

THE NUANCES OF ACTIVE LEGITIMACY AD CAUSE OAB IN PUBLIC CIVIL ACTION

AS NUANCES DA LEGITIMIDADE ATIVA AD CAUSAM DA OAB NA AÇÃO CIVIL PÚBLICA

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ABSTRACT

In this work, an exploratory analysis based on doctrine, legislation and jurisprudence is made, of the hypotheses for the suitability of public civil action, of the rights and interests protected by the so-called microsystem of the Brazilian collective process, as well as of the nuances of extraordinary active legitimation and completion the thematic relevance requirement. After this contextualization, the legitimacy of the Brazilian Bar Association for the filing of public civil action is examined. The thematic pertinence requirement had been verified, if it would be possible to defend any collective rights in a broad sense, among those listed in the items of art. 1 of Law no. 7,347 / 85 or whether the entity can only demand self-interest, concluding that it is possible to defend collective rights in the face of a more restrictive understanding. The second theme would be whether this legitimacy would affect only the Federal Council and Sectional Councils, or would also extend to Subsections. Finally, as for Subsections, whether active legitimacy is directly dependent on the legal personality

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requirement or not. As for the legitimated OAB body, it was understood that the active legitimacy attributed to the federal council and sectional councils can be extended to the Subsections, so that the absence of legal personality is not an impediment to its legitimation.

Keywords: Civil Procedural Law. Collective process. Ad cause legitimacy. Thematic relevance. Public Civil Action. OAB.

RESUMO

Neste trabalho, faz-se uma análise exploratória baseada na doutrina, legislação e jurisprudência, das hipóteses de cabimento da ação civil pública, dos direitos e interesses protegidos pelo chamado microsistema do processo coletivo brasileiro, bem como das nuances da legitimação ativa extraordinária e do preenchimento do requisito da pertinência temática. Após essa contextualização, examina-se a legitimidade da Ordem dos Advogados do Brasil para o ajuizamento da ação civil pública. Verifica-se o requisito da pertinência temática, se seria possível a defesa de quaisquer direitos coletivos em sentido amplo, dentre aqueles listados nos incisos do art. 1º da Lei n. 7.347/1985 ou se somente pode a entidade demandar interesse próprio, concluindo-se pela possibilidade de defesa de direitos coletivos frente a um entendimento mais restritivo. O segundo tema seria se essa legitimidade afetaria somente ao Conselho Federal e aos Conselhos Seccionais, ou se estenderia também às Subseções. Finalmente, quanto às Subseções, se a legitimidade ativa tem relação direta de dependência com o requisito de personalidade jurídica ou não. Quanto ao órgão da OAB legitimado, entendeu-se que a legitimidade ativa atribuída ao Conselho Federal e Conselhos Seccionais pode ser estendida às Subseções, de maneira que a ausência de personalidade jurídica não seja fator impeditivo de sua legitimação.

Palavras-chave: Direito Processual Civil. Processo coletivo. Legitimidade ad causam. Pertinência temática. Ação Civil Pública. OAB.

1. INTRODUCTION

The process of re-democratization of Brazil, which culminated in the promulgation of the Federal Constitution of 1988, brought profound changes to the Brazilian legal system, particularly about the institutional role of lawyers and the Brazilian Bar Association (OAB). In this vein, the Constitution provided, in article 133, that “the lawyer is indispensable to the administration of justice”. In the same way, Law nº 8.906/1994 (Statute of the Practice of Law), in regulating the Constitution, corroborates the character of the practice of law as an essential function to the administration of justice, by establishing the main purpose of defending the Constitution, the legal order of the Democratic State of Law, human rights, the social justice, and to strive for the good application of the laws, for the speedy administration of justice and for the improvement of legal culture and institutions, detailing the character of public service and the purpose of the institution foreseen in section 44 of the Statute of the Practice of Law.

In this way, supported in the deductive research method and in the bibliographic and documentary technique, in order to search in the theorists the pertinent fundamentalism to the theme, presented in books, articles, periodicals, and jurisprudence.

This article will initially analyze whether the Regional Councils of the Brazilian Bar Association have standing to bring public civil actions, with a focus on the Statute of the Practice of Law. Under the aspect of thematic pertinence, if it would be possible to defend any collective rights in a broad sense, among those listed in the items of article 1 of Law n. 7.347/1985 (Law

of Public Civil Action - LACP), which are the environment, consumers, goods and rights of artistic, aesthetic, historic, tourist and landscape value; any other diffuse or collective interest, for infringement of the economic order, the urban order, or if it can only demand its own interest. The second issue is whether this legitimacy only affects the Federal Council and Sectional Councils, or whether it also extends to the Sub-Sections. As to the latter, it will be analyzed whether their active legitimacy has a direct dependency relation with the legal personality or not.

Based on a historical and logical-systematic interpretation of the Constitution, more specifically of art. 103, which grants universal legitimacy to the OAB to file Direct Unconstitutionality Action (ADI) and Declaratory Action of Constitutionality (ADC) in the concentrated control of constitutionality, a position that even has the endorsement of the Federal Supreme Court (STF) by recognizing it as a corporate autarchy, it is defended the recognition of the lack of thematic pertinence of the OAB in the ambit of the Public Civil Action (ACP), both of the Federal Council and the Sectional Council, resulting from the parallelism of attributions registered in art. 59 of the Statute of the Practice of Law, provided that the issues invoked are of concern to their respective local sphere.

Finally, based on the sole paragraph of section 61 of the Statute of the Practice of Law, it is unequivocal that once the Council of the Sub-Section is created, the Sub-Sections automatically acquire their own legal personality, in the same manner as the Sectional Council, respecting the territorial area and the limits of competence and autonomy, therefore they would have the same prerogatives as the Federal Council in the handling of public civil action in defense of collective and diffuse rights.

On the other hand, in the absence of a Subsection Council, it is believed that, regardless of their legal personality, it is imperative to recognize the judicial personality of the OAB's Subsections to guarantee the effectiveness of their institutional mission of protecting the Brazilian society.

2. THE VARIOUS CATEGORIES OF INTERESTS

The protection of fundamental rights is a historical achievement, arising in different periods, according to the decisive historical conflict. All these rights coexist, which is why they can be called dimensions or generations. In this context, Norberto Bobbio emphasizes that the development of human rights has gone through three phases: in a first moment, the rights of freedom, that is, all those rights that tend to limit the power of the State; in a second moment the political rights, which conceive freedom not only negatively, but positively, as autonomy; finally, the social rights were proclaimed, which express the maturing of new values, such as welfare and material equality, of freedom through or by the State (BOBBIO, 2004, p. 32).

It is worth pointing out that:

(...) This occurs because the origin of such rights goes back to the idea of defense of individuals against the abuses committed by the one and only holder of power that existed in the absolutist State model.

In an attempt to limit this absolute power held by the State, the Liberal State model was presented, tying the state acts to what was expressed by law. The so-called “fundamental rights of the first dimension” appeared, “demarcating a zone of non-intervention by the State and a sphere of individual autonomy in the face of its power”. Later, in the beginning of the 20th century, the “second dimension rights” appeared, which, along with the evolution from the Liberal State to the Social State, also evolved, because, besides defending the individual against the State, they generated positive obligations that should be provided by the latter. In this sense, the emergence of other (possible) dimensions of fundamental rights could be pointed out, however the objective at the moment is to demonstrate the prominence that these rights reached at the beginning of the 20th century, especially after the period of the Post-World War II.” (GERVASONI; GERVASONI, 2014, p. 401)

Finally, the fourth-generation rights, born with political globalization, covering the rights to democracy, information and pluralism. The fourth generation is born with the globalization of the world economy and politics, with the objective of safeguarding democracy, pluralism, etc.

Mazzili, referring to Renato Alessi, states that it is essential to distinguish the primary and secondary public interest, a differentiation established by Renato Alessi when he realizes that the general good, the interest of the community as a whole, often the diffuse interest such as the environment in general, is the primary interest that does not always coincide with the secondary interest, in other words, the way in which the administration organs decide on the public interest. Nevertheless, he explains that some more recent scholars have sustained the emptying of the concept of public interest, or have even denied the existence of a single concept of common good, since the complexity and conflict in today’s society causes the interests of groups and diffuse interests to clash, as in the example of the installation of a factory in a city which can generate jobs and increase tax collection, on the other hand it can cause serious damage to the environment of the region according to economic activity. Despite the conflict drawn, the author believes that the supremacy of the primary public interest is possible to view from the perspective of reasonableness and respect for the Constitution, even if it is not able to compose all interests at stake instantly (MAZZILI, 2007, p. 47-48).

Therefore, considering the complexity of contemporary society, transindividual interests have arisen, situated in an intermediate position between public and private interests, shared by groups, classes or categories of people, that exceed the strictly individual sphere, but do not constitute public interests. Such rights were in a sort of limbo, without jurisdictional protection because their ownership was not clear. Under the procedural aspect, its characteristic is that the legal system recognizes the need that the individual access of interested parties to Justice should be replaced by a collective process, able to avoid contradictory decisions and able to a more efficient solution, considering that the collective process is exercised for the benefit of the entire injured group. (MAZZILI, 2007, p. 48)

The Brazilian system of collective litigation is based on a distinction between diffuse, collective (or essentially collective) and individual homogeneous rights. These categories are the basis of the procedural discipline of collective actions, directly conditioning the regime of legitimacy to act and the scope of the *res judicata*. (MOREIRA, 1984, p. 195-197)

The diffuse interests (*lato sensu*), provided in art. 81, sole paragraph, item I of the Consumer Protection Code (CDC), also called transindividual, metaindividual, of indivisible nature,

which can only be considered as a whole, held by a group of indeterminate people, empirically understood as utility relations, concerning goods or situations, which do not have individualized holders by law, aiming to protect the collectivity in general or part of it. (DIDIER; ZANETI, 2019, p. 90)

Collective rights *stricto sensu*, as per clause II of the same sole paragraph, also called transindividual rights, of an indivisible nature, held by a group, category or class of persons that are indeterminate, but determinable, as a group, category, or class, connected by a legal relationship among themselves by *affectio societatis* (for example lawyers enrolled in the Brazilian Bar Association) or with a basic legal relationship with the opposing part. The characteristic that differentiates them from diffuse ones is the possibility of determination of the members integrating the group, whose basic relationship is necessarily prior to the injury, that is, the cohesion as a group, category or class prior to the event, remaining the indivisible nature of the object, the unavailability of the object common to both species (DIDIER, ZANETI, 2019, p. 90-91).

Finally, the rights of collective nature only in the form in which they are protected, or homogeneous individual rights, are defined in item III of this sole paragraph. This is a peculiar category, because it is not about the defense of collective rights, but the collective defense of individual rights. In fact, these are typically individual rights, fractionable, to which the law grants the possibility of collective defense, because they have a common origin, the coincidence of legal situations between the several injured parties among themselves or between them and or the opposing part, having the law chosen to define them to avoid doctrinal discussions could prevent the effective protection of consumer rights.

3. THE SO-CALLED CLASS ACTION MICROSYSTEM

The extraordinary legitimacy requires express authorization according to art. 18 of the Code of Civil Procedure (CPC). Even before the new constitutional order took effect, Law 4.215/1963 provided for the legitimacy of the OAB to represent the interests of lawyers and the individual interests related to the exercise of the profession (GRINOVER, 1984, p. 45).

According to Teori Zavascki, the general rule is that the *legitimatío ad causam* in relation to individual unavailable rights requires the nexus of conformity between the parties of the material law relationship and the parties in the procedural relationship because the legitimacy by substitution of procedural means is admitted as an exception, and for this reason it is called extraordinary, according to the caput of art. 18 of the CPC. However, there is a tendency in the Brazilian procedural system to expand the hypotheses of substitution, aiming primarily at collective protection. The 1988 Constitution adopted this technique for the collective protection of transindividual rights (art. 129, III) and also for individual rights, in the provision of the collective writ of *mandamus* in defense of liquid and certain rights (CF, art. 5º, LXX, b⁴) and com-

4 Article 5 (...) LXX - a collective writ of *mandamus* may be filed by:

(a) political party with representation in the National Congress;

(b) trade union, class entity, or association legally constituted and in operation for at least one year, in defense of the interests of its members or associates;

mon procedures to protect other types of rights (art. 5º, XXI⁵ e art. 8º, III⁶), so that in the field of legitimacy for collective protection the substitution procedural is no longer an exceptional phenomenon, on the contrary, became the normal form of action (ZAVASCKI, 2005, p. 215).

The legislation that constitutes the so-called micro-system of collective lawsuit was a progressive legislative reward, initially with the effectiveness of the Law of Popular Action (LAP - Law No. 4.717/1965), which enabled the jurisdictional protection of diffuse rights linked to the environmental heritage, in a broad sense, through the legitimization of the citizen.

The public civil action was established in art. 129, III, of the Constitution as a constitutional action for the protection of diffuse and collective rights and interests, to be promoted by the Public Prosecutor's Office, without prejudice to the legitimacy conferred to other entities by law. This is the denomination given by LACP, when it instituted a special procedure destined to promote the protection of transindividual rights and interests, by means of a set of mechanisms to instrument preventive, reparatory and precautionary demands of responsibility for moral and patrimonial damages caused to the environment; to the consumer; to assets and rights of artistic, aesthetic, historic, touristic and landscape value; to any other diffuse or collective interest; for infringement of the economic order; of the urban order; of the honor and dignity of racial, ethnic or religious groups; of the public and social heritage. The sole paragraph of art. 1 expressly excludes the suitability of public civil action for claims involving taxes, social security contributions, the Employee Severance Indemnity Fund (FGTS) or other institutional funds whose beneficiaries can be individually determined.

After that, some variants of public civil actions were instituted, such as the protection of collective and diffuse interests of handicapped people (arts. 3 to 7 of Law No. 7.853/1989); of children and adolescents (arts. 280 to 224 of the Child and Adolescent Statute - Law No. 8.069/1990). With the enactment of the CDC, by express imposition of art. 5, XXXII of the Constitution and art. 48 of the Transitory Provisions Act (ADCT), a category of homogeneous individual interests or rights was created, together with LACP, interacting through the reciprocal application of the rules of the two legal diplomas, configuring in Brazil a micro-system of collective lawsuits.⁷

Consequently, sectorial codes and statutes were edited, as well as special legislations, which began to complement and integrate the system of protection of diffuse, collective *stricto sensu* and homogeneous individual interests. Along this line, the possibility of integration and joint use of several legal diplomas, destined to protect the rights emerging from mass societies, contributed, with greater effectiveness, to the protection of pulverized social rights, which, due to the absence of a conceptual and legislative model until then, remained adrift from judicial protection. In fact, it is undeniable the affection of a true microsystem of protection of collective rights determined through the corresponding guardianship, considering the meeting of several legal diplomas, on the various rights, which intercommunicate, garnished by the CDC

5 Article 5. (...) XXI - the associative entities, when expressly authorized, are legitimate to represent their affiliates judicially or extrajudicially;

6 Art. 8º (...) III - the union is responsible for the defense of the collective or individual rights and interests of the category, including in judicial or administrative issues;

7 "The CDC, by modifying Law No. 7.347/1985 (LACP), acted as a true unifying and harmonizing agent, employing and adapting to the procedural system in force of the Code of Civil Procedure and the LACP for the defense of "diffuse, collective and individual rights, where applicable, the provisions of Title III of Law 8.078, of 11.09.1990, which established the Consumer Protection Code." (DIDIER; ZANETI, 2019, p. 69)

and the LACP in the core, and on the periphery the Law of Administrative Improbability, the Law of Writ of Mandamus and other sporadic laws, dialoguing with the Federal Constitution and the new CPC (DIDIER; ZANETI, 2019. p. 70-76).

To Teori Zavascki, one can identify in the Brazilian procedural system a subsystem that expressly delineates the instruments for protecting collective rights, namely, public civil actions and popular action, and the means for collectively protecting individual subjective rights, that is, individual homogeneous interests, collective civil actions, despite the fact that this terminological distinction is not a scientific requirement, it is not being observed either by the legislator or by the jurisprudence that has given the denomination of public civil action to almost all the actions related to the collective process, including those that have individual homogeneous rights as their object. He mentions Law no. 7.913/1989, which denominates as public civil action the "(...) of liability for damages caused to investors in the real estate securities market, although it is evident that the rights injured have the character of homogeneous individual rights, also citing several judgments of the STF and STJ in the same sense. (ZAVASCKI, 2005, p. 45/50)

These laws, although they outline the main quadrants of the microsystem, are not, nor do they claim to be, exhaustive. There are other laws that, in a specific way, deal with the collective lawsuit, to compose the same microsystem.

Furthermore, the principle of non-exhaustivity or atypicality of the collective lawsuit is in force, provided in art. 83 of the CDC; in art. 212 of the Child and Adolescent Statute (ECA); in art. 82, of Law no. 10,741/2003 (Elderly Statute), being admissible all kinds of actions capable of providing the adequate and effective protection of the desired interests. This principle has two aspects: the first determines that access to justice cannot be denied to collective rights, since it is an open concept. The second establishes that any form of protection is admissible for the effectiveness or guarantee of these rights.

Precisely because they compose the same microsystem, all these legislations present themselves or, at least, should present themselves in a harmonic way, including with respect to the main procedural institutes.

4. STANDING TO SUE IN THE BRAZILIAN CLASS ACTION SUIT - THE NONPROVISION OF THE BAR AS A LEGITIMATE PARTY IN THE CDC AND THE LACP

Differently from the class actions of the American law, which adopted the legitimacy based on the adequacy of representation, that is, any member of the group, class or interested category is legitimized for the filing of the collective action, acting as representative of the other interested parties without the need for express granting of powers, through the adequate notification of the members of the group (*fair notice*) for the purposes of the *right to opt out*⁸; In

8 "The systems that are based on class action adopt legitimation based on "adequacy on representation". In other words, it means that the principles related to due legal process are confirmed, then, by the control of this legitimation by the judge. The parties "represent" the class, that is, the class is present at the trial. The adversary and the ample defense are guaranteed by

Brazilian public civil actions, the criterion adopted is that of the pre-constitution of legitimate associations, so that active legitimacy is attributed by law only to certain bodies or entities (GIDI, 2002).

The lawful parties to file a public civil action are listed in article 5 of Law no. 7. 347/1985 and they: the Public Prosecutor's Office, the Public Defender's Office, the entities of the federation (Union, States, Federal District and Municipalities), are the indirect administration bodies (autarchy, public company, foundation or society of mixed economy) and the associations that concomitantly have been constituted for at least 01 (one) year under the terms of the civil law and include, among its institutional purposes, the protection of the public and social heritage, the environment, the consumer, the economic order, free competition, the rights of racial, ethnic or religious groups or the artistic, aesthetic, historical, touristic and landscape heritage.

According to the majority doctrine, ordinary and extraordinary legitimacy *ad causam* are fundamental procedural legal concepts, so that the collective legitimacy *ad causam* is extraordinary, by procedural substitution, an entity is authorized to defend in court the right whose ownership belongs to a group or a collectivity, therefore there is the need for legal authorization according to art. 18 of the CPC. Therefore, Brazil has adopted a multiple legitimacy, since there are several entities that are legitimized, and a mixed legitimacy, since it legitimizes entities from civil society and from the State. There are three legitimacy techniques that are most used in collective actions adopted in Brazil: the legitimacy of the private individual, such as the citizen in a popular action, for example; the legitimacy of legal entities of private law, such as unions, political parties and the legitimacy of Public Power agencies, such as the Public Prosecution Service and the Public Defender's Office. The elected technique was that of legitimacy by autonomous, exclusive, concurrent and disjunctive procedural substitution. Autonomous because the extraordinary legitimized party is legally authorized to conduct the lawsuit independently of the participation of the holder of the right in court; exclusive because as a rule only the extraordinary legitimated party can be a party in the lawsuit, exception made in the case of individual homogeneous rights in which the holder can intervene as a later litigation assistant. Concurrent among the various extraordinary legitimates by law so that any legitimate may file the collective action; disjunctive because each co-plaintiff may exercise it independently of the will of the other plaintiffs (DIDIER JR; ZANETI JR. 2019. p. 209-218).

It is clear that the CDC and LACP have not provided for the extraordinary legitimacy of the Brazilian Bar Association to file public civil actions.

Nevertheless, this systemic inconsistency was detected and the Senate Bill (PLS) 686/2015 or PL 2943/2019, authored by former Senator Cássio Cunha Lima from PSDB/PB, is currently in Congress. The project was approved by the Federal Senate Plenary and sent to the House of Representatives on May 16, 2019. It proposes the amendment of art. 5 of Law No. 7.437/85, in order to add an item, with the following wording:

“THE NATIONAL CONGRESS decrees:

Art. 1 Art. 5 of Law No. 7.347, of July 24, 1985, shall be in effect with the addition of the following item VI:

“Art. 5

the adequate notification of the group members (*faire notice*) - and, as a consequence, the right to opt out - right to exclude or "leave" the class member - and the binding effect - binding by subjective extension of the *res judicata* - are established. (DIDIER; ZANETI, 2019, p. 214)

(...)VI - the Federal Council and the Sectional Councils of the Brazilian Bar Association.” (NR)

Art. 2 This Law goes into effect on the date of its official publication.”

The bill was approved in 2017, by the Commission of Constitution, Justice and Citizenship (CCJ), rapporteur Senator Antonio Anastasia (PSDB-MG), who supported the initiative, adding that the Federal Council of the OAB was authorized by the Constitution to propose direct actions of unconstitutionality and declaratory actions of constitutionality to the STF (SENADO FEDERAL, 2015).

The project will add the OAB to the list of entities that can file a Public Civil Action contemplated in Law 7.347, of 1985, to act on national issues through the Federal Council and on local issues through the respective Regional Councils.

Likewise, the bill for the new Public Civil Action Law (PL 5. 139/09), whose purpose would be to act as a general law of collective lawsuits, proposes some innovations to collective lawsuit institutes, highlighting the establishment of principles pertinent to collective civil procedure, the revocation of the territorial limitation for *res judicata*, the determination of specialization of judicial bodies and the expansion of the list of active legitimates, expressly including the Brazilian Bar Association, which was rejected by the House of Representatives and is awaiting Appeal Deliberation at the Board of the House of Representatives since 2010 (CÂMARA DOS DEPUTADOS, PL 5139/2009).

This concern demonstrates that the purpose of granting the OAB extraordinary legitimacy for the protection of transindividual rights is not recent. As early as 1963, the Statute of the Brazilian Bar Association (EOAB) attributed to the Bar Association the power to represent the general interests of the lawyers’ class and of other persons related to the exercise of the profession, a provision that was maintained in the 1994 Statute. Thus, its performance in the defense of the lawyers’ class is certain, since the legal requirements for the adequate representation of associations are fulfilled. However, doubts remain as to the OAB’s legitimacy to bring collective actions in defense of collective rights different from the group of lawyers in favor of the collectivity in general (COELHO, 2019, p. 253).

Even in the face of such a legislative gap, it is certain that art. 54 of the Statute of the Practice of Law expressly grants extraordinary legitimacy to the Federal Council of the Brazilian Bar Association to file a Public Civil Action.⁹

In a judgment issued on August 31, 2016, the Full Bench of the Federal Supreme Court (STF) concluded that the Brazilian Bar Association is constituted as a corporatist autarchy. In this context, the Plenary of the STF, in the trial of Extraordinary Appeal No. 595.332-PR, unanimously, considering topic 258 of the general repercussion, decided that it is up to the Federal Court to process and judge actions in which the Brazilian Bar Association, either through the Federal Council or Sectional, is part of the procedural relationship. In his vote, Minister Marco Aurélio clarified that the OAB, whether from the standpoint of the Federal Council or the Sections, is not a legal entity of private law. It should be noted that the purposes of the Brazilian Bar Association are established by Federal Law, which clearly demonstrates its peculiarity

9 Art. 54 The Federal Council is responsible for: (...) XIV - to file direct actions of unconstitutionality of legal norms and normative acts, public civil actions, collective writ of mandamus, writ of injunction, and other actions whose legitimacy is granted by law; (our emphasis)

in relation to other associative entities. According to the rapporteur, it is a class body with legal discipline, which allows it to impose annual contributions and exercise supervisory activity, characterizing it as a corporative autarchy, able to attract the competence of the Federal Court.¹⁰

Therefore, it can be inferred that the OAB, as a corporative autarchy, is included in the list of lawful parties according to item IV of art. 5 of LACP, included by Law 11.448/2007.

Once these premises are established, it will be necessary to determine the thematic pertinence in the public civil actions filed by the OAB.

5. OF THEMATIC PERTINENCE: OVERVIEW

The doctrine diverges in Brazil on the issue of jurisdictional control of collective legal standing. Some believe that it was up to the legislator to establish a list of legal representatives, leading to an absolute presumption that they would always be adequate representatives, so that the verification of the adequacy would occur (*ope legis*) by law. However, there is a strong doctrinal current discussing the role of the Judiciary in the analysis of the adequate representation, and should relate the list of legal representatives to a possible abuse, spurious interests, possible persecutions or contradictions with the interests in litigation, so that in addition to the legal authorization for the collective legitimacy, the judge would control the adequacy of the legitimacy in concrete in order to assess the presence of the elements that ensure the adequate representation (CONCENTINO, 2009, p. 439-240).

The 1988 Constitution, which was promulgated to satisfy democratic desires after 21 years of military regime, made a colossal contribution to this phenomenon of jurisdictional expansion. Many innovations were brought by the new Constitution, regarding the legitimacy to file actions of constitutionality control, which in the 1969 Constitution was conferred only to the Attorney General of the Republic, which could have the logical consequence of blocking the filing of actions contrary to the interests of the Executive Branch, and in article 103 of the new Constitution, it is now conferred to a series of subjects. There are respectable positions contrary to the establishment of thematic pertinence, since the requirement of thematic pertinence for certain legal entities would represent a paradox, since the processes of concentrated control of constitutionality are of an objective nature, where the possible offense of a law or normative act against the Constitution is discussed, so that there are not exactly parties but participants, creating a subjective requirement in an objective process, adding that there is no normative basis in thematic pertinence being an option of the Ministers of the STF, limiting a constitutional guarantee without provision in the constitutional text or in infra-constitutional legislation (RANGEL, 2017. p. 101).

10 "The Brazilian Bar Association, whether under the angle of the Federal Council or of the Sectionals, is not an association, a legal entity of private law, in relation to which state interference in its operation is forbidden - subsection XVIII of Article 5 of the Brazilian Constitution. It is a class body, legally regulated - Law no. 8.906/1994 - and is responsible for imposing annual contributions and exercising supervisory and censorial activities. It is, for this very reason, a **Corporative autarchy, which attracts, in accordance with article 109, item I, of the Major Diploma, the competence of the Federal Justice to examine actions** - of whatever nature - in which it is part of the procedural relationship. It is improper to establish a distinction considering the other existing councils". (excerpt from the vote - our emphasis)

In the American system, the control of adequate representativeness is verified in the concrete case and requires minimum requirements: the legitimate party needs to demonstrate the interest and ability to represent the claims of the class in a vigorous and consistent manner, and that it is free from the conflict of interests, demonstrates adequate motivation to act on behalf of the group, technical and economic capacity, credibility (DIDIER JR; ZANETI JR. 2019, p. 225-227).

There are three stages in the examination of the legitimacy for collective protection. Firstly, the identification in the abstract of who may conduct a collective suit as a plaintiff; secondly, the concrete jurisdictional control of the adequacy of such legitimacy, and finally the control of the conduction of the suit, of the very performance of the legitimated party, to be done by the judge and by those who have been replaced, the latter still the new frontier of investigation of the Brazilian doctrine on the aspect of collective due process. Among the various factors that can be used to verify adequate representation, one that has practical utility is the thematic affinity between the lawyer and the litigious object. The STF jurisprudence has named such bond “thematic pertinence” (DIDIER JR; ZANETI JR, 2019, p. 222-232).

In fact, there is no provision in the homeland law for control of adequate representation by the judge, supporting the doctrine in the possibility created by art. 82, § 1 of the CDC, which allows the judicial exemption of the requirement of pre-constitution of associations, when there is manifest social interest evidenced by the size or characteristic of the damage, or by the relevance of the legal good to be protected, that is, once the absence of adequate representation is found in the case in question it was opted for the protection of effective jurisdictional protection in respect of the collective due process of law (COELHO, 2019, p. 252).

The “thematic pertinence” is the indispensable congruence between the statutory objectives or the institutional purposes of the plaintiff entity and the material content of the rule being challenged in the abstract control, among those who have standing for the concentrated control of rules (STF, ADI 1157-MC, 2006).

In this context, in the scope of collective actions, two classes of legal standing to defend diffuse, collective and individual homogeneous rights were created: the broad or universal legal standing, which are not subject to the requirement of thematic pertinence, and the restricted or special legal standing.

Thus, in relation to actions of concentrated control, the special legitimates are those who need to demonstrate thematic pertinence, described in items IV, V and IX of art. 103, in other words, the Bureaus of the Legislative Assemblies and the Legislative Chamber of the Federal District (STF, ADI 1307, 1995, Rel. Min. Francisco Resek; ADI 3.756, rel. min. Ayres Britto, j. 21-6-2007, P, DJ de 19-10-2007) 2007) and Governors of States and Federal District, with the requirement that the direct action of unconstitutionality is admissible as long as the impugned law or act concerns the respective federative entity (STF, ADI 733, 1992, Rel. Min. Sepúlveda Pertence) and trade union confederation or class entity of national scope (ADI 1.507 MC-AgR, rel. min. Carlos Velloso, j. 3-2-1997, P, DJ de 6-6-1997).

On the other hand, the universal legitimates are exempted from demonstrating any institutional relationship with the contested matter, whose generic interest derives from their institutional attributions. Thus, the President of the Republic, the Bureaux of the Federal Senate and House of Representatives, the Attorney General, the Federal Council of the Brazilian Bar

Association and the political parties represented in the National Congress are considered to have universal standing (ADI 1396, Rel. Min. Marco Aurélio), based on items I to VI, VII and VIII of art. 103 of the Federal Constitution. And of interest to the present study, the Federal Council of the Brazilian Bar Association (STF, ADI 1396, Rel. Min. Marco Aurélio).

However, the evolution of doctrine and jurisprudence has shown that not even the Public Prosecutor's Office could be considered a universal collective legitimized party, since its actions have also been mitigated in the jurisdictional control.

In this sense, with regard to the Public Defender's Office, its legitimacy for collective actions has been established when the result of the lawsuit may benefit a group of underprivileged people, revealing a "legal clause of potential benefit to the needy"¹¹, question which has been overcome by the STF's decision in the judgment of RE 733.433, appraising Theme 607 of the General Repercussion.¹²

The Public Prosecutor's Office is the most active entity in the filing of Public Civil Action, although it has no superiority over other entities. The Public Prosecutor's Office is the most active entity in filing a Public Civil Action, although it has no superiority over the other entities. This function was granted to it in art. 127, *caput*, of the Constitution, as a permanent and essential institution to the jurisdictional function of the State, being in charge of the defense of the legal order, of the democratic regime and of the social interests, and for the protection of individual unavailable and homogeneous unavailable interests, referring to indispensable values for the survival and development of the human being and for the welfare of the community, whose protection is reviewed as having a qualified social interest, in the presence of the social relevance of the protection, which may be objective or subjective, if derived from the special quality of the subjects or from the mass repercussion of the demand.¹³ It can be inferred from the aforementioned provisions that, with regard to the active legitimacy of the Public Prosecutor's Office, it is authorized to protect the defense of transindividual interests of any issue, as long as the action is compatible with its institutional and constitutional functions.¹⁴ This understanding is summarized in the jurisprudence of the Superior Court of Justice (STJ) regarding the defense of consumer interests.¹⁵

For the legitimacy of associations, the requirements of pre-constitution and thematic pertinence are provided for in art. 82, IV, CDC and art. 5, V, of LACP, provided that they are legally constituted for at least one year and that they include among their institutional purposes the defense of the interests and rights protected by this code, waiving the authorization of the assembly, which is justified since the associations can amend their statutes aiming to expand

11 Art. 4 The institutional functions of the Office of the Public Defender are, among others: (...) VII - to promote public civil action and all kinds of actions capable of providing adequate protection for diffuse, collective or individual homogeneous rights when the result of the lawsuit may benefit a group of persons in need.

12 "The Public Defender's Office has legitimacy to file a public civil action in order to promote the judicial protection of diffuse and collective rights held, in theory, by people in need."

13 Such understanding is corroborated by Precedent No. 7 of the Superior Council of the Public Prosecution Service of the State of São Paulo, as well as in the National Organic Law of the Public Prosecution Service (Law No. 8.625/1993 - LONMP) and in Article 6, item IV, letter "d" of Complementary Law No. 75/1993 (LOMPU).

14 Similarly, the Federal Supreme Court has recognized that, since DPVAT insurance is mandatory by law and its purpose is to protect the victims of car accidents, there is social interest, which is why the ministerial body has standing to file a collective lawsuit, thus rendering Precedent No. 470 of the STJ prejudiced.

15 Precedent 601 STJ: The Public Prosecutor's Office has active legitimacy to act in defense of diffuse, collective and individual homogeneous rights of consumers, even if arising from the provision of public services. (The Special Court, in the ordinary session of February 7, 2018, DJE 25/02/2018)

their powers, to the extent that they modify their ability to act. They are private entities and, in this sense, totally different from the OAB in its legal nature, therefore any analogy built in favor of thematic pertinence is not appropriate.

With respect to political parties, since they are represented by the national directory of the political party, the STF understands that the link of thematic pertinence is not required, provided that they are represented in the National Congress, and that they can, in abstract control, argue the unconstitutionality of federal, state or district normative acts, regardless of their material content, since the jurisprudential restriction derived from the link of thematic pertinence does not apply to party associations (ADI 1.407 MC, rel. min. Celso de Mello, j. 3-7-1996, P, DJ de 24-11-2000; ADI 779 AgR, rel. Celso de Mello, j. 8-10-1992, P, DJ de 11-3-1994).

According to article 8, III of the Federal Constitution, the actions of the Unions in Class Actions must be limited to the collective and individual interests restricted to the category (STF. ADI 1157-MC. Rel. Min. Celso de Mello, DJ de 17-11-06).

6. THE THEMATIC PERTINENCE OF THE OAB

Regarding the need of thematic pertinence for the OAB, such understanding seems to contradict several judgments of the STF in relation to the filing of a Direct Action, so that the OAB is not required to have thematic pertinence in a direct action, which by analogy leads us to believe that the STF would also not require it in a Public Civil Action.

In fact, according to art. 103 of the Constitution, as amended by EC no. 45/2004, the Federal Council of the Brazilian Bar Association is authorized, among other legitimate parties, to file direct actions of unconstitutionality and declaratory actions of constitutionality (item VII). Law 9.868/1999, in its article 2, reproduces *ipsis literis* the list of active legitimates for abstract control of art. 103 of the FC. In turn, the legal standing to file an action for breach of a fundamental precept provided for in Law 9882/1999 are the same legal standing to file a direct action of unconstitutionality.

To corroborate this assertion, item I of Article 44 of the Statute of the Legal Profession is clear in attributing to the OAB the task of defending the Constitution, the legal order of the democratical State of Law, human rights, social justice, and to strive for the good application of the laws, for the speedy administration of justice, and for the improvement of legal culture and institutions. Therefore, this legal provision grants the OAB the defense of collective rights and interests. The broadness of the wording of this item authorizes the conclusion that, in relation to the OAB, the mitigation of the requirement of thematic pertinence for the filing of the Public Civil Action.

Evidence of this are the statistics presented by Luiz Werneck Vianna and others, whose graphs reveal that the OAB has continuously used the Adins, making its presence felt among the members of the community of interpreters, and that the balance of the Adins against federal rules filed by the OAB reveals that its action is mostly for the control of the legal system, including a broad spectrum of issues and not restricted to the defense of corporate interests (VIANNA; BURGOS; SALLES, 2007, p. 75-76).

Furthermore, article 81, III, of the Statute of the Elderly, expressly granted the OAB, in a generic manner - without designating the competent body for such - the legitimacy to file civil suits to defend the diffuse, collective, individual unavailable or homogeneous interests of the elderly.

7. THE LEGITIMACY OF THE OAB'S INTERNAL BODIES

Once the universal legitimacy of the Federal Council of the Brazilian Bar Association has been analyzed for the filing of a Public Civil Action, it is appropriate to address the issue of the legitimacy of the Regional Councils of the Brazilian Bar Association.

The Statute of the Practice of Law provides that the following are organs of the Brazilian Bar Association: the Federal Council, the Sectional Councils, the Subsections, and the Bar Association (Art. 45, items I to IV). The same article, in § 3, grants autonomy to the Subsections, as autonomous parts of the Sectional Council, in the form of this law and of its constituent act, but does not grant them legal personality, which is granted to the Federal Council, the Sectional Councils, and the Bar Association, according to §§ 1, 2, and 4.

The OAB Statute expressly grants active legitimacy to the Federal Council to file a public civil action (art. 54, clause XIV). This legitimacy is extensive to the Sectional Council, by force of art. 57, which disposes that the Sectional Council exercises and observes, in the respective territory, the competencies, prohibitions, and functions attributed to the Federal Council, as applicable and in the scope of its material and territorial competence, and the general norms established in the Law, in the General Regulation, in the Code of Ethics and Discipline, and in the Provisions.

The General Regulation of the Brazilian Bar Association, edited by the Federal Council, provides that it is the Regional Council's responsibility, in addition to what is provided in arts. 57 and 58 of the Statute of the Brazilian Bar Association, to file, after deliberation, a Public Civil Action for the defense of general, collective, and homogeneous individual diffuse interests (art. 105, V, b).¹⁶ However, this capability is not expressly foreseen in the list in article 61 of the Statute of the Brazilian Bar Association, which attributes to the Subsections, among others, the attributions foreseen in the General Regulation or by delegation of competence from the Sectional Council (item IV).

It is understood that if the Statute of the Brazilian Bar Association, in its article 44, attributes to the entity in two items, item I, the defense of the Constitution, of the legal order of the Democratic State of Law, of human rights, among others, in a comprehensive manner, it does not seem correct to restrict its right to file a Public Civil Action only when it is a matter of defense of the interests of the practice of law, which it is in charge of by force of item II of the same article 44.

¹⁶ Art. 105 - It is up to the Sectional Council, besides the foreseen in arts. 57 and 58 of the Statute V - filing, after deliberation: (...)

b) public civil action, for the defense of diffuse interests of a general character and collective and individual homogeneous interests.

Hence, and based on the provisions of Art. 54, Subparagraph XIV of the Statute of the Brazilian Bar Association, which complements the provisions of Art. 44 of the same law, the Brazilian Bar Association, in the form of its Federal Council, may file direct actions of unconstitutionality, collective writs of mandamus, writs of injunction, public civil actions or other collective actions, following the example of its Regional Offices, within the exact limits of their spheres of action.

On the other hand, the Second Panel of the STJ, in Special Appeal No. 331.403-RJ, reporting Justice João Otávio de Noronha, decided that the Subsections of the Brazilian Bar Association, lacking legal personality of their own, do not have standing to bring a class action.¹⁷

According to this decision, the Subsections, for not having legal personality, do not have legitimacy to file public civil actions, not even by delegation of the Sectional Council, deciding also that, although article 54, XIV, of the OAB Statute authorizes the Federal Council to file public civil actions, it does so within the limits of the competence of the Bar Association. In other words, the Federal and Regional Councils of the OAB would have legitimacy to file public civil actions to guarantee their own rights and those of their associates, and not those of all citizens.

In other appeal, the STJ, in Amendment of Divergence No. 1.351.760, Reporting Justice Benedito Gonçalves, decided that the Sectional Councils of the Brazilian Bar Association, endowed as they are with their own legal personality, may file the actions provided for, including public civil actions dealt with in art. 54, XIV of the Statute of the Brazilian Bar Association, in relation to matters affecting their local sphere, that is, the respective territories of the Member States, the Federal District and the Territories (art. 45, §2).

Nevertheless, in the judgment of Special Appeal nº 135.176/PE, the Reporting Justice Humberto Martins brought an innovative interpretation with respect to the legitimacy of the Brazilian Bar Association to file a public civil action, by casting his vote in the sense that the Regional Councils may file the actions foreseen in the aforementioned art. 54, XIV of the Statute of the Practice of Law, including public civil actions, in relation to issues of interest to the federation unit where they are installed, such as in defense of local urban, cultural and historical heritage, as can be seen in the judgment's summary:

CIVIL PROCEDURE. ADMINISTRATIVE. PUBLIC CIVIL ACTION. BAR ASSOCIATION OF BRAZIL. SECTIONAL COUNCIL. PROTECTION OF URBAN, CULTURAL AND HISTORICAL HERITAGE. LIMITATION BY THEMATIC PERTINENCE. UNACCEPTABLE. SYSTEMATIC READING OF ART. 54, XIV, WITH ART. 44, I, OF LAW 8.906/94. DEFENSE OF THE FEDERAL CONSTITUTION, THE RULE OF LAW AND SOCIAL JUSTICE. 1 This is a special appeal against the appellate decision that upheld the sentence that extinguished, without examination of the merits, a public civil action filed by the sectional council of the Brazilian Bar Association on behalf of the protection of the local urban, cultural and historical heritage; the appellant alleges violation of arts. 44, 45, § 2, 54, XIV, and 59, all of Law 8.906/94. 2 The sectional councils of the Brazilian Bar Association may file the actions provided for - including public civil actions - in

17 CIVIL PROCEDURE. SPECIAL APPEAL. COLLECTIVE ACTION. ILLEGITIMACY OF THE SUBSECTION OF THE OAB. PUBLIC LIGHTING FEE. ART. 54 OF LAW 8.906/94. 1 - The OAB Branches, lacking their own legal personality, do not have legitimacy to file a collective action. 2 - The OAB (Federal Council and Sectional Councils) only has legitimacy to file a public civil action to guarantee its own rights and those of its members, and not those of all citizens. (Special Appeal granted. (Special Appeal 331.403/RJ, Reporting Justice João Otávio de Noronha, Second Panel, DJ 29/5/2006))

art. 54, XIV, in relation to the themes that affect their local sphere, territorially restricted by art. 45, § 2, of Law 8.906/84. 3. the **active legitimacy - established in art. 54, XIV, of Law 8.906/94 - for the Brazilian Bar Association to file public civil actions, either by the Federal Council or by the sectional councils, must be read in a comprehensive manner, due to the purposes granted by the legislator to the entity - which has a peculiar character in the legal world - through art. 44, I, of the same norm; it is not possible to limit the OAB's activities on the grounds of thematic pertinence, since it is responsible for the defense, including judicial defense, of the Federal Constitution, the Rule of Law and social justice, which inexorably includes all collective and diffuse rights.** Special Appeal granted. (REsp nº 1.351.760/PE. Reporting Justice Humberto Martins. Second Panel. Judged on 26/11/2013. DJe: 09/12/2013 - our emphasis)

This judgment changed the previous jurisprudence of the STJ, which held that the OAB's subsections, lacking their own legal personality, did not have legal standing to bring a class action; and that the sectionals would only be legitimate to bring a public civil action to ensure their own rights and those of their members.

He (the Minister) based his vote on the fact that the contemporary doctrine on the Statute of the OAB has treated as possible the filing of public civil actions, in defense of collective and diffuse interests, without thematic restrictions, since being of legal character the collective legitimacy of the OAB, there is no need to prove thematic pertinence with its purposes, when entering court. However, the minister pointed out, the parallelism of attributions between the Federal Council and the Sectional Councils, foreseen in its art. 59, which must be read with temperament, is undeniable.¹⁸ A Sectional Council can only file the actions foreseen in art. 54, XIV, in relation to issues that affect its local sphere, restricted by art. 45, § 2, concluded the reporter. This paragraph establishes that the sectional councils have their own legal personality and jurisdiction over the respective territories of the States or the Federal District.¹⁹ Furthermore, he understood that, as it happens to direct actions of unconstitutionality, the limitation on the filing of Public Civil Actions by the OAB due to thematic pertinence does not apply.

In his vote, the Minister brings up the thought of Luiz Werneck Vianna, in a paper about the relationship between law and politics, when he defends that the competence of the Brazilian Bar Association to file public civil actions is a result of the expansion of the coverage of social life by the law, by the expansion of the protection of society, by virtue of the Federal Constitution of 1988, in such a way that the expansion of public civil actions, without the requirement of thematic limitation, is a logical consequence of the parallelism of the competence for the filing of direct actions of unconstitutionality by the OAB.²⁰

18 Art. 59 - The Board of Directors of the Sectional Council has an identical composition and attributions equivalent to those of the Federal Council, according to the internal regulations of the former.

19 Art. 45. The following are organs of the OAB

I - the Federal Council;

II - the Sectional Councils

III - the Subsections;

IV - the Lawyers' Assistance Funds.

§ The Federal Council, endowed with its own legal personality and headquartered in the capital of the Republic, is the supreme body of the Brazilian Bar Association.

§ The Regional Councils, endowed with their own legal personality, have jurisdiction over the respective territories of the Member States, the Federal District and the Territories.

20 As Luiz Werneck Vianna explains in a recent publication on the relationship between law and politics, the Brazilian Bar Association's competence to file public civil actions can only be read as a result of the increased coverage of social life by the law. That is, by the expansion of the protection of society, in attention to the dictates of the 1988 Federal Constitution."

The Ministers also understood that the active legitimacy granted in item XIV of article 54 of the Statute for the Brazilian Bar Association to file public civil actions, either by the Federal Council or by the Sectional Councils, should be read broadly, due to the purposes granted by the legislator to the entity, which has a special character in the legal sphere, as provided in item I of article 44.

They considered that it was not possible to limit OAB's activities on the grounds of thematic pertinence, since it is responsible for the defense, including judicial defense, of the Federal Constitution, the Rule of Law, and social justice, which inexorably includes all collective and diffuse rights.

This discussion was also the subject of Special Appeal No. 1.423.825-CE, judged by the Fourth Panel of the Superior Court of Justice, under the reporting of Minister Luís Felipe Salomão. The appeal was filed in a public civil action filed by the Brazilian Bar Association Ceará Section, against several banks, seeking compensation on the grounds of collective moral damages under the allegation of increased waiting time of consumers in bank lines due to the service system with the reduction of the number of tellers and branches aiming at maximizing profits. In the judgment, the STJ reiterated the active legitimacy of the OAB to file a public civil action in defense of consumers on a collective basis, recognizing the generic aptitude of the institution to act on behalf of supra-individual interests, not being subject to the thematic pertinence as to the collective jurisdiction, as can be seen in the judgment:

(...) 4 The Brazilian Bar Association, either through the Federal Council or through the sectional councils, has legal standing to file a Public Civil Action for the defense of consumers on a collective basis.

5. Due to its specific constitutional purpose, the relevance of the protected legal assets and the manifest protective bias of social interests, the active legitimacy of the Brazilian Bar Association is not subject to the thematic pertinence requirement regarding the collective jurisdiction.

6. However, "the sectional councils of the Brazilian Bar Association may file the actions provided for - including public civil actions - in art. 54, XIV, in relation to the issues affecting their local sphere, territorially restricted by art. 45, § 2, of Law 8906/84" (REsp 1351760/PE, Reporting Justice Humberto Martins, Second Panel, judged on 26/11/2013, DJe 9/12/2013)

7. In the present case, since the OAB's appeal was not heard, the case must return to the Court of origin for reexamination of the case, and the plaintiff's illegitimacy thesis must be considered overcome.

8. Special Appeal partially granted. (EDcl in EREsp 1423825 - 2013/0403040-3 of 04/20/2018. Min. Luís Felipe Salomão - our emphasis)

In the same line of reasoning, in a trial concerning a public civil action before the Supreme Court, Minister Rosa Weber admitted the active legitimacy of the OAB to file a public civil action, taking into consideration the institutional purposes provided for in its Statute (art. 44, I). She added that the Federal Council of the Brazilian Bar Association and its Regional Offices, within the territorial limits of their respective activities, are not limited to proving thematic pertinence for purposes of filing a public civil action, taking into account the amplitude of the institutional purposes set forth in the Statute (ACO 2059/DF. Reporting Justice Rosa Weber. Judged on September 25, 2015. DJe: September 29, 2015).

Considering, as seen below, that the OAB is a corporate autarchy, a public service provider, and that it is up to the Subsection, within the limits of its circumscription, to effectively fulfill the purposes of the OAB (Article 61, item I of the Statute), it is necessary that the Subsection be equipped with adequate instruments to fulfill the functions entrusted to it, among which stands out the legal standing to file class actions.

In this way, the provisions of art. 105 of Law no. 8.906/94 were consecrated, in attention to the institutional purpose of the Brazilian Bar Association, which is not limited to the regulation of the Lawyers class, since it is also responsible for the Federal Constitution and for the Democratic State of Law, in which sphere the fundamental collective rights *lato sensu* are inexorably found, whose defense in court can be done, among other means, through the filing of the Public Civil Action, overcoming the obstacle of the limitation of the list of lawful parties of art. 5 of LACP, leaving patent the legitimacy of the OAB for the filing of public civil action in defense of diffuse interests of general character, collective and individual homogeneous, without proof of specific thematic pertinence, since it is already presumed before the purpose constitutionally provided for such institution (COELHO, 2019, p. 255).

In this sense, we support the understanding that the thematic pertinence of the public civil actions filed by the OAB, as well as all the other co-plaintiffs, must follow the doctrine postulated by Fredie Didier Jr and Hermes Zaneti Jr, quoted above, with regard to the adequate representation, with regard to the fulfillment of the three steps in the examination of the legitimacy for collective protection: the identification in the abstract of who may conduct a collective suit as an author; secondly the concrete jurisdictional control of the adequacy of such legitimacy, lastly the control of the conduction of the process, of the very performance of the legitimated party, to be done by the judge and by the substituted.

Furthermore, it is also understood that, regardless of legal personality, it is imperative to recognize the judicial personality of the OAB Branches to ensure the effectiveness of its institutional mission of protecting the Constitution and the legal order in the Democratic State of Law (CUSTODIO, 2015).

Mazzili explains that the Constitution and several laws have been broadening the active legitimacy in defense of transindividual interests, even allowing its defense by entities and bodies, even if without legal personality, so that bodies without legal personality may in some cases be given judicial personality.²¹

This need is all the more imperious the smaller the Subsection is, sometimes circumscribing municipalities in the interior of the State, sometimes outlying districts, because without the prerogative of autonomously resorting to collective jurisdiction, they are entirely at the mercy of the representation of the Sectional Council or the Public Prosecutor's Office.

21 "Although some public bodies may not have legal personality (the Public Ministry itself does not), they may, in some cases, have judicial personality, as occurs with the boards of the legislative chambers or with the state bodies that defend the environment or the consumer (such as the Procons), in municipalities and states where they are mere public services with no personality, etc. Condominiums of apartment buildings may also defend in court the collective interests of the condominium members, as long as they are authorized to do so by the General Assembly". (MAZZILI, 2007, P. 315)

8. CONCLUDING REMARKS

The Public Civil Action seeks to protect the interests of the community in case of damage to the environment, to the consumer, to the urban order and to goods and rights of artistic, aesthetic, historical, touristic and landscape value. Not only the public administration, but any individual or legal entity that causes damage to the community can be the defendants.

Article 54, XIV, of the Statute of the Practice of Law granted the handling of several special actions to the Federal Council of the Brazilian Bar Association, a body endowed with its own legal personality and headquartered in the capital of the Republic, among which is the Public Civil Action, without foreseeing such prerogative for the sectional councils.

As provided in art. 133 of the Constitution, the lawyer is indispensable to the administration of justice, being inviolable for his acts and manifestations in the exercise of his profession, within the limits of the law. The importance of the practice of law has been attested by Brazilian democratic history itself, which found in the Brazilian Bar Association one of the most notable pillars in the conquest and consolidation of the Democratic State of Law. Its role, which today is defined by the Statute of the Practice of Law, stands out for the responsibilities that are not attributed to any other regulated professional class entity.

There are respectable opinions that the OAB is a class entity that pertains only to lawyers enrolled in it. In truth, OAB goes beyond being an organ of representation, defense, selection, and discipline of lawyers, it is an entity destined, preponderantly, to defend the Constitution, the Legal Order, the Democratic State of Law, Human Rights, Social Justice, besides fighting for the good application of laws, for the swift administration of Justice, and for the improvement of culture and legal institutions, in an absolutely independent way.

The OAB does not have any functional or hierarchical link with any public administration body. The entity has institutional purposes of protection of the supremacy of the constitutional text and of the legal-democratic order as a whole, indispensable for the direct defense of the interests of society as a whole and for the inspection of the acts of public power, affirmation of citizenship and of the constitutional order of values in which are embodied the fundamental rights that gravitate on the idea of human dignity.

In other words, as stated in the Statute of the Practice of Law, the most important function of the OAB is not in its corporate role, but in its role as an institution - guardian of the constitutional and democratic order, representative of civil society and defender of citizenship and human rights.

It was also shown that the universal legitimacy of the Brazilian Bar Association in the scope of the ACP arises from the recognition of the lack of thematic pertinence of the OAB to file a lawsuit in the abstract control of constitutionality, which was recognized by the 2nd Panel of the STJ in Special Appeal No. 1.351.760/PE. Thus, it was declared that the Regional Council of the Brazilian Bar Association has active legitimacy to file a public civil action, as a result of the parallelism of attributions established in article 59 of the Statute of the Practice of Law, as long as the issues invoked are related to its respective local sphere.

And, lastly, we understand that the OAB's Subsections also have legal standing to file a Public Civil Action, whether or not they have legal personality.

On the first hand, it is unequivocal that once the Subsection Council is created, the Subsections automatically acquire their own legal personality in the same manner as the Sectional Council, respecting the territorial area and the limits of competence and autonomy. On the other hand, in the absence of a Subsection Council, it is believed that, regardless of the legal personality, it is imperative to recognize the judicial personality of the OAB's Subsections in order to guarantee the effectiveness of its institutional mission of protecting Brazilian society, in the local scope.

In fact, the OAB must remain faithful to its constitutional role as the spokesperson for society; and therein lies all of its legal, moral, and ethical authority that makes this institution one of the most respected entities in society, being a true refuge for those in need of social justice.

The protection of the Constitution and the democratic order is not a mere power of the Brazilian Bar Association, but a constitutionally assigned duty. For this reason, it is necessary to attribute remedies for such action to the OAB's Sections or Subsections as well.

Recognizing this reality, the Federal Council of the OAB was authorized by the original constituent, as an extraordinary legitimacy, to propose direct actions of unconstitutionality and declaratory actions of constitutionality before the Supreme Court, to protect the legal order. It would be a contradiction, therefore, to admit that the OAB, with respect to direct actions of unconstitutionality and declaratory actions of constitutionality, has extraordinary legitimacy for the protection of transindividual interests and, for others, such as public civil action, is left without legal standing for the most relevant issues of the protection of collective rights.

Besides the systemic incoherence pointed out, which would be more than enough to justify the understanding expressed here, it is also unreasonable that the Brazilian Bar Association should remain outside the protection of collective rights, inserted by the Constitution of the Republic itself as a fundamental right and, therefore, under the terms of § 1 of art. 5, with immediate application.

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