

ARTICLES

CLASS ACTIONS IN ARGENTINA: STANDING TO SUE AND ADEQUACY OF REPRESENTATION

FRANCISCO VERBIC,

School of Law and Social Sciences of the National University of La Plata
(La Plata, Argentina)

The paper describes how Argentine policy makers have thought about and enacted rules on collective litigation in the field of consumer and environmental protection. It presents an overview of the scope and content of those rules, with special focus on standing to sue and adequacy of representation. It also explains how the Supreme Court of Justice of Argentina has reacted when facing collective conflicts even in absence of adequate procedural rules to deal with collective conflicts. The case law of this high Court has provided relevant guidance to lower courts as well as to litigants regarding case management and constitutional requisites of collective litigation mechanisms. It has also summoned Congress due to the lack of a comprehensive and adequate procedural regulation in this field of law. In doing that, it has shaped a system quite similar to that enacted in the US Federal Rule of Civil Procedure 23. Almost 20 years after the constitutional amendment which has given constitutional status to collective standing to sue, it may be said that this kind of representative proceedings is just going through a developing and experimental phase in Argentina. Thanks to the role of the Supreme Court in the last 10 years, however, there are good reasons to have great expectations about what is coming up in the near future.

Key words: class actions; standing to sue; adequacy of representation; consumers protection; environmental protection.

1. Introduction

This paper has three main objectives. The first one is to describe how Argentine policy makers have thought about and enacted rules on collective litigation in the

field of consumer and environmental protection. Secondly, to present an overview of the scope and content of those rules. Third, to deal particularly with standing to sue and adequacy of representation, explaining how the Supreme Court of Justice of Argentina ('SCJ') has acted when facing collective conflicts even in absence of adequate procedural rules in this field of law.¹

From the very beginning of the essay we have to bear in mind three essential issues. The first one is the constitutional pedigree of collective standing to sue in Argentina. As we will see, Art. 43(2) of the Argentine Federal Constitution ('AFC') vests certain kind of NGOs, the ombudsman and the individual 'affected' with the right to initiate representative lawsuits on behalf of a group of people. The second issue is the lack of adequate procedural regulations to manage collective conflicts. Finally, we need to be aware of the SCJ tight 4-3 decision in the *Halabi* case on 2009,² where the majority held – among other relevant statements that I will analyze in this paper – that is 'perfectly acceptable' to file actions 'with analogous characteristics and effects as US class actions' in Argentina.³ The *Halabi* doctrine has been recently upheld by the SCJ in a case filed by a consumer protection NGO.⁴ I will assess the impact of this decision as well.

2. Constitutional Roots of Collective Proceedings (and, still, lack of adequate procedural regulations)

Argentina is a federal country, whose central state coexists with 23 local states called Provinces and with the City of Buenos Aires, which has a very particular juridical status already recognized by the SCJ. Federal Government's powers are only those which had been delegated by local states. The political system assumes

¹ For more information on collective proceedings in Argentina, see in general Leandro J. Giannini, *La tutela colectiva de derechos individuales homogéneos* (Librería Editora Platense 2007); Francisco Verbic, *Procesos Colectivos* (Astrea 2007); José M. Salgado, *Tutela individual homogénea* (Astrea 2011).

² SCJ in re *Halabi Ernesto c/ Poder Ejecutivo Nacional*, 24/02/09, Fallos 332:111. All the SCJ cases are available online at <www.csjn.gov.ar>. Among other comments, see Fernando R. García Pullés, *Las sentencias que declaran la inconstitucionalidad de las leyes que vulneran derechos de incidencia colectiva. ¿El fin del paradigma de los límites subjetivos de la cosa juzgada? ¿El nacimiento de los procesos de clase?*, 2009-B La Ley 186; María A. Gelli, *La acción colectiva de protección de derechos individuales homogéneos y los límites al poder en el caso 'Halabi'*, 2009-B La Ley 565; Ramiro Rosales Cuello & Javier D. Guiridlian Larosa, *Nuevas consideraciones sobre el caso 'Halabi'*, 2009-D La Ley 424; Daniel A. Sabsay, *El derecho a la intimidad y la 'acción de clase'*, 2009-B La Ley 401; Maximiliano Toricelli, *Un importante avance en materia de legitimación activa*, 2009-B La Ley 202; Néstor P. Sagüés, *La creación judicial del 'amparo-acción de clase' como proceso constitucional*, SJA (Apr. 22, 2009); Eduardo D. Oteiza & Francisco Verbic, *La Corte Suprema Argentina regula los procesos colectivos ante la demora del Congreso. El requisito de la representatividad adecuada*, 2010(185) Revista de Processo (Brazil) [hereinafter Oteiza & Verbic, *La Corte Suprema Argentina regula*].

³ Paragraph 19° of the majority opinion.

⁴ SCJ in re *PADEC c/ Swiss Medical S.A. s/ nulidad de cláusulas contractuales*, 21/08/13, P.361.XLIII.

that everything not expressly delegated remains in hands of the latter. As far as we are concerned for the analysis that follows, we should take into account that Art. 5 of the AFC establishes as a condition for recognizing the autonomy of the Provinces that they must organize their own justice administration system, a task that includes the enactment of procedural regulations.

Regarding collective litigation, as I have anticipated in the introduction to this essay, it is not possible to find in Argentina a comprehensive and adequate procedural regulation to face conflicts involving large groups of people. Not even at the local level. As we will see with more detail in the following section, there are only some isolated provisions on collective proceedings enacted on the Consumer Protection Act No. 24.240 ('CPA') and the General Environmental Act No. 25.675 ('GEA'). The lack of adequate procedural devices at the federal level is particularly problematic due to the fact that, since the 1994 amendment to the AFC, the standing to sue in order to enforce collective rights has acquired constitutional pedigree, as well as some substantive rights that can be labeled as 'collective.'

Indeed, since 1994, Art. 43(2) of the AFC explicitly recognizes that different social actors (the 'affected' person and certain kind of NGOs) and a governmental institution (the ombudsman) have the right to bring *amparo colectivo* on behalf of groups and against 'any kind of discrimination and with regard to the rights that protect the environment, the free competition, users and consumers, as well as collective incidence rights in general.' Article 86 of the AFC, in turn, is even more explicit about the ombudsman (it plainly states that this political actor 'has standing to sue').

Articles 41 and 42 of the AFC (also incorporated in the text by the 1994 amendment) reinforce the Art. 43 notion of 'collective incidence rights' recognizing several environmental and consumers' collective substantive rights like the right to a healthy environment, to equal treatment, to consumers' health, to the protection of their economic interests, access to adequate information and freedom of choice, among others. We can see here how the Argentine constitutional policy makers followed a path quite similar to Brazilians, who have included in the new Federal Constitution of Brazil (1988) several substantive and procedural group rights.⁵

⁵ Among others: Art. 5(XXI), which recognizes the standing to sue of associative entities; Art. 5(XXXII), which states that the government will enact regulations to protect consumers; Art. 5(XXXIII), recognizing the right of access to information on both individual and collective basis; Art. 5(LXIX), implementing the *mandado de segurança* as an expeditive procedural remedy to protect those liquid and uncontroverted rights that cannot be enforced by means of *habeas corpus* or *habeas data* (Art. 5(LXX), in turn, states that a collective *mandado de segurança* can be brought by political parties, labor unions and associations with at least one year since their incorporation); the already mentioned Art. 5(LXXIII), which provides for the *actio popularis*; and Art. 129(III), which recognizes among the competences of the Public Ministry that of promoting the public civil action. Then, in the Consumer Protection Code (1990), they enacted three categories of consumers' substantive collective rights (diffuse, collective and 'homogeneous individual'), and vested different social actors (but not individuals) with standing to sue on behalf of consumers in order to enforce those rights, *i.e.* the Public Ministry, the state (federal, local, municipal), public entities, organisms committed to the defense of consumers' rights, and NGOs.

3. Overview on the Scope and Content of the CPA and the GEA

The globalization of economy, the massive production of goods and services and the increasing transnational character of commerce have dramatically changed the characteristics of the conflicts to be solved by the judiciary in Argentina. Daily, thousands of people are being affected in similar ways by illegal commercial practices, polluting activities and unconstitutional State intervention on taxes, among other factors.

Facing this phenomenon, there are several grounds to justify the use of collective litigation devices within Argentine justice administration system. Among others we can mention the goal of improving access to justice, procedural economy (efficiency) and the deterrence effect of these sort of mechanisms. However, the only two federal regulations available in Argentina to deal with conflicts involving large groups of people in Argentina are CPA and the GEA. Both of them have been passed by Congress and can be characterized as 'substantive' laws. However, both of them contain certain isolated procedural provisions applicable, in principle, to deal with collective conflicts arising from those particular areas of substantive law. It is important to clarify that even though is for the provinces to enact procedural provisions according to Art. 5 of the AFC, the SCJ has long since recognized the federal government's power to do that when such regulations are deemed absolutely indispensable to enforce substantive rights.⁶

The CPA was originally enacted in 1993 and has gone through several minor reforms regarding its substantive content until 2008,⁷ when the Act No. 26.361 introduced relevant modifications, including several provisions on collective litigation. Among them we need to underline those regarding collective settlements (Art. 54(1)), scope of *res judicata* (Art. 54(2)), fluid recovery (Art. 54(3)), free access to the justice system (Arts. 53(4) and 55(2)), punitive damages (under the label of 'civil fine' (Art. 52 bis)), collaboration duty on evidence proceedings (Art. 53(3)), and collective standing to sue (Arts. 52(2) and 55).

The GEA, in turn, was enacted and promulgated in 2000. It includes a chapter which regulates some procedural aspects regarding environmental collective damage proceedings. Among the provisions included therein we can find a definition of 'environmental damage' (Art. 27), the 'recomposition principle,' which demands that the wrongdoer reestablish the situation as a priority and order the payment of damages only when the reestablishment is not possible (Art. 28), the scope of objective responsibility in this field of law and some factors that could be invoked by the wrongdoer in order to avoid it (Art. 29), collective standing to sue, third

⁶ CSJN in re *Correa c/ Barros*, 22/06/23, Fallos 138:154.

⁷ Acts Nos. 24.568, 24.787 and 24.999.

party intervention and pure injunctive relief to stop the polluting activity (Art. 30), jurisdiction on these kind of proceedings, as well as court's powers and provisional measures (Art. 32), some aspects of scientific evidence (Art. 33), and the creation of the 'Environmental Compensation Fund' (Art. 34 (still inoperative due to lack of administrative regulation)).

Both statutes are far from being an adequate regulation of a collective procedure. They lack the necessary systemic view to face the challenges imposed on the judiciary by collective conflicts, and they only regulate isolated issues of what needs to be a complete and logic system of discussion. Moreover, they only apply to two fields of substantive law (environment and consumers rights). This scenario is bringing about several and quite complicated management problems with collective proceedings in Argentina, because courts continue to use traditional procedural mechanisms to deal with mass conflicts. That is why the SCJ jumped on the scene five years ago, at the beginning of 2009. And it did it to communicate a strong message and to deploy some rules to help courts (and litigants) do their job.

4. The Reception of the US Federal Class Actions Scheme in the SCJ Case Law

Besides the constitutional and (insufficient) legal framework on collective proceedings currently enacted in Argentina, it is worth noting that case law (especially that of the SCJ) has acquired an unusual relevance in this field. In fact, no general description of the law of collective litigation in Argentina would be accurate if it does not address the striking opinion issued by the SCJ at the beginnings of 2009 in the case *Halabi* (upheld in its core doctrine in *PADEC c/ Swiss Medical* on August, 2013). Though striking, the opinion in *Halabi* was not unexpected. By then, the SCJ had already issued some opinions regarding different aspects of collective litigation. Most of these opinions had been rendered in environmental and human rights cases. Moreover, the rationale of the majority opinion in *Halabi* had been insinuated, at least in its more relevant aspects, in some of the dissenting opinions on those cases.⁸

Ernesto Halabi was a lawyer and user of mobile phones and Internet services, who filed an *amparo* seeking the judicial review of a federal statute that had allowed the intervention of private phone communications without previous judicial order.⁹ The case reached the SCJ with the substantive issue already solved. The Court of Appeals had declared the Act unconstitutional and extended the binding effects

⁸ See *Mendoza I*, 20/06/06, M.1569.XL; *Asociación de Superficialios de la Patagonia I*, 29/08/06, A.1274.XXXIX; *Defensoría del Pueblo*, 31/10/06, D.859.XXXVI; *Mujeres por la Vida*, 31/10/06, M.970.XXXIX; *Mendoza II*, 08/07/08, M.1569.XL; *Asociación de Superficialios de la Patagonia II*, 26/08/08, A.1274.XXXIX.

⁹ Act No. 25.873 and Executive Decree No. 1563/04 (the media referred to the Act as 'the spy statute').

of the solution to all users of the telecommunication system who were similarly situated. That was the only issue to be discussed in the SCJ, *i.e.* the collective binding effects of the Court of Appeals' opinion (the scope of *res judicata*).

As I have anticipated in the Introduction to this essay, when deciding the case the majority of the SCJ asserted that it is possible to file in Argentina class actions (which it labeled *acción colectiva*) with analogous characteristics and effects to the US class actions. It also plainly held that – even in absence of legislation – Art. 43 AFC provisions are clearly operative and must be enforced by courts. Moreover, in this opinion the SCJ enunciated the constitutional requirements for obtaining a valid collective opinion under due process of law standards, and also deploy several rules regarding issues of procedure.

In this way, after underscoring the lack of an adequate procedural regulation enacted by Congress on collective litigation, the court made some remarks to provide guidance in order to protect absent members' due process of law rights in future uses of the *acción colectiva*.¹⁰ That is how the SCJ held that the 'formal admissibility' of any *acción colectiva* must be subject to the fulfillment of the following requirements:

(i) there has to be a precise identification of the group of people that is being represented in the case;

(ii) the number of people affected must be 'relevant';

(iii) the plaintiff must be an adequate representative of the group;

(iv) the claim has to focus on questions of fact or law common and homogeneous to the whole class;

(v) there has to be a proceeding capable of providing adequate notice to all people that might have an interest in the outcome of the case;

(vi) that proceeding has to provide members of the class an opportunity to opt-out or to intervene;

(vii) there should be an adequate publicity and advertising of the action in order to avoid two different but related problems: on the one hand, the multiplicity or superposition of collective proceedings with similar causes of action; and on the other, the risk of different or incompatible opinions on identical issues.

As we have already seen, the CPA contained some provisions on these different topics. The relevance of *Halabi*, however, is the fact that when delivering the opinion the SCJ accorded constitutional status to these procedural safeguards.¹¹

On August, 2013, the SCJ delivered another essential opinion in this field of law in the *PADEC v. Swiss Medical* case. I do not hesitate to consider it as an essential opinion because it upheld the whole *Halabi* doctrine in a case filed by an NGO instead of an

¹⁰ Paragraph 20° of the majority opinion.

¹¹ See Ricardo L. Lorenzetti, *Justicia colectiva* 275–76 (Rubinzal Culzoni 2010) (arguing that the CPA establish an 'acción colectiva,' but in a 'very insufficient way taking into account the abundant comparative law materials completely omitted by the legislator'). It is worth to note that Lorenzetti is the SCJ Chief Justice.

affected person. Besides that it is also relevant to note that, in this opportunity, one of the dissenting Justices in *Halabi* (Fayt) took part of the majority and the result was a 5-2 opinion.

5. Collective Standing to Sue in the CPA and the GEA

To some extent, the CPA in its current version could be considered as a reasonable regulation, within the field of consumers' rights, of the standing to sue already recognized by Arts. 43 and 86 of the AFC. Article 52 of the CPA states that the action 'corresponds to the consumer or user by her own right, the associations of consumers and users authorized according to the provisions of art. 56 of this act, the national or local authority of application, the ombudsman and the Public Ministry.'¹² That article also authorizes associations and individuals to intervene in the proceedings, subject to leave of the court.¹³ Lastly, it rules that in case of voluntary dismissal or abandonment of the action by the authorized associations, the Public Ministry will assume the role of representative party in order to continue with the proceedings.¹⁴ Let us now review the scope of these provisions.

First of all, we have the standing of the individual person. The idea of consumers and users acting on behalf of a group of people similarly situated can be considered to be already allowed in Argentina by the time it was incorporated in the CPA through the Act No. 26.361. That had happened thanks to the meaning accorded by courts to the expression 'the affected' included in Art. 43(2) of the AFC.¹⁵ In *Halabi*, for example, plaintiff's collective standing to sue was recognized on the ground of his status as a user of mobile telephone and Internet services. According to the majority, Halabi's claim was intended to enforce 'collective incidence rights concerning individual

¹² Art. 52(1) CPA.

¹³ Art. 52(2) CPA. In order to grant this permission the judge has to assess whether they would have had standing to file the action in the first place.

¹⁴ Art. 52(4) CPA.

¹⁵ See *Monner Sans c/ P.E.N.*, J. Fed. Cont. Adm. No. 1, 30/10/97, 1998-D La Ley 219; *Yousseffian, Martín c/ Secretaría de Comunicaciones*, CNac. Fed. Cont. Adm, sala IV, 23/06/98; *Monner Sans, Ricardo c/ Fuerza Aérea Argentina*, SCJ, 26/09/06, M.2975.XXXVIII, M.2855.XXXVIII (only Justice Argibay opinion, the majority denied the petition of certiorari). After the 2008 reform by the Act No. 26.361 the CPA casts some doubts on the issue when it states that individuals can exercise this standing 'by her own right.' This expression was incorporated by the Act No. 26.361, and could be interpreted as allowing individuals only to file ordinary individual actions aimed to protect exclusively their particular interests. Nothing in the congressional record helps to clarify what the legislators were thinking about when they included that wording. However, it is apparent that this provision of the CPA cannot be interpreted in a sense that would amount to a denial of the constitutional right established in Art. 43(2) AFC. Moreover, a restrictive interpretation of this kind might raise another sort of constitutional challenge on grounds of equal protection under the law (Art. 16 FCA), because it would deprive only individual consumers and users of collective standing to sue while that standing remains free of restrictions for individuals in other fields of law.

homogeneous interests' and –precisely because of that – it was not circumscribed to enforce just his own individual right to privacy and professional secret. Due to the kind of rights involved in the dispute, the claim was 'representative of the interests of all users of telecommunication services, as well as those of all lawyers.'¹⁶

In the second place we have the standing to sue recognized on behalf of certain associations. It is worthwhile to mention that this collective standing was part of the original text of the CPA, enacted prior to the 1994 amendment to the AFC. On the one hand, we have to bear in mind that these private organizations have to be incorporated as juridical persons and need to obtain an authorization from the government in order to be able to represent the interests of consumers and users.¹⁷ On the other hand, it is equally relevant to note that Art. 52 of the CPA establishes a formal and abstract control of the organization in order to decide whether to allow its participation in judicial proceedings: the judge is directed only to check whether the institutional mission of the NGO match the content of the action, and whether it is correctly registered under the applicable law.¹⁸ In *PADEC v. Swiss Medical* the SCJ did not analyze whether PADEC was an adequate representative of the group, a requirement that it has set forth in *Halabi*. This seems to confirm that the previous registration as an NGO of consumer protection is enough to consider that requirement fulfilled.¹⁹

The third and last provision of the CPA strictly related to the abovementioned constitutional framework is the express recognition of the ombudsman's collective standing to sue. Like the reference to the individuals capacity to file actions 'by her own right,' that of the ombudsman had not been included in the original version of the CPA and was inserted therein by the Act No. 26.361. Notwithstanding the clear wording of Art. 86(2) of the AFC ('The ombudsman has standing to sue'), by the time

¹⁶ Paragraph 14° of the majority opinion. Hence, according to the majority of the SCJ, the solution had to be extended to the whole group of affected people. In my view, however, it is difficult to find plausible reasons to explain why and how the majority could accord collective *res judicata* effects to the declaration of unconstitutionality. As one can tell from the plaintiff's opinion in a book he published soon after the judgment, he never asked for a collective redress nor invoked any kind of collective standing to sue (see Ernesto Halabi, *El derecho a la Intimidación y la Ley Espía* (Utsupra 2009)).

¹⁷ Arts. 55 and 56 CPA.

¹⁸ This registration demands, among other requirements, that the organization avoids taking part on partisan political activities, remains independent in regard to any kind of professional or commercial activity, and does not receive donations or any sort of contributions from commercial, industrial or services corporations (Art. 57 CPA).

¹⁹ See Gustavo Maurino & Martin Sigal, '*Halabi*': *la consolidación jurisprudencial de los derechos y acciones de incidencia colectiva*, SJA (Apr. 22, 2009) ('Adequacy of these kinds of representations [those of the NGOs and public organisms] is already defined by Art. 43 of the AFC and accepted by the consumers protection act . . . Those rules set – *a priori* – that these kinds of subjects have sufficient representative character to protect collective incidence rights before courts. Regarding NGOs, legislation avoids the necessity of a judicial analysis of adequacy of representation on a case by case basis . . .').

of the CPA reform the SCJ had systematically denied the ombudsman's standing in this area of substantive law when the actions were aimed to protect 'economic and purely individual rights.'²⁰ The recognition of this constitutional right to sue in the text of the CPA might be understood as the legislature's answer to that line of precedents. However, it is still far from clear which could be the scope of the new legal authorization.²¹

Beyond the three figures recognized in the AFC to act in the field of collective litigation (the consumer or user 'affected,' the associations and the ombudsman), the CPA vested two other governmental actors with collective standing to sue; *i.e.* the national and local authorities of application, and the Public Ministry. The last reform by Act No. 26.361 did not introduce major changes in the CPA regarding

²⁰ I have analyzed elsewhere the precedents of the SCJ in this field, showing that – by then – the reasons provided to deny the ombudsman's standing to sue were almost absurd (*see* Francisco Verbic, *La (negada) legitimación activa del defensor del pueblo de la nación para accionar en defensa de derechos de incidencia colectiva*, (2007-I) *Revista de Derecho Procesal*).

²¹ Particularly doubtful is whether, even in the face of the now crystal clear content of the CPA, the ombudsman will be allowed to get involved in collective actions seeking economic reparation for individuals. As I have already mentioned, in *Halabi* the majority recognized that Art. 43(2) of the AFC contemplates 'collective incidence rights related to homogeneous individual interests' (the influence of the Brazilian system in this regard is evident). What matters the most here is that the SCJ did not establish any difference on grounds of the economic content of those rights. Instead, it plainly held that, even in the absence of legislation, Art. 43 AFC is 'clearly operative and it is an obligation of the courts to enforce it when there is a clear showing of the breach of a fundamental right and of the access to justice of its holder' (para. 12° of the majority opinion). Justice Highton de Nolasco subscribed that holding with the majority, but at the same time made a 'reservation' in respect to collective actions brought by the ombudsman in order to protect economic and purely individual rights (para. 28° of the majority opinion). An opinion rendered some months after *Halabi* only serves to increase the uncertainties in this regard. I refer to the case *Defensor del Pueblo de la Nación c/ Estado Nacional – P.E.N. – M° de Eco. Obras y Serv. Púb. y otros s/ amparo ley 16.986*, opinion issued 11/08/09, Fallos 332:1759. This case involved both a user of a public service and the ombudsman as plaintiffs, challenging an administrative regulation setting out the way of charging apartment buildings for water consumption. They obtained a favorable opinion, but during the enforcement proceedings the defendant challenged the scope of *res judicata* of the solution. He argued that it should only benefit the owners of the apartments individually named in the action, while the ombudsman claimed that it should benefit all users situated in the same circumstances. The majority of the Court reversed the opinion of the Court of Appeals that had limited the effects of the judgment to the individualized apartments. Adopting the opinion of the General Procurator (head of a sector of the Argentinean Public Ministry that is required to intervene in certain cases before the SCJ), the majority held that 'the implicit recognition of the ombudsman's standing to sue presupposes the existence of a special relation between him and the debated issues and also that the consequences of the solution will produce juridical effects even though he is a different subject from those affected' (para. V of the General Procurator opinion). Otherwise, said the majority, the scope of the ombudsman's intervention in these kind of procedures 'would be limited to accompany the user,' and in this way would 'deprive of sense' its participation as a guardian of collective rights (*id.*). The holding of this case makes a lot of sense within the constitutional and legal framework I have described so far. However, the opinion creates some confusion if we consider two things. On the one hand, it does not contain a single mention of *Halabi* (issued just 6 month before); and on the other, the dissenting opinion was entered by two of the judges that comprised the majority in *Halabi* (Chief Justice Lorenzetti and Justice Highton de Nolasco, the one that made the 'reservation' in that opportunity).

the authorities of application.²² They exercise the control and supervision that is considered necessary to secure the correct application of the act, and they are also in charge of judging breaches of the law in this field according to certain administrative regulations and proceedings.²³ Even though the collective standing to sue of these administrative organs had been already recognized in the original version of the CPA, their participation in judicial proceedings on behalf of groups of consumers and users is almost nonexistent.²⁴

Regarding the Public Ministry,²⁵ both its collective standing to sue and its mandatory role in these kinds of judicial proceedings as a guardian of the 'general interest of the law' (when it does not participate exercising its standing) were already recognized in the original version of the CPA. The same happens with its mandatory role as named party in those cases where there is a voluntary dismissal or abandonment of the action by the authorized associations acting in that character.²⁶ It is worth mentioning that the current constitutional status of the Public Ministry in Argentina provides an interesting background to allow an active participation of the figure in this field (after the 1994 amendment, the AFC expressly declared its autonomy and independence).²⁷ However, it is difficult to find judicial decisions involving collective cases brought by that figure.²⁸

Let us now turn to the GEA, which Art. 30 recognize the right to promote these kinds of proceedings not only by those social actors mentioned in Art. 43 of the AFC but also by the national, provincial and local governments. It also recognizes the right of 'any person' to promote a collective action seeking to stop the polluting activity (in this case, excluding damages). Due to the public interest involved in environmental cases, courts have been more open to recognize the standing to sue of both affected persons and NGOs in this kind of conflicts. They are, by far, the most involved actors regarding judicial environmental protection. On the contrary, public authorities have not played a relevant role in this field of law.

²² The reform has only eliminated the possibility of delegating that role to local municipalities, an alternative that was available in the original version of the CPA.

²³ Arts. 41 to 44 CPA.

²⁴ See Gabriel A. Stiglitz, *Acciones colectivas de los consumidores. Legitimación de la autoridad de aplicación*, 2004-D La Ley 1215.

²⁵ The Public Ministry is an institution that has no strict parallel in the US. For a brief overview of its meaning and the scope of its competence in civil law countries see Ugo Mattei et al., *Schlesinger's Comparative Law* 521–523 (7th ed., Foundation Press 2009).

²⁶ Art. 52(4) CPA.

²⁷ Art. 120 AFC.

²⁸ I have postulated elsewhere that the functional autonomy and economic autarchy of the federal Public Ministry, explicitly recognized by Art. 120 of the AFC after the 1994 amendment, is a solid background to sustain an active participation of that institution in the enforcement of collective rights (see Verbic, *Procesos Colectivos*, *supra* n. 1, at 235 ff.).

6. Adequacy of Representation

As it is well known, representative procedural schemes of group litigation require a strong, capable, dedicated and experienced representative party, defended by legal counsel with similar features. And the reason for this requirement is that, within those schemes, the process assumes that the affected group of people is actually present in the debate. This is based on a fiction: that group is deemed to be present through their representative.²⁹ We also need to take into account that the *res judicata* effect of decisions taken in those kind of proceedings will affect the whole group represented by the plaintiff. The way those effects will operate depends on the system. In Argentina the system is different depending on the substantive rights which are being discussed: *secundum eventum litis* for consumers rights (Art. 54 CPA) and *secundum eventum probationem* for environmental collective proceedings (Art. 33 GEA).³⁰ In this context, concerns about restrictions on individual autonomy and on the right to have 'a day in court' almost automatically appear on the scene. And that is precisely why it is so important – indispensable I would say – to insure that the representative party and her lawyers could defend the group in a vigorous manner and have no strong conflicts of interest that could undermine her role as such. As Nagareda puts it, the requirement 'is not merely the creature of present-day procedural rules but, more importantly, a component of constitutional due process of law.'³¹

In order to control parties and counsel, courts have to analyze several and quite different factors.³² These factors can be established either by statute or by case law (once again depending on the system, on political decisions). Three examples of the former methodology would be: (i) FRCP 23 (sect. (g) after the 2003 reform), which rules adequacy of representation regarding class counsel in the class action context;³³ (ii) the U.S. Private Securities Litigation Reform Act of 1995 (PSLRA), which

²⁹ Samuel Issacharoff, *Governance and Legitimacy in the Law of Class Actions*, 1999 S. Ct. Rev. 337.

³⁰ For explanations on the features of these different kinds of sistemas, see, among others, Michele Taruffo, *I limiti soggettivi del giudicato e le 'class actions'*, XXIV Rivista di Diritto Processuale 609 (1970); Andrea Giussani, *Studi sulle class actions* (CEDAM 1996); Antonio Gidi, *Las acciones colectivas y la tutela de los derechos difusos, colectivos e individuales en Brasil. Un modelo para países de derecho civil* 95–113 (UNAM 2004).

³¹ Richard A. Nagareda, *The Law of Class Actions and Other Aggregate Litigation* 76 (Foundation Press 2009) [hereinafter Nagareda, *The Law of Class Actions*].

³² Regarding Courts' power in this respect see *Manual of Complex Litigation*, Fourth 278–82 (Federal Judicial Center 2004), available at <<https://public.resource.org/scribd/8763868.pdf>> (accessed Aug. 1, 2014); *Principles of the Law of Aggregate Litigation* 55–75 (ALI 2010).

³³ FRCP 23(g): 'Class Counsel. (1) *Appointing Class Counsel*. Unless a statute provides otherwise, a court that certifies a class must appoint class counsel. In appointing class counsel, the court: (A) must consider: (i) the work counsel has done in identifying or investigating potential claims in the action; (ii) counsel's experience in handling class actions, other complex litigation, and the types of claims

defines adequacy of representation in the context of securities class actions;³⁴ and (iii) the Model Code of Collective Proceedings for Iberoamerica (Art. 2(2°)), which rules adequacy of representation mainly following U.S. standards.³⁵ An example of the latter methodology would be the traditional approach towards the requirement: as it is well known, standards which govern adequacy of representation have been developed by the judiciary almost exclusively interpreting FRCP 23(a)(4).³⁶ In fact, standards incorporated in FRCP 23(g) by the 2003 amendments have been taken from federal case law ruling on that provision.³⁷ In any case, whether written in a statute or not, there is always place for discretion and flexibility in deciding the issue. Particularly

asserted in the action; (iii) counsel's knowledge of the applicable law; and (iv) the resources that counsel will commit to representing the class; (B) may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class; (C) may order potential class counsel to provide information on any subject pertinent to the appointment and to propose terms for attorney's fees and nontaxable costs; (D) may include in the appointing order provisions about the award of attorney's fees or nontaxable costs under Rule 23(h); and (E) may make further orders in connection with the appointment. (2) *Standard for Appointing Class Counsel*. When one applicant seeks appointment as class counsel, the court may appoint that applicant only if the applicant is adequate under Rule 23(g)(1) and (4). If more than one adequate applicant seeks appointment, the court must appoint the applicant best able to represent the interests of the class. (3) *Interim Counsel*. The court may designate interim counsel to act on behalf of a putative class before determining whether to certify the action as a class action. (4) *Duty of Class Counsel*. Class counsel must fairly and adequately represent the interests of the class.' See Robert H. Klonoff, *The Judiciary's Flawed Application of Rule 23's 'Adequacy of representation' Requirement*, 2004 Mich. St. L. Rev 671, 699–701 (commenting on the reform). Prior to the 2003 reform several American federal Courts have already required the control over class counsel (see Robert H. Klonoff, Edward K.M. Bilich, *Class Actions and Other Multi-Party Litigation: Cases and Materials 108* (West Group 2000)).

³⁴ See Nagareda, *The Law of Class Actions*, *supra* n. 31, at 314 ('The PSLRA directs the Court to "appoint as lead plaintiff the member or members of the purported plaintiff class that the court determines to be most capable of adequately representing the interests of the class . . ." The Act creates a rebuttable presumption . . . that the most adequate plaintiff . . . is the person or group of personas that (aa) has either filed the complaint or made a motion in response to a notice . . . (bb) in the determination of the court, has the largest financial interest in the relief sought by the class; and (cc) otherwise satisfies the requirements of Rule 23 of the Federal Rules of Civil Procedure').

³⁵ Art. 2(2°): 'To determine whether adequacy of representation is fulfilled in the case, the court must analyze data such as: (a) the credibility, prestige and experience of the representative; (b) its record in the judicial and extrajudicial protection of group rights of the class she wants to represent; (c) her conduct in other collective proceedings; (d) the coincidence between the interests of class members and those of the representative party; and (e) the NGO's time of incorporation and the representativity of this kind of organizations or the individual with respect to the group, category or class' (literal translation).

³⁶ Even though '[f]or all the agreement on the centrality of adequate representation to the modern class action – indeed, on its constitutional status – there remains remarkably little agreement on the content of that concept or how to enforce it' (Richard A. Nagareda, *Administering Adequacy in Class Representation*, 82 Tex. L. Rev. 287, 288 (2003–2004)).

³⁷ See the Advisory Committee Notes on the 2003 Amendment: 'Subdivision (g) is new . . . Until now, courts have scrutinized proposed class counsel as well as the class representative under Rule 23(a) (4). This experience has recognized the importance of judicial evaluation of the proposed lawyer for the class, and this new subdivision builds on that experience rather than introducing an entirely new element into the class certification process.'

due to the fact that adopting a rigid and uniform approach in this field would be – as Cappelletti put it – like using an ax to perform a delicate surgery.³⁸

As we have seen, collective standing to sue has explicit constitutional foundations in Argentina. The AFC and some statutes like the CPA and the GEA provide for that sort of standing not only for individuals but also for NGOs and public organisms. Apart from that *a priori* recognition neither the GEA nor the CPA contain provisions demanding judicial control over the quality of the representative party. However, as I have anticipated, the SCJ ruled in *Halabi* that adequacy of representation is one of the ‘formal admissibility requirements’ of any *acción colectiva*.³⁹ Moreover, it held that the requirement was fulfilled based on consideration of three factors: (i) the publicity given to a hearing that took place before the Court; (ii) the fact that the substantive constitutional issue has been already solved in favor of the plaintiff; and (iii) the intervention of two important Bar Associations as *amici curiae*. It is not difficult to see that none of these factors has anything to do with adequacy of representation.⁴⁰ Hence, we can see how the SCJ took an interesting position in requiring that the representative party must be an adequate representative of class members’ interests, but it did not provide for any useful guidance in order to know whether the requirement is fulfilled or not in a particular case.

After *Halabi* many legislators rushed to introduce their own bills to regulate class actions in Argentina. More than ten bills have been pending before Congress since 2009.⁴¹ All of them pose serious concerns regarding the issue we are dealing with, because: (i) the majority of the bills do not provide for anything at all about adequacy of representation; and (ii) some of them do include this requirement within their provision, though without taking into consideration some relevant aspects to make it work within the Argentine legal system.

The last development regarding adequacy of representation happened at the end of March 2012, when the President and the Chief Justice of the SCJ presented together

³⁸ Mauro Cappelletti, *Vindicating the Public Interest through the Courts: A Comparativist’s Contribution*, in 3 *Access to Justice* 561 (Mauro Cappelletti & Bryant Garth, eds.) (Giuffrè 1979).

³⁹ The other conditions mentioned by the Court are: (i) there has to be a precise identification of the group of people that is being represented in the case; (ii) the claim has to focus on questions of fact or law common and homogeneous to the whole class; (iii) there has to be a proceeding capable of providing adequate notice to all people that might have an interest in the outcome of the case; (iv) that proceeding has to provide class members with an opportunity to opt-out or to intervene; and (v) there should be adequate publicity and advertising of the action in order to avoid two different but related problems: on the one hand, the multiplicity or superposition of collective proceedings with similar causes of action; on the other, the risk of different or incompatible opinions on identical issues (para. 20° of the majority opinion).

⁴⁰ We have criticized elsewhere the way the Court dealt with the issue (see Oteiza & Verbic, *La Corte Suprema Argentina regula*, *supra* n. 2, at 283).

⁴¹ All of them can be downloaded from the official website of both Chambers, available at <<http://www.diputados.gov.ar/>> (Chamber of Representatives) and <<http://www.senado.gov.ar/>> (Senate).

the Preliminary Draft of a New Civil Code for Argentina.⁴² The original version of the Preliminary Draft included several provisions regarding collective proceedings and collective rights. However, almost all of these have been eliminated by the Executive Power. Among the eliminated provisions was Art. 1747, aimed to regulate 'admissibility requirements' of collective damage proceedings. Notwithstanding its pretentious tittle, Art. 1747 content was mainly devoted to adequacy of representation.⁴³ It began ruling as follows: 'For the recognition of standing to sue in proceedings involving damage claims related to collective incidence rights or individual homogeneous rights, the plaintiff must have sufficient attitudes to assure an adequate defense of collective interests.' It also provided for several standards to assess that requirement. And these standards – fortunately – had nothing to do with those employed by the SCJ in *Halabi*. In respect to this point, the aforementioned article states that: 'among other factors, the court must take into consideration: a) plaintiff's experience, records and economic solvency regarding protection of these kind of rights; b) the coincidence between class members' interests and plaintiff's claims.'

7. Closing

It may be said that this kind of representative proceedings is just going through a developing and experimental phase in Argentina. And that may be true. However, both the text of the AFC after the amendment of 1994 and the opinion of the SCJ in *Halabi* have provided strong constitutional foundations to the system. That opinion, in fact, has accelerated the process of consolidation in this area of the law in a way that makes the enactment of adequate procedural regulations in the near future almost inexorable. Particularly after the opinion delivered in *PADEC v. Swiss Medical*, which made clear that *Halabi* was neither a mistake nor an improvised decision.

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⁴² The Committee that prepared the draft was appointed by the President through Decree No. 191/2011.

⁴³ It also established a superiority and predominance requirement, very similar to that included in FRCP 23(b)(3).

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Information about the author

Francisco Verbic (La Plata, Argentina) – Professor of the Course ‘Complex Litigation, Collective Proceedings and Class Actions’ in the LL.M. on Procedural Law, School of Law and Social Sciences of National University of La Plata (Av. 7 N° 776 1° piso Oficina 26 – Edificio Presidencia La Plata, Buenos Aires, CP B1900TFT, Argentina; e-mail: verbicfrancisco@hotmail.com).