and 9), the opening of which is an act exclusive to the Department of Public Prosecutions (Article 129, sub-item III, of the 1988 Constitution).<sup>73</sup>

The civil inquiry is a prior procedure with the aim of gathering the elements necessary for bringing a public civil action. Its opening is not mandatory, and the action may be brought irrespective of its opening, if there is already a “just cause” for this.

However, if the inquiry is opened, and upon its conclusion there is no characterization of a wrongful act to be fought through a public civil action, the inquiry must be closed by the Member of the Department of Public Prosecutions; such a decision would however, be conditional on a judgment for revision from a Body of the Higher Administration of the Institution, known as the Higher Council of the Department of Public Prosecutions, which will be responsible deciding whether to ratify the proposal for closure (Article 30 of the National Organization Law of the Department of Public Prosecutions—Federal Law No 8,625/93).<sup>74</sup> If the proposal is not ratified, the records return to the Prosecutors’ Department for another

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71. *Id.*; Lei No. 11.232, de 22 de dezembro de 2005, D.O.U. 23.12.2005.

72. Lei No. 8.078, de 11 de setembro de 1990, D.O.U. de 12.09.1990. Article 84 of the CDC states: “Article 84—In a lawsuit whose object is performance of an obligation to act or refrain from acting, the Judge will grant specific protection of the obligation or will order measures that ensure the practical result equivalent to that of performance.” The wording of Article 213 of the Statute of the Child and Teenager is identical. Lei No. 8.069, de 13 de julho de 1990, D.O.U. 14.07.1990.

73. C.P.C. arts. 273, 461.

74. Lei No. 8.625, de 12 de fevereiro de 1993, D.O.U. de 13.02.1993.

Prosecutor to continue the investigation until a new opinion is reached.

One very interesting mechanism is known as the “commitment of adjustment of conduct,” which may be entered into before or during the public civil action, between the defendant and the plaintiff party, whether this is the Department of Public Prosecutions or a public-law legal entity.<sup>75</sup> An extremely thorny issue concerns the legal nature of the undertaking of adjustment of conduct.<sup>76</sup> Obviously, this does not

75. See generally Sant’Anna, *supra* note 40, at 28, noting:

Environmental problems may expose a company and its managers to civil penalties and other civil sanctions, as well as to criminal sanctions. A company that is aware of the existence of an environmental problem and does not immediately disclose the situation to the appropriate environmental authorities risks the imposition of increased penalties and harsher sanctions.

In cases of environmental accidents, soil contamination, air emissions, liquid effluents, and the like, it is recommended that a detailed study (conducted with the assistance of environmental consultants) be undertaken for purposes of finding possible solutions to correct the problem and to restore the environment to its prior condition when possible, or to minimize or mitigate the environmental damage. Such a detailed study should be undertaken after a preliminary study of the factual situation has been conducted to identify the problem and its legal consequences.

After the detailed analyses are completed, the proposed remediation or other solution is then typically discussed with the state environmental agency having jurisdiction over the operations at issue. The goal of such discussions is to elicit the support of the state environmental agency for the remedial actions proposed and to obtain the agency’s approval of a timetable for completing the remedial work. After the support of the state environmental agency is obtained, the matter is then discussed with the environmental district attorney, and a document called a ‘Term of Adjustment of Conduct’ (Termo de Ajustamento de Conduta) is negotiated and ultimately entered into by representatives of the company, the state environmental agency and the environmental district attorney.

By entering into a Term of Adjustment of Conduct, a company can substantially reduce (and in most cases eliminate) its exposure to criminal liability in connection with the matter and can also thereby preclude any further action on the part of the state environmental agency, as well as any civil action requiring the company to pay monetary damages.

*Id.* (internal quotations and citations omitted).

76. See Gidi, *supra* note 52, at 342–43, stating:

Another major shortcoming of Brazilian class action law is the absence of regulation and procedures for approval of settlements. This aspect was neglected by the legislature, most likely because the rate of settlement in Brazil is almost insignificant. American class plaintiffs negotiate aggressively with the opposing party. They can and do make substantial concessions and may even partially or totally waive rights of absent class members. In comparison, the powers of the Brazilian class representative are very limited. Since the rights do not belong to the representative, but to the group as a whole, plaintiff cannot freely dispose of the group’s rights (“inalienable rights”). Therefore, representatives are allowed to make only peripheral concessions over the manner in which the defendant will adjust its behavior to the law, regarding time and place, for

mean that the DPP is allowed to relinquish the right on which the action is based; if it were, the Department of Public Prosecutions would be acting against its constitutional function, stated in Article 127 of the Constitution.<sup>77</sup> Furthermore, practice makes it clear that, without granting advantages to the party making the commitment, the mechanism would become totally ineffective, as there would be no reason for him to accept the undertaking of adjustment. Therefore, it seems that there is nothing to prevent, at the time of making the undertaking, an agreement between the parties addressing, for instance, the timeframe for the obligations set to be fulfilled. To stress once again, what must not happen is a negotiation between the parties on the essence of the material right in dispute, as ownership of this is conferred on society.<sup>78</sup>

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example. The power of the American class representative to settle the group's claim is legitimized by a sophisticated regulation of adequacy of representation, which includes judicial approval of the settlement, with notice to absent members, evidentiary hearing, right to intervene and challenge the terms of the settlement, right to opt out, etc. In contrast, in Brazil, as long as the statute or case law does not establish an adequate proceeding for court approval and notice to the group, giving binding effect to any class-wide settlement would be a precarious enterprise. The impact of this omission is further amplified by the specific rules of *res judicata* in Brazilian class actions, which do not bind absentees if the judgment is not favorable to their interests. After all, if the class decree is binding on the absent class members only if favorable to their interests, to what extent should a class settlement be binding at all?

*Id.* (internal citations and quotations omitted).

77. C.F. art. 127.

78. See generally FED. R. CIV. P. 23(e). As it is known, in the United States, Rule 23 (e) of the Federal Rules of Civil Procedure says:

(e) Settlement, Voluntary Dismissal, or Compromise. The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

- (1) The court must direct notice in a reasonable manner to all class members who would be bound by the proposal.
- (2) If the proposal would bind class members, the court may approve it only after a hearing and on finding that it is fair, reasonable, and adequate.
- (3) The parties seeking approval must file a statement identifying any agreement made in connection with the proposal.
- (4) If the class action was previously certified under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.

In setting the commitment, a new legal situation arises from the effects produced by this instrument. For purposes of organization, we highlight the four main effects arising from setting the undertaking. These are: (a) determination of the responsibility of the party obliged to fulfillment of the adjustment established; (b) formation of an out-of-court title to enforcement; (c) suspension of the administrative procedure on which it was based or on which it will have a repercussion; and (d) closing the investigation after its performance. The fact of the matter is that the undertaking, taken on the basis of the commitment made, serves to exclude the public civil action, when made within the scope of the civil inquiry or by some other means prior to filing suit, or also to close the case. What is involved is a powerful tool, capable of avoiding lengthy and unnecessary court cases, and which has been widely used by the Department of Public Prosecutions, especially when those under investigation in a civil inquiry display reasonableness and common sense.

There is just one restriction on use of the commitment, this stated in Article 17, 1st paragraph of Law No. 8,429/92 (administrative malfeasance).<sup>79</sup> We do acknowledge that academically the issue calls for deeper reflection, not only from this angle, but in its genesis and purpose, particularly within a context of socially-effective and instrumental procedural law.

Regarding the civil sentence, just a few points warrant examination. Article 16 of Law No. 7,347/85 states that the sentence will entail a *res judicatum*, and this *erga omnes*,<sup>80</sup> unless the plea is rejected for lack of proof.<sup>81</sup>

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(5) Any class member may object to the proposal if it requires court approval under this subdivision (e); the objection may be withdrawn only with the court's approval.

*Id.*

79. Lei No. 8.429, de 2 de junho de 1992, D.O.U. de 3.06.1992.

80. Lei No. 7.347, de 24 de julho de 1985, D.O.U. de 25.07.1985. It should also be noted that the wording of Article 16 of the Law of the Public Civil Action was amended by Law No. 9,494, of September 10, 1997.

Art 18. The civil sentence will entail a *rem judicatum erga omnes*, within the limits of the territorial competency of the body passing sentence, unless the plea is rejected due to lack of proofs, in which case any legitimate party may bring another suit on identical grounds, making use of new proof.

Articles 103 and 104 of the CDC make the rule more specific, taking into account the nature of the right at stake, whether diffused, collective or homogeneous and individual.<sup>82</sup>

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Lei No. 9.494, de 10 de setembro de 1997, D.O.U. de 11.09.1997. This amendment has been much criticized by doctrine, which understands that this contains a breakdown in the system of access to justice that had been established in law. On the other hand, the Executive Branch, in making this change, used as rationale the need to make compatible the mechanisms of competency and of the subjective limits of the sentence.

81. See Gidi, *supra* note 52, at 384–86, stating:

Common law and civil law systems employ different concepts of *res judicata*. It is important, therefore, to discuss these systemic differences before dealing with an analysis of *res judicata* rules in Brazilian class actions. The policy reasons underlying the use of *res judicata* to preclude litigation are the same in both systems, and the general rule is expressed in similar language: A party cannot assert the same cause of action twice. The similarities between the two systems end here. The primary differences are most visible in the concept of 'cause of action' itself. Cause of action has a much broader meaning in common law systems, as it refers to the whole controversy between the parties. *Res judicata*, correspondingly, has a much broader scope in common than in civil law systems. The common law doctrine of *res judicata* includes both issue preclusion, also known as collateral estoppel, and claim preclusion. Issue preclusion bars relitigation of all issues that are 'necessary steps' to the first decision on the merits, provided that those issues have actually been litigated and decided in the first action. Civil law doctrine has claim preclusion alone. In addition, the concept of claim preclusion is broader in common law than in civil law systems. In the civil law tradition, only the claims formally raised in an earlier proceeding are barred from being relitigated. Claims not raised in a previous action may be the object of a subsequent proceeding. The common law tradition, however, precludes not only claims actually raised but also those that could potentially have been raised but were not. Therefore, all claims that can be raised in a proceeding, arising from the same conflict (i.e., transaction) between the parties, must be raised under penalty of being precluded in a future action. Proper appreciation of the broad rules of claim preclusion that are characteristic of the American legal system requires an understanding of the procedural foundation upon which they have been constructed. As a counterbalance to broad application of *res judicata*, common-law systems allow more liberal discovery of evidence, pleading amendments, and authorize the judge to decide issues not explicitly included in the parties' claims. Moreover, in limited situations, courts can avoid the application of the strict rules of claim and issue preclusion if the particular circumstances of the case suggest that this is the most adequate course of action. In contrast, in civil law systems, generally, the opportunity for discovery is narrower, the rules of amendment are more restrictive, the judge is not allowed to decide beyond the claims stated in the pleadings (prohibition of *ultra petita* and *extra petita* decisions,) and the rules of *res judicata* are applied mechanically.

*Id.* (internal citations and quotations omitted).

82. Lei No. 8.078, de 11 de setembro de 1990, D.O.U. de 12.09.1990. These provisions have the following wording:

Art. 103—In the class actions addressed in this Code, the sentence will entail a *rem judicatum*:

I—*erga omnes*, unless the plea is rejected due to lack of proofs, in which case any legitimate party may bring another suit, on identical grounds, making use of new proof, in the case of sub-item I of the sole paragraph of article 81;

The general rule, therefore, is as follows:

- a) In cases of closure of the proceeding with no resolution of merit, or in those in which merit is touched upon but the plea is rejected due to lack of proofs, only a formal *res judicatum* is produced;
- b) On the other hand, if merit is examined and the plea is upheld or rejected for a reason other than lack of proofs, this entails a material *res judicatum*.

Here, one sees quite clearly the lawmaker's option to attenuate the rigor of the material *res judicatum*, to the benefit of society, a rule not existing in individual jurisdiction, in which every definitive decision (cases of article 269 of the Code of Civil Procedure) entails a material

II—*ultra partes*, although limited to the group, category or class, unless rejected due to lack of proofs, pursuant to the previous sub-item, in the case addressed in sub-item II of article 81;

III—*erga omnes*, only in the case of the plea being upheld, to benefit all the victims and their successors, in the case of sub-item III of the sole paragraph of article 81.

1st Paragraph—The effects of the *rem judicatum* addressed in sub-items I and II will not affect individual rights and interests of those belonging to the collectivity, the group, category or class.

2nd Paragraph—In the case addressed in sub-item III, should the plea be rejected, interested parties who have not intervened in the case as joint parties may file an individual suit for indemnity.

3rd Paragraph—The effect of the *rem judicatum* addressed in article 16, combined with art. 13 of Law No. 7,347, of July 24 1985, will not affect suits for indemnity for personal damages sustained, brought individually or as provided for in this Code, but if the plea is upheld, will benefit the victims and their successors, who may proceed to liquidation and execution, pursuant to articles 96 through 99.

4th Paragraph—The provisions of the previous paragraph apply to a sentence of criminal conviction.

Art. 104. Class actions, addressed in sub-items I and II of the sole paragraph of article 81, do not entail a pending suit for individual actions, although the effects of the *rem judicatum. erga omnes. or ultra partes* referred to in sub-items II and III of the previous article will not benefit the plaintiffs of the individual suits, if their suspension is not requested within 30 (thirty) days, counting from acknowledgement in their records of the class action being filed.

*Id.* (internal citations and quotations omitted).



*res judicatum*, regardless of the context of proof.<sup>83</sup> However, not always is this general rule sufficient to resolve issues cropping up in practice, because quite often in the course of the class action, or even before it is filed, individual suits are brought by persons harmed on the same grounds that provided the basis for the class action.

In these cases, a more thorough examination of the provisions of the CDC is called for. In the case of a homogenous individual right, the sentence will produce effects *erga omnes* if the plea is upheld to benefit victims and successors.<sup>84</sup> The holders of these rights may seek their personal indemnities with no need to prove the obligation to indemnify and the causal nexus between the general damage and the party causing the damage. They need merely demonstrate that their private damage is tied to that damage generically recognized, and quantify their indemnity in a liquidation proceeding.

At this point, Article 95 of the same code states that, if the plea is upheld, the judge must set a generic conviction.<sup>85</sup> Then the phase of liquidation of the sentence will begin, as regulated in Articles 475-A through 475-H of the Code of Civil Procedure, which will be done individually by each person harmed, according to the sum appropriate to them, although it is also the case that subsidiary legitimacy still falls to the persons listed in Article 82 of the CDC, for opening this phase of liquidation, and also for execution.<sup>86</sup>

What is under discussion in this case, is whether the class action will lead to pending suits in relation to individual lawsuits brought

83. *Id.* As a matter of fact, this rule is the same applied to the people's class action. Lei No. 4.717, de 29 de junho de 1965. Just for the record, in the aforementioned Article 18 of the Law of the People's Class Action, just as in the previous wording of Article 16 of the Law of the Public Civil Action (now modified by Lei No. 9.494, de 10 de setembro de 1997), one reads the expression "shortage of proofs."

84. Lei No. 8.078, de 11 de setembro de 1990, D.O.U. de 12.09.1990.

85. *Id.*

86. *Id.* Articles 97 and 98 of the CDC state as follows:

Art. 97—Liquidation and execution of sentence may be pursued by the victim and his successors, as also by those enjoying legitimacy as addressed in article 82.

Art. 98—Execution may be collective, being pursued by those enjoying legitimacy as addressed in article 82, encompassing the victims whose indemnities have already been set in a sentence of liquidation, without prejudice to other suits being filed.

*Id.* See also, C.P.C. art. 475.

for the same purpose.<sup>87</sup> It seems to us that this is not the case, insofar as the parties are different, the right of action may or may not be identical and the plea will always be different, as in the class action the plea for indemnity is generic, unlike the individual suit, where this is specified according to the needs of each plaintiff. Nonetheless, one is forced to recognize, still mindful of the terms of Article 104 of the CDC, that the benefit of the *res judicatum* formed in a class action will depend on the timely request for suspension of an individual lawsuit, when the two are under way simultaneously.

On the other hand, rejection of the class action will allow those affected who do not participate in the class action, as joint parties, to file individual suits, as a sentence of rejection in a class action entails a *res judicatum erga omnes*, preventing only another or the same legitimate party from bringing a new class action, but not ruling out an individual lawsuit for indemnity. It is as if the lawmakers had made the mechanism of *res judicatum* more flexible in these cases, using the argument that the legitimate parties are different for the individual and class actions, in an unequivocal political option for the weaker party in the procedural relationship. This trend, deemed unsuitable in other times, has been gaining followers day by day, boosting the number of defenders of the institution of "making the *res judicatum* more relative." Lastly, interested parties who intervene as assistant joint parties cannot bring an individual suit in the event of rejection, as one gathers from Article 103, second paragraph, of the CDC.<sup>88</sup>

Summing up, based on the conjugation of legal factors, the following hypotheses may come about:

- a) The party affected filed an individual suit before the class action was filed, and requested suspension of the first suit. In this case, he will benefit from the class action being upheld, and will

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87. Lei No. 8.078, de 11 de setembro de 1990, D.O.U. de 12.09.1990.

88. *Id.*

not be adversely affected if it is rejected—he may go ahead with the individual suit for indemnity;

b) The party affected filed an individual suit before the class action was filed, and did not request suspension of the first suit. Here, he will not benefit from the class action being upheld;

c) The party affected participated in the class action as assistant joint party. He cannot bring an individual suit in the event of rejection of the class action and, in this case, the *res judicatum* in the class action will produce effects in relation to the party affected;<sup>89</sup>

d) The party affected did not participate in the class action nor file an individual suit. He may file an individual suit in the event of the class action being rejected, or will benefit in the event of its being upheld.

In any event, one sees clearly that the aim of the lawmaker was to allow the affected party to always benefit from the collective *res judicatum*, which is in line with the modern trend in collective procedural law.<sup>90</sup> These, in rather brief words, are the most relevant ideas on collective protection in Brazilian law.

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89. C.P.C. art. 472. Also by virtue of the provisions of Article 472, 1st part, of the Code of Civil Procedure: “Art. 472 - The sentence produces a *res judicatum* for the parties between whom it is given . . .” *Id.*

90. See OQUENDO, *supra* note 44, at 762, stating:

This asymmetric approach to group suits contrasts sharply with the treatment of class actions in the United States. U.S. class suits have full and symmetric *res judicata* effect. Ordinarily, members of the class may not individually or collectively relitigate the issues, irrespective of whether the initial action was successful. How does this result compare with that contemplated in the Consumer Code in terms of efficiency and fairness? Is it more acceptable because of the unequivocal requirement regarding adequacy of representation in the U.S. federal system? Of course, the Public Ministry’s participation in part compensates for the lack of such a formal prerequisite in Brazil. Should Brazilian law therefore adopt tighter preclusion standards along the lines of its U.S. counterpart?

*Id.*

### III. THE ROLE OF THE DEPARTMENT OF PUBLIC PROSECUTIONS

In the 1988 Constitution, the Department of Public Prosecutions is regulated in Articles 127 through 130, and it is considered to be “a permanent institution, essential to the jurisdictional function of the State, answering for the defense of the legal order, the democratic regime and inaccessible social and individual interests.”<sup>91</sup> First of all, we must note that, as per the very definition given by the lawmaker, the Department of Public Prosecutions is an Institution, and therefore not to be confused with legal entities, thus not possessing a juridical personality. The Department of Public Prosecutions must be understood as always being a permanent institution, and essential to the jurisdictional function of the State.

It is worth stressing that Article 127, main section, is subdivided into two parts: one corresponding to the concept of the Institution, and the other to its functional or institutional objectives.<sup>92</sup> With regard to the first part encompassing the concept, the remarks set out below are called for.

When the 1988 Constitution of the Republic employs the expression “permanent institution,” it implies that this is a clause set in stone, and thus cannot be suppressed by the derived constituent power.<sup>93</sup> Meanwhile, regarding the word “essential,” this likely means that in cases where its intervention is obligatory, if it is not called in, it will be a case of absolute nullity of the proceeding.<sup>94</sup> The action of the Department of Public Prosecutions as *custos legis*, that is to say, an inspector of the law, finds its constitutional basis in this aforementioned article, which refers to defense of the legal order, while the action of the DPP in all cases involving elections is based upon the defense of the democratic regime, likewise stated in that provision.

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91. C.F. art. 127.

92. *See id.*

93. *Id.*

94. *Id.*

We are in the habit of saying that the Department of Public Prosecutions may participate in two ways in a proceeding: through its action or its intervention. Participation, thus, would be a genus brooking within itself two species. Action is spoken of when the DPP acts as a party in the proceeding, bringing the suit. Intervention refers to cases in which the Department of Public Prosecutions functions as an inspector of the law, as *custos legis*, in a suit brought by someone else. Recently, the understanding has gained ground that, even in cases when the Department of Public Prosecutions participates in the proceeding as a party, it also does so as inspector of the law. The DPP's participation as a party does not entail the impossibility of its simultaneously acting as inspector of the law. Today, thus, it is no longer possible to consider any participation by the Department of Public Prosecutions only as party in a proceeding. In actual fact, it is certain that whenever the Department of Public Prosecutions acts as an agent, it will be doing so linked to its inspecting function, not least through obedience to the paramount objective attributed to it by Article 127, main section, of the Federal Constitution.<sup>95</sup>

Participation by the DPP as an agent of action or an agent of intervention occurs differently in a Civil Proceeding and a Criminal

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95. See Nicholas A. Robinson, *Why Environmental Legal Developments in Brazil & China Matter: Comparing Environmental Law in Two of Earth's Largest Nations*, in ALI-ABA INT'L ENVTL. LAW COURSE OF STUDY, PRINTED COURSEBOOK 313, 320 (Apr. 21, 2006), noting,

1. Brazil's *dirigiste* constitutional provisions for the environment require the government to take affirmative action to protect the environment.
2. As a Civil Law nation, under the constitution are complementary statutes, and ordinary statutes, and the treaties and commentaries on the law, and the decrees and provisory measures, and regulations.
3. Role of the Ministerio Publico: Art. 127, CF/88 "a fundamental institution to the jurisdictional scope of the State, in charge of defending (a) the legal order, (b) the democratic system, and (c) the inalienable social and individual interests." The role of the Ministerio Publico is unique, as a Custos Legis, to ensure that the law is being correctly applied, and as a public interest advocate, an attorney for the common rights of society. The Ministerio Publico can take actions against a state or other component of the government.
4. A federal and state systems of public prosecutors enforce the environmental laws, through criminal actions, civil inquires and public civil actions, and can request information and undertake investigative measures and file police inquires, as well as have external oversight of police activities.

*Id.*; see also C.F. art. 127.

Proceeding, because, in the Civil Proceeding, it behooves the DPP to act, first and foremost, as inspector of the law, by virtue of the provisions of Article 82 of the Code of Civil Procedure.<sup>96</sup> Along this line, it will only act as a party in the cases expressly addressed and authorized by law.

In participating in a procedural relationship in the capacity of party (action), the Public Prosecutor may set in motion an individual or class action. It will be an individual action, obviously, in a suit in which the interested party is just one person, and a class action when the whole of society, or a social group, is interested in the suit.

We understand that the DPP must focus even more on the protection of collective rights in the broad sense, participating either as a party or as inspector of the law. Article 127 of the Constitution of the Republic states that it behooves the Department of Public Prosecutions to defend "inaccessible individual and social interests."<sup>97</sup> One notes that the lawmaker uses a generic term, *social interests*, opting not to speak of collective interests, or meta-individual interests, or even trans-individual, as was common at the time of the Constitutional Assembly. On the other hand, the lawmaker refers to *inaccessible individual interests*. It seems to us that the lawmaker wishes to refer to cases in which the Department of Public Prosecutions acts, either as party or as inspector of the law, in defense of the rights of the incapable or those which, given their importance, go beyond the sphere of disposal by the party. However, the term "inaccessible" is not individualized, leaving doubt as to whether this qualifies only individual interests or also social interests.

Complementing the main section of Article 127, we find sub-item III of Article 129, also mentioned above, which states that it is a function of the Department of Public Prosecutions to open the civil inquiry and bring the public civil lawsuit "for protection of the public and social estate, the environment and other diffused and collective interests." Here the constitutional text already mentioned *diffused and*

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96. See C.P.C. art. 82.

97. C.F. art. 127.

*collective interests*, and is therefore more technical than in the main section of Article 127, pointing out the direction towards establishing species of the genus *collective interest*, although it does not mention the modality of homogeneous and individual.<sup>98</sup>

At this point we may note that the collective class action, taken generically, unlike the collective writ of mandamus and the people's class action, was not addressed in Article 5 of the Federal Constitution, even though Law No. 7,347/85 had already been in force for three years at the time of promulgation of the Constitution.<sup>99</sup>

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98. See Gidi, *supra* note 52, at 379–82 stating:

Although several class actions have been brought by private associations under the new statutes, so far the offices of the Attorney General (state and federal branches) has played the primary role in protection of group rights in Brazil. These offices have brought important class suits to curb illegal or abusive conduct against groups, whenever the “social interest” has been at play. This reality challenges Mauro Cappelletti’s theory that the *Ministere Public* would not adapt to its revised role of “effective champion of newly emerged collective interests.” The *Ministere Public’s* success in assuming this new social role has considerably broadened its political power as an institution, to the extent that it is now considered by some to be a sort of fourth branch of government. This phenomenon evoked bitter criticism by some judges, practitioners, scholars, and social observers. Critics assert that this power undermines the democratic doctrine of government because the members of the *Ministere Public* are public servants, not elected officials. Others resent the attention the institution receives from the media. This criticism is intensified by accusations that some officials abuse their powers and bring class actions for reasons of self-publicity and a desire for media attention. The members of the Brazilian *Ministere Public* (*Ministerio Publico*) were active participants in the committee that drafted the class action statutes. They are also the most active practitioners and the most authoritative scholars in interpretation of the class suit legislation. It is worrisome that they have considerable influence in shaping the very statutes and precedents that are intended to limit their own power. On the other hand, the active participation of the *Ministere Public* in the protection of group rights has been essential for the evolution of class actions in Brazil in every respect, especially in the drafting and promotion of legislation, development of precedents and elaboration of scholarly comments. It can be argued that such conspicuous governmental activity is a manifestation of a largely disorganized and apathetic society. Unlike, say, France and the United States, Brazilian society lacks a structure of mature associations or interest groups. With the expansion and development of associations in Brazil (from an organizational as well as a financial perspective), society at large might play a more active role in protecting citizen interests. Ultimately, associations are the protectors of group rights *par excellence*, and it would be politically unwise to place this responsibility exclusively on the shoulders of public officials. There are now greater legal, social, and political incentives to develop associations in Brazil. It remains to be seen whether Brazilian society will become more active in the protection of group rights.

*Id.* (internal citations and quotations omitted); see also C.F. art. 127.

99. Compare C.F., art. 5, with Lei No. 7.347, de 24 de julho de 1985, D.O.U. de 25.07.1985.

The only constitutional provision for the collective class action appears in Article 129, sub-item III, precisely within the institutional functions of the Department of Public Prosecutions.<sup>100</sup> Obviously, and as we have already mentioned, this did not come about by chance. This practice demonstrates the intense commitment of the DPP to the defense of social interests, both through its judicial action, but also—and in many cases principally—through the use of out-of-court mechanisms, such as the civil inquiry, the commitment of adjustment of conduct, plus a genuine approach between the Public Prosecutor and the community.<sup>101</sup>

#### IV. THE PRACTICAL IMPORTANCE OF THE ACTIONS OF THE DEPARTMENT OF PUBLIC PROSECUTIONS IN DEFENSE OF THE ENVIRONMENT: THE CASE OF “FAVELAS” IN THE CITY OF RIO DE JANEIRO

The whole theoretical basis set out so far can be proven, in practice, through a suit brought by the Rio de Janeiro State Department of Public Prosecutions, before the 4th State Public Treasury Bench, and which took on the number 2006.001.139217-4.<sup>102</sup>

In this action, four Public Prosecutors sued the Municipality of Rio de Janeiro and its Mayor, seeking to force him to remove a “favela” (shanty town) inside an environmental preservation area, causing intensive degradation and creating a risk of landslides and the

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100. C.F. art. 129.

101. See Robinson, *supra* note 95, stating:

Both the offices of the Attorneys General, the Federal Union Prosecutors, and the State Public Prosecutors Offices, as well as the offices of the *Ministerio Publico*, can advance [sic] cases. Citizens have a right to complain to the *Ministerio Publico*, which then investigates their claims and can institute suits on their behalf. However, all lack access to adequate scientific capacity to document the underlying facts for environmental civil or criminal prosecutions.

*Id.*

102. T.J.R.J., Pro. No. 2006.001.139217-4. 4th State Public Treasury Bench, Rio de Janeiro State Court (Brazil). For more information, see *Tribunal de Justiça do Estado do Rio De Janeiro Homepage*, <http://www.tj.rj.gov.br>.



collapse of buildings.<sup>103</sup> This “favela” consists of the union of various communities, the outcome of squatters’ activities, located in the “Alto da Boa Vista” district, considered an Urban Environmental Protection Area.<sup>104</sup> The Alto da Boa Vista neighborhood represents a rare example of harmonious cohabitation between the city’s natural and historical-cultural heritages. It encompasses the Tijuca Forest, a nationally-preserved site, the largest urban woodland on the planet, a pioneering manifestation of urban reforestation with environmental concerns and, given these attributes, a permanent preservation area.

According to the report prepared by the 5th Survey Division of the Cartography Department of the Brazilian Army, with the expansion of clearing woodlands in Alto da Boa Vista, the region has lost 48% of its total area over recent decades.<sup>105</sup> As one of the consequences of the growing population in the large urban centers pursuing better economic and social conditions, we find the growth of peripheral settlements that are devoid of the necessary basic infrastructure, consisting of a society that occupies unsuitable areas in a disorderly manner and causes serious losses to the citizens and to the environment as a whole. This urban development can lead to the spread of epidemics, due mainly to the lack of basic sanitation, the poor management of solid wastes, and the lack of drainage, among other problems found in the least favored regions of our cities.

The substantial demand of these lower-income populations for areas in which to settle is one of the factors stimulating occupation of areas unfit for habitation, such as areas prone to frequent flooding, squatting on hillsides, areas with soil with a tendency to erosion, and areas of environmental protection, among others. Debates on the quality of life and preservation of the environment have been growing constantly, and the rhythm of human interferences with nature requires reflections and preventive actions, when possible, or

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103. *Id.*

104. *Id.*

105. One excellent survey of this topic, with lots of satellite images and graphics was previously available at <http://exblogdocesarmaia.googlepages.com/RelatrioFinalFavelas.pdf>, and remains on file with the Georgia State University Law Review.

so as to repair the damages caused by the non-sustainable handling of natural resources. An improvement in the quality of life for the population is the outcome of the assimilation of ideas that are ecologically correct and coherent with reality, enabling a combination of economic-social development with conservation. The environmental issue must be worked through in society, so as to demonstrate that the environment and conservation of natural resources can become mitigating solutions for the socio-economic problems currently present in society.

In this regard, the lawsuit points out the Municipality's omission in exercising police power over the environment, insofar as the public agents did nothing to contain the disorderly expansion in communities, with this omission in their duties to supervise leading to the elimination of the vegetation existing at the site, the occupation of hillsides and innumerable aggressions against the Alto da Boa Vista Area of Environmental Protection and Urban Recovery.<sup>106</sup> In this context, the 1988 Constitution expressly established the duty of the Public Power to act in defense of the environment, with the duty set forth in the 1st paragraph of Article 225—to adopt a series of actions and programs that as a whole amount to the country's environmental policy, as measures indispensable to assuring the effective nature of the right of all to an ecologically-balanced environment, a fundamental right laid down in the constitutional text.<sup>107</sup>

The Municipality's omission also breached the Principle of Dignity of the Human Person, stated in Article 1, sub-item III, of the 1988 Constitution, insofar as the members of the communities live in a precarious situation, subject to all kinds of illnesses and facing the risk of landslides.<sup>108</sup> Lastly, the Municipality failed to implement the actions and programs necessary to constitute a clear environmental policy, based on the Principles of Legality and Reasonableness,

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106. See T.J.R.J., Pro. No. 2006.001.139217-4. 4th State Public Treasury Bench, Rio de Janeiro State Court (Brazil).

107. C.F. art. 225.

108. See C.F. art.1.

which prevented the establishment of an ecologically-balanced environment, a fundamental right laid down in the already-mentioned Article 225 of the 1988 Constitution.<sup>109</sup>

At this point it is necessary to have judicial control over the administration's omission, as a way of ensuring the effectiveness of the constitutional principles violated.

At the end of the action, the Department of Public Prosecutions sought a measure of urgency to make dis-occupation feasible from the outset, and also:

- a) Condemnation of the Municipality of Rio de Janeiro to recover the environmental area degraded as a result of the irregular occupation;
- b) The obligation of the Municipality to inspect and take all measures necessary for containing the process of squatting and irregular occupation of the communities of the Alta da Boa Vista district;
- c) Payment of indemnity by way of moral environmental damages, at an amount to be set by the court, in favor of the State Fund for Environmental Control (FECAM), or invested in projects focused on the environmental recovery of the areas destroyed.

The lawsuit was filed in October 2006. Less than three days after the filing, the judge handling the case granted the measure of urgency sought by the Department of Public Prosecutions in the following terms:

In spite of the lamentable situation of housing in the city of Rio de Janeiro, it is necessary to implement effective measures in defense of the environment, whose preservation, besides innumerable beneficial effects, affects the quality of life of all the citizens, regardless of their economic condition. Moreover,

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109. C.F. art. 225.

the competent agency must be obliged to take steps to mitigate the notorious shortfall in housing. The dignity of the human person, a paramount principle that must guide the Public Administration in the execution of its projects and in the performance of its obligations, also requires safeguarding the environment. In the light of the foregoing, I grant the advancement of protection to determine that the first defendant, Municipality of Rio de Janeiro, within 30 days, shall take the measures requested in items a, b, and d on page 62, also identifying the constructions in progress, and also, within 40 days, submit the Projects for Reforestation of the area cleared and the performance schedule for the removal and resettlement of those resident in the area, as set forth on page 62. As for the plea to accelerate the demolition of the constructions in progress and those appearing after this measure, I order awaiting submittal of the schedule with the measures for removal and resettlement of the residents, including in these the demolition indicated in item c on page 62.<sup>110</sup>

The suit is still under way.<sup>111</sup> The defendants presented their preliminary defense and now the phase of submitting proofs is to begin.<sup>112</sup> Regardless of the outcome, this groundbreaking case serves as a warning of the serious situation of the urban environment in the city of Rio de Janeiro, along with the need to establish a serious environmental policy, committed to the constitutional principles.

The precedent is also emblematic, since it counterpoises two constitutional principles—on the one hand the right to an ecologically-balanced environment, and on the other the right to housing, especially for those with low income, lacking minimal socio-economic conditions. It is a fact that in cases such as this one,

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110. T.J.R.J., Pro. No. 2006.001.139217-4. 4th State Public Treasury Bench, Rio de Janeiro State Court (Brazil). For more information, see Tribunal de Justiça do Estado do Rio De Janeiro Homepage, <http://www.tj.rj.gov.br>.

111. *Id.*

112. *Id.*

there is no general and abstract rule, and the principles must be weighed in the concrete case to gauge, in those particular circumstances, which of them must prevail.

We have it that, given the absolutely chaotic state in which the city of Rio de Janeiro finds itself facing an ongoing and uncontrolled process of irregular occupation of the slopes and hillsides, there is no solution other than the planning a firm and gradual removal of the “favelas” and the resettlement of their residents in other areas, following a schedule set in advance, based on dialog with society, founded upon democratic and transparent principles.

Nevertheless, we are forced to recognize that this action is just the beginning of a long and passionate juridical discussion.