AN OVERVIEW OF CLASS ACTIONS IN ARGENTINA

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I. Constitutional and Statutory Overview

It is not possible to find in Argentina, even at the local level,[1] a systematic and comprehensive procedural mechanism to deal with class actions. The lack of adequate procedural devices at the federal level is particularly problematic because, since the 1994 reform to the Argentine Federal Constitution (AFC), standing to sue to enforce collective rights has acquired constitutional pedigree, as well as some collective substantive rights labeled as "collective incidence rights".[2]

Since 1994, art. 43, 2nd paragraph of the AFC explicitly recognizes that different social actors (the "affected" person and certain kinds 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 rights of collective incidence in general*"*.

Art. 86 of the AFC, in turn, is even more explicit about the ombudsman (it plainly states that the figure "has standing to sue*"*). We can add the Public Ministry to the list of collective plaintiffs, because art. 120 of the AFC states that it has *"functional autonomy*" and freedom to allocate its budget in order to fulfill its constitutional mission: protect the general interest of the population.

On top of that, articles 41 and 42 of the AFC (also incorporated in the text by the 1994 reform) recognize several environmental and consumers' substantive rights, while art. 75, section 17° vested Congress with power to enact protective legislation on indigenous peoples.

Other collective rights have been expressly recognized as well by the 1994 reform to the AFC. The scope of class action litigation becomes even wider if we take into account the constitutional status recognized by art. 75, section 22° of the AFC to several international covenants subscribed to by Argentina in which text we could easily find collective rights.[3]

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[1] There are several local statutes dealing with collective procedural devices in the Argentina's Provinces. However, none of them provide a coherent and comprehensive system to face mass conflicts. The reform to the "amparo" proceeding in Buenos Aires Province can be seen as an example of that (Act N° 14.912, introducing reforms to Act Nº 13.928). Although it still lacks a systemic structure, the current version of the statute can be considered as an improvement because -among other modifications- it contemplates therein the idea of adequacy of representation for the first time in the Province (art. 7).

[2] For an explanation of the problem, see E. D. Oteiza, "La constitucionalización de los derechos colectivos y la ausencia de un proceso que los 'ampare'", in: E. D. Oteiza (coordinator), *Procesos Colectivos* (Rubinzal Culzoni Ed., Santa Fe, 2006) at 28. For a survey of some of the most relevant precedents in the area of collective rights in Argentina and further discussion about the problems entailed in the absence of adequate procedural means, particularly after the 1994 reform to the AFC, see L. J. Giannini, *La Tutela Colectiva de Derechos Individuales Homogéneos* (Librería Editora Platense, La Plata, 2007); J. M. Salgado, "La corte y la construcción del caso colectivo", *L.L.* 2007-D, 787; F. Verbic, *Procesos Colectivos* (Astrea Ed., Buenos Aires, 2007).

[3] Among others, the American Convention on Human Rights.

Notwithstanding those constitutional provisions, the only federal regulations available to deal with collective conflicts involving groups of people in Argentina are the General Environmental Law (GEA) and the Consumer Protection Act (CPA).[4] Both of them have been passed by Congress and can be characterized as "substantive" laws.[5] However, in both of them we can find certain isolated procedural provisions applicable, in principle, to deal with collective conflicts involving those particular areas of substantive law.

Even though in Argentina it is for the Provinces to enact procedural provisions according to art. 5 of the AFC, the Supreme Court of Justice (SCJ) has long since recognized the federal government's power to do that when such regulations are deemed indispensable to enforce substantive rights.[6] In fact, the new Civil and Commercial Code (2015) contained many procedural rules.

The CPA was originally enacted in 1993 and underwent several minor reforms regarding its substantive content until 2008, [7] when Act N° 26.361 introduced relevant modifications that included several provisions on class actions. The reform introduced to the CPA by Act N° 26.361 made the system regain the minimal coherence it had lost when the provision on *res judicata* included in the original text of Act N° 24.240 was vetoed by the President.[8]

In its current version, the CPA states that a favorable judgment for the plaintiff will produce *res judicata* effects in respect of the defendant and also to all consumers similarly situated, except those who express their will to avoid being bound by the solution. It is considered as a *secundum eventum litis* mechanism,[9] and that right to opt-out should be exercised before the opinion is delivered, and according to the "the terms and conditions imposed by the judge".[10]

The GEA was enacted in 2002, and it also includes procedural regulations to enforce protection of the environment. These provisions concern tort proceedings as well as injunctions to cease polluting activities. In this respect the GEA includes provisions on standing to sue, evidence, provisional and interim measures, powers of the courts in these procedural contexts, *lis pendens*, scope of *res judicata* (a system based on the principle of *secundum eventum probationem*), and jurisdiction.[11] This regulation has demonstrated to be incomplete and insufficient to deal with environmental collective conflicts.

II. Case Law Overview: The "Halabi" Case and its Progeny

The turning point in class actions development in Argentina was the opinion delivered by the SCJ at the beginning of 2009 in the *"Halabi"* case. Though striking, the opinion was not unexpected as the SCJ had already delivered by then some opinions

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[4] R. Lorenzetti *Justicia Colectiva* (Rubinzal Culzoni Ed., Santa Fe, 2010), at 275-276 (arguing that the CPA establishes an "acción colectiva", but in a "very insufficient way taking into account the abundant comparative law materials completely omitted by the legislator").

[5] They are not *stricto sensu* "federal" statutes, but "national" ones.

[6] *Correa, Bernabé c/ Barros, Mario B.,* SCJ (22 June 1923), *Fallos* 138:154.

[7] Acts N° 24.568, N° 24.787 and N° 24.999.

[8] Presidential Decree N° 2089/93. The main reason invoked to sustain this veto was the governmental interest in avoiding the proliferation of cases. The Decree says that the eventual costs of those lawsuits would prejudice merchants and industries, and, through them, the consumers themselves by increasing the final costs of the products.

[9] R. Lorenzetti, *Justicia colectiva* (Rubinzal Culzoni Ed., Santa Fe, 2010), at 282-283.

[10] Art. 54, 2nd para. of the CPA.

[11] Arts. 30 to 34 GEA.

regarding different aspects of class actions. 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 in those earlier cases.[12]

Ernesto *Halabi* was a lawyer and user of mobile phones and internet services, who filed an "amparo" seeking a declaration of unconstitutionality of a federal statute that had allowed the interception of private phone and Internet communications without prior judicial order.[13] The case reached the SCJ with the substantive issue adjudicated: the Court of Appeal declared the Act unconstitutional and extended the binding effects of the solution to all users of the telecommunication system who were similarly situated. The only issue to be discussed in the SCJ was the collective binding effects of the Court of Appeal's opinion.

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 art. 43 AFC provisions are clearly operative and must be enforced by the courts, even in the absence of legislation.

Moreover, the SCJ enunciated constitutional requirements for obtaining a valid collective opinion under due process of law standards. After underscoring the lack of an adequate procedural regulation enacted by Congress on class actions, the Court made some remarks to provide guidance in order to protect the due process of law for absent class members in future uses of the "acción colectiva".[14]

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 definition of the group of people that is being represented in the case.

(ii) The plaintiff must be an adequate representative of the class.

(iii) The claim has to focus on questions of law or fact common and homogeneous to the whole class.

(iv) There has to be a proceeding capable of providing adequate notice to all persons that might have an interest in the outcome of the case.

(v) Members of the class need to have an opportunity to opt-out or to intervene in the proceedings.

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

(vii) There must be problems for accessing justice on an individual basis. This is why cases involving positive value claims may bring about some difficulties. As we have said, the SCJ asserted that art. 43 of the AFC is operative and that it is a courts' duty to enforce it. But this holding was qualified in the same opinion because the Court continued by saying that the enforcement should proceed "when there is clear evidence about the harm to a fundamental right and to the access to justice of its holder".[15]

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[12] *Mendoza I*, SCJ (20 June 2006), File n° M.1569.XL; *Asociación de Superficiarios de la Patagonia I*, SCJ (29 August 2006), case A.1274.XXXIX; *Defensoría del Pueblo*, SCJ (31 October 2006), File n° D. 859. XXXVI; *Mujeres por la Vida*, SCJ (31 October 2006), File n° M.970.XXXIX; *Mendoza II*, SCJ (8 July 2008), File n° M.1569.XL; *Asociación de Superficiarios de la Patagonia II*, SCJ (26 August 2008), case A.1274.XXXIX.

[13] Act N° 25.873 and Executive Decree N° 1563/04 (the media referred to the Act as "the spy statute").

[14] Para. 20 of the majority opinion.

[15] Para. 13 of the majority opinion.

According to this statement, those cases involving positive value claims would not qualify to be litigated on a representative basis (because, in the view of the Court, there is no harm to the access to justice right of its holder, who has sufficient interest at stake to file an individual lawsuit on his own).

Taking into account this holding, it can be said that -as a matter of principle- the SCJ forbids class actions for damages when individual interests at stake justify individual lawsuits. This is hard to justify because there are neither constitutional nor legal or principle foundations to sustain such a narrow view of the scope of class action litigation. Art. 43 of the AFC does not contain any sort of limitation in this sense. The same could be said about the CPA and GEA. The problem with such an approach to the phenomenon of collective redress, which seems to be aligned with the European one,[16] is that it deprives class actions of one of the main advantages they could advance in contemporary litigation landscapes: judicial efficiency.[17]

The SCJ case law (*"Halabi"* and its progeny) provides no explanation at all regarding why collective redress could only be performed in Argentina when individual access to justice is compromised. That is particularly striking if we take into account the fact that official statistics from the national and federal judiciary show a quite heavy caseload to deal with every single year (and, everybody knows even in the absence of official statistics, that many of those cases are repetitive and could be efficiently handled together).[18]

In this complex context, and perhaps in order to preserve its discretion in this delicate field of litigation, the SCJ established in *"Halabi"* an exception to the standard of "no class action if you can get access to justice by yourself": class actions would also be admissible when the case involves a "strong state interest" in the protection of the rights involved in the dispute (not a "public interest" but a "state" one, whatever that may imply). The Court also held that this "state interest" could arise either from "the social significance" of the rights in dispute (the majority of the SCJ mentioned environmental, consumers and health rights), or from the "particular features of the affected class" (the SCJ referred to "traditionally disadvantaged or weakly protected groups").[19]

The SCJ has already begun to make use of the broad discretion provided by this standard and its (also broad) exception.

In 2015, it vacated a Federal Appellate Court opinion in order to allow maintaining a class action where an NGO was seeking declaratory and economic relief for a group of

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[16] For recent developments on collective redress in Europe, see S. Voet, "European Collective Redress: A Status Quaestionis", *Int'l Journal of Procedural Law*, Volume 4 (2014), No. 1, at 97-128; E. Silvestri "Towards a Common Framework of Collective Redress in Europe? An Update on the Latest Initiatives of the European Commission", *Russian Law Journal*, Vol 1 (2013), No 1, at 46-56.

[17] F. Verbic, "Class actions in Argentina: the need for a wider scope to embrace judicial efficiency", 6 *Civil Procedure Review*, 95-102 (2015).

[18] In 2013 (latest available statistics) the National Commercial Appellate Court, with jurisdiction only in Buenos Aires City, delivered 13,453 opinions, while Commercial Courts of First Instance (district courts) had 210,898 pending cases. The Federal Civil and Commercial Appellate Court, in turn, at the end of 2013 had 4,594 pending cases, while Federal Civil and Commercial Courts of First Instance (district courts) had 50,449 pending cases. Other forums which present a huge number of repetitive litigation are those dealing with social security lawsuits: The Social Security Federal Appellate Court had, at the end of 2013, 59,446 pending cases; while the Social Security Courts of First Instance (district courts) had 138,266 pending cases. Numbers at the SCJ are equally compelling: in 2012 the Court delivered 9,586 opinions in "no social security cases" and 6,452 in social security cases; in 2013 a total of 15,792 opinions; and in 2014 a total of 23,183 opinions. These SCJ opinions are not necessarily on the merits of cases, but they demonstrate the demanding caseload that must be faced every year by a Court which, nowadays, has only three Judges. All statistics available at http://www.pjn.gov.ar/07_estadisticas/ (Accessed 20 February, 2017).

[19] *"Halabi"*, para. 13 of the majority opinion; *"PADEC v. Swiss Medical"*, para. 10 of the majority opinion.

children, women, elders and disabled people.[20] In this precedent, the SCJ held that, even though individual actions were justified due to the economic stakes in dispute, collective redress was still admissible because it was *"*not possible to avoid the unquestionable social content of the rights involved in the dispute, which pertain to groups that must be subject to preferential protection by constitutional mandates due to their vulnerable condition*".*[21]

However, in August 2016 the SCJ did not apply the exception in a nationwide class action filed by an NGO to challenge the rise of rates in natural gas without previous public hearings.[22] Even though this case should have been considered comprised in the exception (because it was a consumer case), the Court applied the standard –in absence of a request from the defendant- in order to limit the scope of its decision only to those members of the group that –it held- can be presumed to have difficulties in accessing justice by themselves on an individual basis.

Besides *"Halabi"*, there is another relevant precedent to consider in this field: *"PADEC c. Swiss Medical"*.[23] With this opinion -delivered four years and a half after *"Halabi"*- the SCJ corroborated the collective redress model currently operational in Argentina. That is, a hybrid model where the definition of certain kinds of substantive collective rights (following the Brazilian Consumers Protection Code system) merges with procedural safeguards taken directly from the US Federal Rule of Civil Procedure 23 (FRCP 23).[24]

Between *"Halabi"* and *"PADEC v. Swiss Medical"*, the SCJ delivered only a few opinions regarding specific aspects of class actions. After *"PADEC v. Swiss Medical"* the landscape drastically changed and we can find several decisions on class actions regarding different issues, both procedural and substantive.

Some of the most relevant precedents include:

(i) *"Municipalidad de Berazategui"*,[25] a cable consumers' case, with holdings on standing of local politicians, provisional measures and overlapping litigation. In this opinion the Court decided to create a Collective Proceedings Public Registry.

(ii) *"Loma Negra"*,[26] where the Court refused to recognize standing to an NGO because of the overbroad definition of the class. In this opportunity it stressed the relevance of a precise definition of the class and developed some guidance in that respect.

(iii) *"Kersich",*[27] an environamental and consumer case on water supply, with holdings on the relevance of an early determination of "clear rules" as an essential premise of due process.

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[20] *Asociación Civil para la Defensa en el Ámbito Federal e Internacional de Derechos c/ Instituto Nacional de Servicios Sociales para Jubilados y Pensionados s/ amparo*, SCJ (10 February 2015), file N° CSJ 000721/2007(43-A)/CS1.

[21] Para. 9 of the Court opinion.

[22] *Centro de Estudios para la Promoción de la Igualdad y la Solidaridad y otros c/ Ministerio de Energía y Minería s/ Amparo Colectivo*, SCJ (18 August 2016), file Nº FLP 8399/2016/CS1.

[23] *PADEC c/ Swiss Medical s/ Nulidad de cláusulas contractuales*, SCJ (21 August 2013), file Nº P.361.XLIII.

[24] F. Verbic, "La decisión de la CSJN en 'PADEC c. Swiss Medical'. Ratificación de "Halabi" y confirmación de las bases para un modelo de tutela colectiva de derechos en Argentina", *Revista de Derecho Comercial, del Consumidor y de la Empresa* (2013) at 124.

[25] *"Municipalidad de Berazategui c/ Cablevisión S.A. s/ Smparo",* SCJ (23 Septembre, 2014), file Nº CSJ 1145/2013 (49-M) .

[26] *"Asociación Protección Consumidores del Mercado Común del Sur c/ Loma Negra Cía. Industrial Argentina S.A. y otros"*, SJC (February 10, 2015), File Nº CSJ 566/2012 (48-A); CSJ 513/2012 (48-A)/RH1; CSJ 514/2012 (48-A)/RH1.

[27] *"Recurso de hecho deducido por Aguas Bonaerenses S .A. en la causa Kersich, Juan Gabriel y otros c/ Aguas Bonaerenses S.A. y otros si amparo",* SCJ (December 2, 2014), file Nº CSJ 42/2013 (49-K).

(iv) *"CEPIS"*,[28] a consumer case where the Court declared void the regulation that raised natural gas rates without previous public hearing. In this decision the Court also insisted on the prerequisites and principles set forth in *"Halabi"*.

III. SCJ Administrative Regulations

Due to the lack of adequate procedural systems and to the institutional relevance and public interest involved in class actions, along the last 15 years the SCJ put in motion its inherent powers and enacted different administrative regulations to amplify and strengthen citizenship involvement, improve publicity and increase transparency in those kinds of cases. These regulations include:

(i) Acordada N° 36/2003, on the proceeding to provide priority treatment to cases of "institutional transcendence"

(ii) Acordada N° 28/2004 (amended by the Acordada N° 7/2013), on the *amicus curiae.*

(iii) Acordada N° 30/2007, providing for public hearings.

(iv) Acordada N° 36/2009, creating an Economic Analysis Unit to perform "economic studies" ordered by the Court to assess the eventual impact of its decisions.

(v) Acordada N° 1/2014, creating an Environmental Justice Office for better treatment of environmental cases.

(vi) Acordada Nº 36/2015, creating the Judicial Secretary of Consumers Relationships.

(vii) Acordada Nº 42/2015, creating the Secretary of Communication and Open Government.

Notwithstanding the relevance of these administrative decisions, their implementation has been far from satisfactory.

For example, since 2004 only eight cases have been published by the SCJ to allow the intervention of *amicus curiae*.[29] Other *amicus* have been filed in other cases, for example in the leading case *"Halabi"*. But the number of official publications (which operate as a public invitation) may indicate that the SCJ is not comfortable with opening for discussion every public interest proceeding.

Something alike happens concerning public hearings. From its enactment in 2008, only 25 of these hearings have been performed.[30] It is far from a significant number if we take into account the cases of institutional, social, political and economic relevance the SCJ has decided in that period.

Besides that, there are two other recent regulations that must be particularly taken into account because they have translated the *"Halabi"* requirements and standards into positive law:

(i) Acordada N° 32/2014, creating the Collective Proceedings Public Registry and establishing in art. 3 of the regulation a sort of "certification stage", because it demands Federal Judges to deliver an opinion on admissibility requirements, notice and adequacy of representation before communicating the existence of a case to the Registry;

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[28] "*Centro de Estudios para la Promoción de la Igualdad y la Solidaridad y otros c/ Ministerio de Energía y Minería s/ Amparo Colectivo",* SCJ (18 August 2016), file Nº FLP 8399/2016/CS1.

[29] See at http://www.csjn.gov.ar/causas-en-tramite/amigos-del-tribunal (Accessed in 06 May 2016).

[30] See the SCJ special website here: http://www.cij.gov.ar/audiencias.html (Year - Number of public hearings: 2008 – 5 / 2009 – 4 / 2010 – 2 / 2011 – 2 / 2012 – 6 / 2013 – 2 / 2014 – 2 / 2015 – 2) (last visit 06/05/2016).

(ii) Acordada N° 12/2016, in effect for cases filed since 1 October 2016, enacting a Regulation of Collective Proceedings which contains provisions on jurisdiction, appeals, registration and *lis pendens*, among others.

It is difficult to sustain the constitutionality of these last two regulations because they plainly provide for procedural law that should be enacted by Congress. However, it is hard to believe that the SCJ would review its own administrative acts in such a way.

Moreover, it is worth mentioning that these regulations came to occupy a statutory empty space which provokes huge problems of legal certainty as well as severe difficulties of coordination between overlapping and parallel litigation (just to mention a couple of critical issues).